STATE OF MICHIGAN

COURT OF APPEALS

CARLOS LOPEZ-NEGRETE, Plaintiff-Appellee,	UNPUBLISHED May 26, 2009
v	No. 286247 Genesee Circuit Court
KARIANN LOPEZ-NEGRETE, Defendant-Appellant.	LC No. 06-271816-DM

Before: Borrello, P.J., and Murphy and M.J. Kelly, JJ.

PER CURIAM.

Defendant Kariann Lopez-Negrete appeals as of right the judgment of divorce awarding plaintiff Carlos Lopez-Negrete sole legal custody of the minor child (d/o/b/ 3/11/05) and plaintiff and defendant joint physical custody of the minor child. Defendant also appeals the trial court's assignment of debt. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Plaintiff and defendant were married on May 24, 2003. The minor child, a daughter, was born almost two years later. For most of the marriage, plaintiff attended law school part-time. He did not work during this time. Defendant began working as a school psychologist for Flushing Community Schools during the marriage. Plaintiff and defendant separated in October 2006, and plaintiff filed for divorce in December 2006.

Following a lengthy bench trial, the trial court issued an Opinion and Order After Divorce Trial on March 14, 2008. The order and opinion contained findings of fact and conclusions of law regarding the minor child and property. The trial court found that an established custodial environment existed with respect to both plaintiff and defendant. The order and opinion addressed the best interest factors in MCL 722.23 and made findings regarding those factors. The trial court also made findings regarding the minor child's best interests. The trial court found that "[b]oth parties are capable, nurturing parents who love their daughter very much." However, the trial court noted its concern with defendant's anger issue, stating: "The Court's most significant concern . . . is Defendant's anger issue, which has the potential to undermine the father/daughter relationship and do serious psychological damage to the child. Defendant is otherwise a good parent, but she is allowing this problem to poison everything." The trial court ordered that plaintiff and defendant would have joint physical custody with equal

time for each parent, but ordered defendant to participate in counseling to address her anger issue. Regarding legal custody, the trial court noted that it generally prefers to award joint legal custody. However, the trial court found that because of defendant's anger issue, the parties would be unable to cooperate and generally agree concerning important decisions affecting the welfare of the child. The trial court stated that "[i]f Defendant were the sole legal custodian . . . she would use her status to marginalize plaintiff. On the other hand, if Plaintiff were the sole legal custodian . . . he would consult, involve and advise Defendant regarding all decisions." Therefore, the trial court determined that it would be in the child's best interest to award sole legal custody to plaintiff.

The trial court also made findings regarding the division of property. The trial court essentially divided the marital assets equally. The trial court awarded each party the property in their possession and specifically awarded defendant her wedding ring, wedding dress and veil. The trial court determined that defendant's unvested pension had an approximate value of $8,000 and awarded it solely to defendant. Each party claimed that their parents had loaned the couple money; the trial court ordered each party to repay their parents. Regarding debt, the trial court noted that the parties did not have joint debt and ordered "that each party is responsible for whatever debts are in their respective names." The court did not order any child or spousal support.

On April 14, 2008, the judgment of divorce was entered. The provisions in the divorce judgment were consistent with the Opinion and Order After Divorce Trial. Thereafter, defendant filed a "Motion for Reconsideration of, Relief from, and To Amend Judgment," arguing that plaintiff, after asserting privilege, then elicited evidence in violation of MCR 2.314(B)(2), that this evidence impacted the trial court's determination of the best interest factors under MCL 722.23 and that the trial court's assignment of certain debt was inequitable. Defendant also sought joint legal custody of the minor child. The trial court denied the motion, stating in relevant part:

> Defendant seeks relief based upon her inability to procure Plaintiff's medical records relevant to the "underlying issue of Plaintiff's mental and emotional stability". She claims that, because Plaintiff asserted his privilege, and then raised the issue himself, that this is a violation of MCR 2.314(B)(2).
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> Should there have been any concern that Plaintiff was improperly "raising" the issue of his mental health pursuant to MCR 2.314(B)(2), one would think that such would draw a timely objection. The Court does not remember any such objection, nor does Defendant claim that such was made.
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> If a timely objection would have been made, however, the language "[u]nless the court orders otherwise" provides the Court with discretion as to what evidence can be introduced by a party that claims privilege. In this case, the Court finds absolutely no issue here.
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> Plaintiff's "mental and emotional stability" was raised early and often by Defendant during the course of the litigation, and to the extent that it was "raised" by Plaintiff at all, it was only as a shield. It may have been mentioned by Plaintiff first at trial, but only because his case went first and he knew that the issue was

> going to be raised by Defendant. Although Defendant did not have Plaintiff's medical records from many years ago, several witnesses testified about the suicide/mental instability issue. Further, Plaintiff underwent a complete psychological exam, where Dr. Hobbs was well aware of the history, and she testified about it at trial. As such, Plaintiff's mental health in this regard was well covered by many other sources, and it is highly doubtful that medical records from years ago would have made any difference at all. In fact, there was much more information made available to the parties and the Court in this case than there was in Navarre v Navarre, 191 Mich App 395 (1991).

The trial court also denied defendant's request for joint legal custody, finding that she had not had sufficient time to remediate her anger issue, and for a modification of the assignment of debt.

II. Analysis

A. Privilege

Defendant makes numerous arguments regarding plaintiff's assertion of privilege. The applicability of a privilege is a question of law that this Court reviews de novo. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000). This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). The abuse of discretion standard recognizes that "'there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCR 2.314 addresses the discovery of medical information concerning a party. MCR 2.314(A) provides, in relevant part:

> (1) When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under these rules to the extent that
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> (a) the information is otherwise discoverable under MCR 2.302(B), and
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> (b) the party does not assert that the information is subject to a valid privilege.

Defendant argues that the trial court erred in allowing plaintiff to assert privilege after he failed to raise it as required under MCR 2.314(B)(1), which provides:

> A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under

> MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

MCR 2.310(C)(2) provides that a party on whom a request for production of documents is served must serve a written response within 28 days after service of the request; however, the court rule permits the trial court to give the responding party "a longer or shorter time" to serve its written response.

On December 28, 2006, defendant filed a written request for production of documents pursuant to MCR 2.310, in which she sought copies "of all psychological, counseling and/or medical records" for plaintiff, including "all histories and notes pertaining to any mental health counseling" from various health care providers and professionals from October 1998 to the present. Defendant also sought "a complete and accurate list of all other doctors, psychologists, physicians, physiatrists [sic], counselors, and/or mental health professionals who have treated and/or consulted with [plaintiff]" from October 1998 to the present. At a hearing on January 8, 2007, counsel for plaintiff did not explicitly invoke the physician-patient or psychologist patient privilege on behalf of plaintiff, but requested that the trial court quash defendant's request for plaintiff's medical records, arguing that under *Navarre v Navarre*, 191 Mich App 395; 479 NW2d 357 (1991), only plaintiff's current psychological condition was relevant. Plaintiff did not file a written response to defendant's request for documents. On January 24, 2007, defense counsel sent a letter to plaintiff's counsel reminding her that defendant had served plaintiff with a written request for production of documents and that defendant had not received a response or objection to defendant's request and advising counsel for plaintiff that defense counsel would seek an order to compel discovery and for costs if defendant did not receive the documents by January 25, 2007, at 5:00 p.m. Plaintiff still did not respond, and on January 29, 2007, defendant filed a motion to compel production of documents under MCR 2.310 and MCR 2.313.

The trial court held a hearing on defendant's motion to compel on February 5, 2007. At the hearing, the trial court stated:

> Now, with regard to the medical records . . . I think it's clear that medical records, psychological records, psychiatric records are privileged. The privilege—this is under MCR 2.314(B), the privilege has to be asserted in the response to the discovery request or it is waived. So, if there's going to be a privilege, it needs to be in the response to the discovery request.
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> If there's a request for documents and the documents are not in the possession of the party, then that needs to be stated formally, properly pursuant to the court rule. So, that's what's going to happen here, again, within seven days from today's date.
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> But with regard to the psychologicals, I will also refer both parties to (2) under 2.314(B), if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable, the party may not thereafter present or produce any physical, documentary or testimonial evidence relating to the party's medical history or mental or physical condition. So, that's what the court rule

says. If they're going to assert the privilege, then they can't utilize—they can't present that evidence in Court.

Following the hearing, the trial court entered an order requiring plaintiff to "produce all documents and information set forth in Defendant's Written Request For Production of Documents Directed to Plaintiff dated December 27, 2006, or otherwise respond as directed by Michigan Court Rule, by not later than February 12, 2007, at 5 p.m." The trial court's order indicates that it was aware that plaintiff had missed the 28 day deadline to respond to defendant's request for production of documents. However, the court, apparently acting pursuant to its authority to modify discovery periods under MCR 2.310(C)(2), granted plaintiff a seven-day extension to file a response, thus allowing plaintiff to avoid waiving the privilege due to his failure to comply with defendant's discovery request within 28 days. On about February 8, 2007, plaintiff filed a verified response to defendant's written request for production of documents. In his response, plaintiff asserted that the evidence sought by defendant was "privileged," irrelevant, and "intended to embarrass, harass and unduly cause attorney fees to be incurred[.]" In claiming privilege, plaintiff did not specify whether the documents sought by defendant were privileged under the physician-patient privilege, MCL 600.2157,[1] or the psychologist-patient privilege, MCL 333.18237.[2] However, plaintiff did state: "[plaintiff] does

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[1] The physician-patient privilege, MCL 600.2157, provides, in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. . . .

[2] The psychologist-patient privilege, MCL 333.18237, provides, in relevant part:

> A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services. . . .

In addition, the admissibility of privileged communications is governed by MCL 330.1750, which provides:

> (1) Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section.
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> (2) Privileged communications shall be disclosed upon request under 1 or more of

(continued…)

not waive the right to introduce any relevant admissible *current* information regarding the mental and physical condition of either party by asserting privilege to any *previous* mental or physical medical providers consistent with the ruling in Navarre v Navarre." (Emphasis added.)

After plaintiff filed his verified response to defendant's request, the trial court did not make any further pre-trial rulings regarding the privilege issue. Thus, although the trial court never entered an order specifically finding the privilege applicable and specifically excluding certain evidence, it did state on the record at the February 5, 2007, hearing that plaintiff's medical, psychological and psychiatric records were privileged. The trial court did not, however, specify under what privilege or privileges the evidence sought by defendant was barred.

It is true that under MCR 2.314(B)(1), a privilege is waived when a party does not assert the privilege in a written response to a request for production of documents. In *Domako v Rowe*, 438 Mich 347, 356; 475 NW2d 30 (1991), the Supreme Court stated that "the plain language of MCR 2.314(B)(1) declares that if the privilege is not asserted in a written response to a request to produce, it is waived for purposes of that action." While plaintiff did not respond or object to defendant's request for the production of documents within 28 days as required by MCR 2.310(C)(2), this does not amount to a waiver of the physician-patient privilege because in its February 5, 2007, order compelling production of documents, the trial court specifically gave plaintiff until February 12, 2007, to produce the documents or respond to plaintiff's written request for production of documents. Under MCR 2.310(C)(2), the trial court has the authority to "allow a longer or shorter time" for a party to serve a written response to a request for production of documents. Therefore, contrary to defendant's argument, plaintiff did not waive the medical privilege and has not lost the privilege for purposes of the action.

Defendant next argues that the trial court erred in permitting plaintiff to assert privilege because plaintiff's assertion of the psychologist-patient privilege is contrary to the purpose of the Child Custody Act, MCL 330.1750 and MCR 2.314(B)(2). In *Navarre*, this Court addressed the interplay between the Child Custody Act and the physician-patient privilege. According to the Court:

(…continued)

> the following circumstances:
>
> (a) If the privileged communication is relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding . . . .
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> * * *
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> (3) In a proceeding in which subsections (1) and (2) prohibit disclosure of a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, the fact that the patient has been examined or treated or undergone a diagnosis also shall not be disclosed unless that fact is relevant to a determination by a health care insurer, health care corporation, nonprofit dental care corporation, or health maintenance organization of its rights and liabilities under a policy, contract, or certificate of insurance or health care benefits.

> The question before the Court is whether the Legislature intended to suspend the medical privilege in custody disputes. The defendant's statutory-construction argument that the specific should dominate over the general is inapposite unless the statutes are found to be conflicting. In other words, they must be in pari materia, i.e., they must cover the same subject matter. . . . Here, the purposes of the Child Custody Act and the medical privilege statute are different. The former seeks to provide a procedural framework for resolving custody disputes and requires the court to consider the mental and physical conditions of the parties. It does not, however, address the evidentiary routes by which such information may come to the attention of the court. The privilege statute, on the other hand, relates only to the right of a patient to prevent a physician from revealing a certain type of information, and it includes a few carefully delineated situations in which the evidence may be used notwithstanding the objection of the holder of the privilege.
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> All privileges exist at the expense of suppressing valuable evidence. Indeed, were this not the case, there would be no need for privileges at all. In this context, potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships. Moreover, the court in this case was able, with the plaintiff's participation, to gather information with regard to her mental condition. See MCR 2.311. The privilege, therefore, did not block the presentation of the only evidence of plaintiff's condition. Additionally, we do not find relevant to a party's present condition the testimony of a physician who has not treated the party for years. [*Navarre, supra* at 398-399.]

Defendant attempts to distinguish the instant case from *Navarre* by arguing that the instant case involves the psychologist-patient privilege, whereas *Navarre* involved the physician-patient privilege. It is true that *Navarre* addressed the interplay between the Child Custody Act and the physician-patient privilege, not the psychologist-patient privilege. However, in asserting privilege before the trial court, plaintiff generally asserted "privilege" without specifically identifying which statutory privilege precluded defendant from obtaining the documents she sought. Also, in ruling that the evidence sought by defendant was barred by privilege, the trial court did not specify whether the physician-patient privilege, psychologist-patient privilege, or both, barred the evidence. There is some overlap in the privilege statutes, and both privileges are arguably relevant and applicable to the facts of this case. Cf. MCL 600.2157; MCL 333.18237. In *Navarre*, the physician-patient privilege was asserted to block evidence of the plaintiff's mental condition. Even if the evidence in this case was precluded because of the psychologist-patient privilege, the reasoning of *Navarre*, that potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships, is no less applicable if the relationship is between a psychologist and patient than it is if the relationship is between a physician and patient. The purpose behind both privileges is the same: to protect the confidential nature of the doctor-patient relationship and to encourage the patient to make a full disclosure of symptoms and conditions to those from whom they seek help. See *Domako, supra* at 354; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Thus, the reasoning in *Navarre* is not uniquely applicable or limited to the physician-patient privilege and can be extended to the psychologist-

patient privilege. As the *Navarre* Court noted, "*[a]ll* privileges exist at the expense of suppressing valuable evidence." *Id.* (emphasis added.)

Defendant argues that under MCL 330.1750(2)(a), privileged communications must be disclosed if relevant to an element of the party's claim and that plaintiff's mental and physical health is a specific element in child custody determinations under MCL 722.23(g). We disagree that the best interest factors in MCL 722.23 constitute elements of a claim under MCL 330.1750(2)(a). Rather, MCL 722.23(a)-(l) constitute the factors that the trial court must consider, evaluate and determine in determining the best interest of a child in a child custody dispute. In any event, the Court in *Navarre* implicitly rejected any argument compelling disclosure of privileged information in a child custody case under MCL 330.1750(2)(a) because it held that a party's privileged medical information was not admissible even as bearing on factor (g) of the best interest factors under the Child Custody Act. This constitutes an implicit rejection of defendant's argument. The Court phrased the issue before it as "whether the Legislature intended to suspend the medical privilege in custody disputes" and clearly answered the question in the negative, stating that "potentially valuable evidence regarding the condition of parties to a custody dispute must be sacrificed to the perceived greater good of protecting physician-patient relationships." *Id.* at 398, 399. Thus, defendant's argument regarding MCL 330.1750(2)(a) is without merit.

Defendant argues that the trial court failed to enforce MCR 2.314(B)(2) because it permitted plaintiff to testify regarding aspects of his mental and psychological health or conditions. MCR 2.314(B)(2) provides:

> Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

In spite of MCR 2.314(B)(2), plaintiff testified at length regarding his mental and psychological health, both present and past. Plaintiff does not argue that his testimony did not constitute "testimonial evidence related to . . . [his] medical history or mental or physical condition" under MCR 2.314(B)(2). However, plaintiff asserts that defendant waived this issue by failing to object to plaintiff's evidence regarding his mental and emotional health. To preserve an issue regarding the admission of evidence on appeal, a party must object to the evidence at trial and specify the same ground for objection on appeal that was asserted in the trial court. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Not only did defendant fail to object to plaintiff's testimony regarding his mental and emotional health, defendant herself elicited, on direct and cross-examination, a significant amount of testimony regarding plaintiff's mental and emotional health. Defendant has failed to preserve this issue for review.

Because defendant failed to preserve this issue for appeal, this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, error must have occurred, the error must have been plain (clear or obvious), and the plain error must have affected substantial

rights. *Id.* The third requirement generally requires a showing of prejudice, i.e. that the error affected the outcome of the lower court proceedings. *Id.*

We find that error occurred in this case because the trial court ruled that plaintiff could assert privilege and then permitted plaintiff to testify at length regarding his mental and psychological health in violation of MCR 2.314(B)(2). MCR 2.314(B)(2) prohibits a party who has asserted privilege from testifying or introducing evidence regarding the party's mental or physical condition "[u]nless the court orders otherwise[.]" In this case, there is no indication that the trial court entered an order changing the effect of privilege under MCR 2.314. Furthermore, because defendant failed to object to such evidence, the trial court did not make any ruling regarding the evidence on the record. We further find that the violation of MCR 2.314(B)(2) was plain and obvious. However, we find that the error did not affect defendant's substantial rights, and defendant was not prejudiced by the admission of this evidence for several reasons.

First, contrary to defendant's assertion, the violation of MCR 2.314(B)(2) did not deprive defendant of her Sixth Amendment right to confront and cross-examine plaintiff because defendant did cross-examine plaintiff regarding his mental and psychological health. Furthermore, this case involved a child custody determination, which is a civil matter. The Sixth Amendment applies to "all criminal prosecutions[.]" US Const, Am VI. The Sixth Amendment right to confront and cross-examine witnesses does not apply to civil matters. See *In re Brock*, 442 Mich 101, 107-108; 499 NW2d 752 (1993).

Second, defendant elicited evidence, on direct and cross-examination, regarding plaintiff's mental and psychological condition. Even before plaintiff gave detailed testimony regarding his attempt to commit suicide when he was eighteen years old, defendant elicited testimony on cross-examination from several defense witnesses regarding plaintiff's mental and psychological condition. For example, defendant asked Thomas Joseph Wood if plaintiff ever told him about his many emotional problems or about having an obsessive compulsive disorder. In addition, defense counsel elicited testimony from Wood that plaintiff told him that he (plaintiff) was in therapy and that he had attempted suicide before. Defense counsel also elicited testimony from Wood that plaintiff took medication for attention deficit hyperactivity disorder (ADHD). Defense counsel elicited similar testimony from Aaron Pyciak. In addition, defense counsel also asked plaintiff's sister, Diana Lopez-Negrete, about plaintiff's ADHD and whether he took medication. Defense counsel also attempted to elicit testimony from plaintiff's sister about plaintiff's suicide attempt. When defense counsel asked plaintiff's sister if plaintiff had attempted suicide since his first attempt, she responded in the negative.

Defense counsel also cross-examined plaintiff at length regarding his mental and psychological condition. Counsel for plaintiff elicited testimony from plaintiff that he had ADHD and took medication for the condition, that he had not been diagnosed with obsessive compulsive disorder or any other mental or emotional impairments and that he was fine from a mental health standpoint. She further cross-examined plaintiff regarding his suicide attempt while he was at college in 1998 and other threats of suicide, eliciting testimony that he only threatened suicide one time, that other family members had not threatened suicide and that he was not depressed. Defendant also elicited testimony from plaintiff that on one occasion when he told defendant he should just kill himself, he did not mean it and did not attempt suicide; he stated that defendant was pushing him and being hostile and nasty and that he said something that he did not mean and should not have said because he was upset.

In addition, defendant herself testified regarding plaintiff's mental and psychological condition. Defendant testified regarding plaintiff's suicide attempt in 1998 and stated that plaintiff told her that he had tried to kill himself by jumping out of a window. Defense counsel asked defendant about recent suicide threats or attempts on plaintiff's part, and defendant responded: "He has on several occasions threatened to kill himself by either holding a knife to his throat and saying he was going to end his life, or that he was going to run the car—he had a plan to run the car into a tree." According to defendant, plaintiff's threats of suicide occurred in the fall of 1999, after the couple was evicted from an apartment, twice in October 2006, and once in November 2006. According to defendant, plaintiff's suicide threats would typically be brought on by significant emotional events, such as arguments with plaintiff's mother or family stress. Defendant described plaintiff's alleged suicide threats in detail. For example she stated that on one occasion, plaintiff "grabbed the knife out of the drawer, and . . . [h]e held it to his throat, and he said he was just going to end it, and to not try to stop him because if I tried to stop him, then he was really going to do it . . . ." Defendant asserted that plaintiff put the knife back after she called plaintiff's mother, and then plaintiff crumpled to the floor, cried and slept for a day and a half.

In addition to her own testimony, defendant also introduced the testimony of Dr. Sharon Hobbs, a clinical psychologist who, at defendant's request, conducted a psychological evaluation of both plaintiff and defendant and gave detailed testimony regarding her findings.

In light of defendant's introduction of evidence regarding plaintiff's mental and psychological condition, she cannot complain that plaintiff introduced evidence regarding his mental and psychological condition in violation of MCR 2.314(B)(2). Defendant failed to object to plaintiff's testimony regarding his mental and psychological health. If she had, the trial court might have entered an order otherwise modifying the effect of plaintiff's privilege as it was authorized to do under MCR 2.314(B)(2). Furthermore, defendant benefited from the trial court's failure to preclude the admission of evidence regarding plaintiff's mental and psychological health in that she was able to cross-examine plaintiff regarding his mental and psychological condition. Thus, the trial court's error in admitting the privileged evidence gave defendant an opportunity that she would not have otherwise had to explore plaintiff's mental and psychological health. Defendant contributed to the error by cross-examining plaintiff in this regard. A party may not harbor error, to which she consented, as an appellate parachute. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). Because defendant benefited from the trial court's error admitting evidence, she may not be heard to complain on appeal.

Third, evidence from years ago would not have been relevant to plaintiff's current mental and psychological health. Defendant sought to discover evidence regarding plaintiff's mental and psychological health from as far back as 1998. Under *Navarre*, the testimony of a physician who has not treated a party for years is irrelevant to the party's present condition. *Navarre*, *supra* at 399. Furthermore, this Court observed in *Navarre* that "[t]he privilege . . . did not block the presentation of the only evidence of plaintiff's condition." Similarly, in the instant case plaintiff's assertion of privilege did not block the only evidence of plaintiff's medical condition. As indicated above, both parties testified at length about plaintiff's current and past mental state, defendant cross-examined several witnesses regarding plaintiff's mental and psychological condition and Dr. Hobbs conducted a psychological evaluation of plaintiff and testified regarding

her findings. Therefore, like in *Navarre*, plaintiff's assertion of privilege did not block the only evidence of plaintiff's mental and psychological condition.

In sum, plaintiff did not waive his privilege by failing to assert it within 28 days as required by MCR 2.310(C)(2) because the trial court properly gave plaintiff a longer time to assert privilege, as it was authorized to do under MCR 2.310(C)(2). Although the trial court violated MCR 2.314(B)(1) by allowing the admission of evidence of plaintiff's mental and psychological condition at trial when plaintiff had asserted privilege, this unpreserved error did not affect defendant's substantial rights.

B. Best Interest Factors and Custody Ruling

Defendant argues that the trial court's error in its ruling regarding privilege tainted the trial court's determinations regarding the statutory best interest factors, as well as the trial court's determination regarding the existence of an established custodial environment and the trial court's ultimate custody decision.

MCL 722.28 governs child custody disputes on appeal and provides:

> To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.

This Court applies three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the "great weight" standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher (Fletcher I)*, 447 Mich 871, 877-878; 526 NW2d 889 (1994). The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). A trial court's findings regarding the best interest factors are reviewed under the great weight of the evidence standard. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2 336 (2008). This Court defers to the trial court's determinations of credibility. *Id.*; *Fletcher v Fletcher (Fletcher II)*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Second, this Court reviews questions of law for clear legal error that occurs when a trial court incorrectly chooses, interprets, or applies the law. *Berger*, *supra* at 706. Third, discretionary rulings, such as custody decisions, are reviewed for an abuse of discretion. *Fletcher I*, *supra* at 879; *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006). The overriding concern is the child's best interests. *Fletcher II*, *supra* at 29.

To determine child custody, the trial court must consider the statutory best interest factors in MCL 722.23:

> 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.

The trial court found the parties equal for factors (a), (b), (d), (e) and (h). The trial court found in defendant's favor for factor (c) and found in plaintiff's favor for factors (f), (g), (j), and (k). On appeal, defendant challenges the trial court's findings regarding factors (b), (d), (e), (f), (g), (j) and (k).

The trial court found the parties equal with respect to factor (b), the parties' capacity and disposition to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion. Defendant argues that the trial court should have found in her favor regarding this factor and that she raised questions regarding plaintiff's capacity to care for and guide the minor child because of his mental health issues. Defendant claims that plaintiff did not have the capacity to care for the minor child on a daily basis because of his ADHD and obsessive compulsive issues and because of his inability to focus. There was evidence that plaintiff had ADHD and obsessive compulsive issues. However, the evidence

indicates that these conditions did not render plaintiff incapable of providing the minor child with love, affection and guidance. Defendant also argues that the trial court's findings under factor (c) that plaintiff was unable or unwilling to hold down a job and was completely financially dependent upon his parents are inconsistent with the trial court's conclusion that plaintiff was able to give the minor child love, affection and guidance under factor (b). We disagree. Factors (b) and (c) address different parental abilities. Factor (b) addresses the ability to provide the child with love, affection and guidance, while factor (c) addresses the ability to provide the child with basic material things, such as food, clothing and medical care. The trial court had "concerns about Plaintiff's ability to provide the child with the necessities of life without continued support from his parents" and found that factor (c) favored defendant. The trial court's findings regarding factor (c) were accurate and not against the great weight of the evidence. However, plaintiff's financial dependence on his parents and lack of employment do not affect plaintiff's ability to give the child love, affection and guidance. Therefore, defendant's argument in this regard is without merit. The trial court's finding regarding factor (b) was not against the great weight of the evidence.

The trial court also found plaintiff and defendant equal with respect to factor (d), the length of time the child has lived in a stable environment. According to defendant, she should have been favored under this factor. The trial court found that plaintiff lived in an apartment and planned to conduct parenting time at his parents' home and that plaintiff's "family is a stable and nurturing one." The trial court also found that "[d]efendant also has an appropriate home with stability." Defendant testified regarding dysfunction and instability within plaintiff's family, asserting that on one occasion plaintiff threatened to kill his mother and burn her house down, that plaintiff's parents had a verbal and physical altercation one Thanksgiving over finances, that "[t]here was a lot of marital discord as far as yelling and arguing between Dr. and Mrs. Lopez Negrete[,]" that typical conversations in the household included "a significant amount of yelling and swearing in both English and in Spanish[,]" and that the family did not sit down to dinner together every night. According to plaintiff, the family relationships were "very contentious" and there was a lot of tension in the household. The trial court found defendant's testimony in this regard incredible, stating "that Defendant's criticisms of . . . [plaintiff's] parents and their home are completely without merit and motivated by her anger issue." Whether defendant's claims regarding the alleged instability of plaintiff's family were believable was a credibility determination for the trial court. It is the function of the factfinder to determine the weight of the evidence and credibility of witnesses; this Court should not interfere with that function. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant argues that the focus under factor (d) is on the relationship between the minor child and her parents, not the relationship with the minor child and her grandparents. Defendant suggests that the trial court improperly recognized the child's grandparents as *de facto* custodians or caretakers for the minor child. This suggestion is simply not supported by the record. The trial court's ruling did not give plaintiff's parents custody of the minor child, and the trial court's findings regarding factor (d) do not, as defendant suggests, focus on the grandparents as the caretakers of the minor child, but rather focus on the environment in which plaintiff intended to conduct his parenting time with the minor child. While there was evidence that plaintiff's parents were involved with helping plaintiff care for the minor child, there was ample evidence that plaintiff cared for the minor child. We reject defendant's argument that the trial court awarded *de facto* custody to plaintiff's parents.

The trial court also found the parties equal with respect to factor (e), the permanence, as a family unit, of the existing or proposed custodial homes. Regarding factor (e), the trial court found that "[p]laintiff's proposed family unit will consist of himself and the child, living at his parents' home" and that "[d]efendant's proposed family unit will be her and the child at her home." Factors (d) and (e) have a degree of overlap, but "the focus of factor e is the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). The trial court should examine any "potential disruptions" to the minor's environment, such as frequent moves to unfamiliar settings, a succession of persons residing in the home, or live-in romantic companions for the custodial parent. *Id.* at 465 n 9. The only potential disruption to plaintiff's parents' home serving as the custodial home concerns plaintiff's statements that he did not intend to conduct his parenting time at his parents for the rest of his life and that he hoped to buy his own house at some point. According to plaintiff, parenting time at his parents' home was desirable because it was convenient, the home was nice, it was economically feasible and his parents desired to see their granddaughter. In addition, it was a logical place to conduct parenting time because the location where he exercised his parenting time was an issue for defendant. At the time of trial, plaintiff had completed law school but had not passed the bar examination and was not employed. Based on the evidence regarding plaintiff's parents' financial support of him and his family, it is clear that plaintiff did not have immediate plans to purchase a home and he said as much on the record. Thus, there were no definite or immediate plans to change the location where he exercised his parenting time with the minor child. Furthermore, based on the evidence, there is every indication that plaintiff's parents would be willing to host plaintiff and their granddaughter during his custody times as long as necessary and that this was a stable environment for the child. Plaintiff's parents' conduct demonstrates that they are committed to hosting plaintiff and their granddaughter; they have created a safe environment for her in their home, and the home has a bedroom for her with a child's bed and toys. In *Ireland*, the Supreme Court ruled that changes in a young adult parent's residency, as a result of completing college, do not disqualify the parent for custody under factor (e), but cannot be ignored. *Id.* at 465. Given the lack of specificity regarding when plaintiff intends to purchase his own home, coupled with his financial dependence on his parents, the trial court's determination of this factor was not against the great weight of the evidence.

Defendant also argues that the trial court erred in finding in favor of plaintiff under factor (f), the moral fitness of the parties involved. This factor relates to the parties' moral fitness as a parent. *Fletcher I*, *supra* at 886-887. Conduct relevant to this factor includes "verbal abuse, drinking problems, driving record, physical or sexual abuse of children, and other illegal or offensive behaviors." *Id.* at 887 n 6. The trial court found in favor of plaintiff for this factor based on defendant's lack of credibility. In so finding, the trial court stated: "This Court rarely will made a specific finding under this factor that a parent's lack of credibility impacts their moral fitness to parent. However, such a finding is warranted here." Defendant again takes issue with the trial court's conclusions regarding the parties' credibility, arguing that the trial court erred in finding her claims regarding domestic violence, incidents in which the minor child witnessed plaintiff masturbating to pornography on a computer, and plaintiff's alleged recent suicide threats to be incredible. She claims that evidence that was precluded because of the trial court's improper privilege ruling would have corroborated her testimony regarding these incidents and that the trial court's credibility determinations were made without the benefit of crucial evidence that was improperly excluded. Despite the trial court's privilege ruling, both parties introduced evidence regarding plaintiff's mental and psychological condition. Thus, the

privilege did not block the presentation of the only evidence of plaintiff's condition. See *Navarre*, *supra* at 399. Furthermore, some of the medical evidence sought by defendant was from 1998; the testimony of a physician who has not treated a party for years is irrelevant to the party's present condition. *Id.* In any event, the trial court specifically noted that it found in plaintiff's favor for this factor based on defendant's lack of credibility. It is the function of the factfinder to determine the weight of the evidence and credibility of witnesses. *Wolfe*, *supra* at 514-515. Therefore, defendant's arguments regarding the trial court's findings with respect to factor (f) are unavailing. The findings were not against the great weight of the evidence.

Defendant also asserts that the trial court improperly found in plaintiff's favor with respect to factor (g), the parties' mental and physical health. In finding in favor of plaintiff regarding this factor, the trial court found that "both parties have issues . . . regarding mental health," but concluded that defendant's anger issue, which the court observed "had the potential to undermine the father/daughter relationship and do serious psychological damage to the child[,]" was more of a concern than plaintiff's ADHD, obsessive personality features, indecision and one documented suicide attempt many years before. The trial court noted that defendant's allegations regarding plaintiff's recent suicide thoughts or attempts were uncorroborated. Still, the trial court considered plaintiff's history and concluded "that it does not present a significant risk or a barrier to effective parenting." Regarding defendant's anger, the trial court noted that "Dr. Hobbs asserts that the overarching issue for Defendant is her anger" and that "Dr. Hobbs expressed concern that Defendant is becoming consumed by her anger to the point where 'the air he [plaintiff] breathes is toxic.'"

Despite the trial court's ruling on the record that plaintiff's medical, psychological and psychiatric records were privileged, a great deal of evidence regarding plaintiff's mental and psychological health was admitted at trial. Plaintiff himself testified that he has had ADHD since he was very young and that he took medication for the condition and received accommodations for his ADHD both in college and in law school. Plaintiff also testified regarding his alleged suicide attempt, which occurred in 1998 when he was 18 years old and attending Loyola College. Plaintiff denied that he attempted suicide, stating that he did not think he was really attempting to take his life, but acknowledging that he was very sad and upset at the time because he was lonely, had gotten mugged, had conflicts with his roommate and other men on his floor, and his grandmother was going to die. According to plaintiff:

> I was very upset, and I had—a couple of my friends were around, and I said to them, you know, I just can't take it anymore. I'm under a lot of stress. I'm just going to jump out the damn window, and I was like—and I was crying at this point, and they were worried about me. One of the guys was Moses Ortiz . . . and the other guy, his name was Pete . . . and we just sat down and talked, and I mean I told them like how I felt, and how I felt like crap, and these guys were pretty nice guys. We were good friends and they basically talked me out of it. You know, I never got outside of a building. I was never on a ledge. I was never in a place that, you know, I was about to jump off a precipice of any kind. I was just very upset. I really thought about doing it. It really hurt, but I never really took serious action towards actually doing it. I mean I got towards the window, and that's probably why they took me to the hospital, just in case, but I never actually got on any edge of anything.

Plaintiff stated that after one day of hospitalization, he was released into the care of his psychologist and that he quit attending Loyola and received regular counseling. He asserted that at the time of the incident, he was only 18 years old, and it "was just a one time incident that, you know, I really regret, but it's not something that, you know, is the end all and be all of who I am." Plaintiff also testified that he had been going to counseling because of the divorce.

Furthermore, as explained previously, defendant also testified regarding plaintiff's past suicide attempt and several more recent suicide threats made by plaintiff and described in detail how plaintiff allegedly stated that he would kill himself. In addition, Dr. Hobbs performed psychological evaluations of both plaintiff and defendant and testified regarding her findings. Dr. Hobbs testified that neither plaintiff nor defendant had any "red flags" and that she did not think either was incompetent or needed to be institutionalized. She testified that plaintiff admitted that he had suicidal ideations ten years ago. She also testified that plaintiff had some obsessive compulsive features to his personality and an indecisiveness that made it difficult for him to commit to answers on the psychological tests. Dr. Hobbs testified that this behavior would create a problem in co-parenting, but that just because a person has an obsessive compulsive disorder does not mean that they cannot effectively parent. Dr. Hobbs also testified that plaintiff had self-esteem issues.

Dr. Hobbs also testified regarding her psychological evaluation of defendant. According to Dr. Hobbs, defendant had problems with anger and "her distaste for her husband negates his being in a sense." She further stated that defendant was "so consumed with her negativity and her anger at her husband that the air he breathes is toxic." Dr. Hobbs also stated that defendant's anger toward plaintiff could lead to a situation called parental alienation, in which a child will not acknowledge a single positive thing about the other parent.

The trial court's conclusion that factor (g) favored plaintiff was not against the great weight of the evidence, and the trial court's finding that defendant had an anger issue and that her anger had the potential to undermine plaintiff's relationship with the minor child was supported by Dr. Hobbs' testimony. Furthermore, while there was evidence that both plaintiff and defendant had mental health issues, the trial court's conclusion that defendant's anger problem was more of a concern than plaintiff's mental health issues was proper because determinations regarding the weight of the evidence are properly left to the trial court. *Wolfe*, *supra* at 514-515. The trial court may give the competent evidence the weight it deems appropriate.

Plaintiff also contends that the trial court erred in finding in plaintiff's favor under 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[.]" The trial court found that "[d]efendant's anger issue has manifested into a deliberate attempt to sabotage Plaintiff's relationship with the child" and that "[d]efendant did everything possible to freeze [plaintiff] out of his child's life[.]" The trial court further found:

> [Defendant's conduct toward plaintiff] has already had a harmful effect on the child. There has been testimony as to the child's reserved demeanor at exchanges: she waits until Defendant leaves until she becomes joyful with Plaintiff. She apparently has learned that her mother disapproves of any shows of affection toward her father. How very sad.

> The Court finds that Defendant is engaged in a deliberate effort to undermine Plaintiff's relationship with the child. This is a manifestation of Dr. Hobbs' findings regarding Defendant's anger issue toward Plaintiff, whereby the [sic] "the air he breathes is toxic."
>
> With regard to Plaintiff, the Court does not find any issues regarding his fostering of the child's relationship with Defendant.
>
> * * *
>
> Therefore, the Court finds an intentional effort to undermine Plaintiff's role as a father. As such, this factor favors Plaintiff, and strongly so. Further, this is an important factor in the overall analysis.

There was evidence that defendant did not facilitate a continuing relationship between plaintiff and the minor child. For example, plaintiff testified that defendant prevented or attempted to prevent him from having parenting time on several occasions. According to plaintiff, defendant would ask for the address and telephone number of the location at which he was exercising his parenting time when she already knew that information. He also testified that when the parties first separated, defendant refused more than 15 requests that he made to see the minor child. Plaintiff also stated that defendant refused to tell her the location for exchanging custody of the minor child. In addition, plaintiff's mother testified that during one custody transfer, she went with plaintiff to pick up the minor child from defendant, but defendant refused to transfer the minor child, saying that she did not know who plaintiff's mother was and asking for plaintiff's mother's identification. There was also evidence that defendant attempted to interfere with or preclude plaintiff's involvement with medical care and treatment for the minor child.

Defendant takes issue with the fact that the trial court emphasized factor (j) above the rest. However, "the statutory best interest factors need *not* be given equal weight. Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors." *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485 (1998). The controlling consideration in child custody determinations is the best interest of the child. MCL 722.25(1); *Lombardo v Lombard*, 202 Mich App 151, 159-160; 507 NW2d 788 (1993). Therefore, it was not error for the trial court to give factor (j) important, or extra, consideration in the overall analysis of best interest factors.

Defendant's remaining argument with respect to factor (j) concerns her allegations that she was improperly denied the opportunity to prove that plaintiff was mentally unstable and a bad influence and possibly a danger to the minor child. Once again, this involves a credibility determination, which was properly for the trial court to decide. For the same reasons as those stated previously, defendant's arguments in this regard are not persuasive.

Defendant also contends that the trial court improperly found in plaintiff's favor with respect to factor (k), domestic violence. The trial court found that there was evidence to support several incidents of domestic violence by defendant against plaintiff, and the record supports the trial court's conclusion in this regard. Two of plaintiff and defendant's friends testified regarding defendant's acts of violence against plaintiff. Plaintiff himself testified that defendant

would knee or punch him in the testicles if she wanted something and that she hit him with a fire poker, a brass paper weight and a belt, and threatened him with a knife. Defendant denied abusing plaintiff and asserted that plaintiff physically assaulted her on several occasions. She described one occasion in May or June 2005, when plaintiff became angry at her and threw a humidifier against the wall and then pushed her down the stairs. She further stated that plaintiff pushed her down the stairs again about a year later. Defendant also testified that after the parties separated, plaintiff became angry and again threw a humidifier and pushed her out of the way. Although both parties each denied physically abusing the other, the trial court found "[p]laintiff's version much more credible" and concluded that this factor favored plaintiff. Once again, this factor involved an issue of credibility, and it is the function of the factfinder to determine the credibility of witnesses. *Wolfe, supra* at 514-515. The trial court's finding regarding this factor was not against the great weight of the evidence.

In sum, the trial court's factual findings were not against the great weight of the evidence. Contrary to defendant's argument, the trial court's findings regarding the best interest factors were not tainted by the trial court's privilege ruling. Furthermore, the trial court's decision awarding sole legal custody of the minor child to plaintiff was not an abuse of discretion. In awarding legal custody, the trial court noted that it prefers to award joint legal custody, but could not do so in this case because of the parties' inability to cooperate, which the court stated was "caused primarily by Defendant's anger issues." The trial court stated that it would like to see defendant "remediate her problem so that the parties could effectively co-parent. Should that occur, Defendant may petition the Court to request joint legal custody." If the parties are unable to cooperate, joint custody is not an option. *Wright v Wright*, 279 Mich App 291, 299-300; 761 NW2d 443 (2008). The trial court's finding that defendant had an anger issue was supported by the evidence. The trial court did not abuse its discretion in awarding sole legal custody to plaintiff.

C. Disqualification of the Trial Judge

Defendant argues that further proceedings in this case should be decided by a different trial judge because the trial judge has formed an opinion regarding defendant and can no longer impartially adjudicate this divorce matter.

The proper way to raise a concern regarding alleged bias on the part of a trial judge is by a motion in the trial court pursuant to MCR 2.003, and not by attacks in an appellate brief. *Bracco v Michigan Tech Univ*, 231 Mich App 578, 601 n 16; 588 NW2d 467 (1998). A party who does not move to disqualify the judge in the trial court has not preserved the issue for appellate review. MCR 2.003; *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). Defendant does not dispute that she did not move to disqualify the trial judge under MCR 2.003, but urges this Court to rule that further decisions regarding the parties' divorce be decided by a different judge under this Court's authority to "enter any judgment or order or grant further or different relief as the case may require" pursuant to MCR 7.216(A)(7).

MCR 2.003(B)(1) provides that a judge is disqualified when "[t]he judge is personally biased or prejudiced for or against a party or attorney." Generally, a trial judge is not disqualified absent a showing of actual bias or prejudice. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a "'deep-seated

favoritism or antagonism that would make fair judgment impossible'" and overcomes a heavy presumption of judicial impartiality." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001).

A ruling disqualifying the trial judge from making further decisions regarding this case is not warranted. The bases for defendant's claims that the trial judge must be disqualified are the trial court's "fundamental privilege error" and the trial court's inequitable division of debt, specifically the assignment of credit card debt to defendant. Even though the trial court's ruling regarding the admission of evidence following plaintiff's assertion of privilege was technically erroneous, this error benefited defendant as much as plaintiff in that it allowed defendant to explore defendant's mental and psychological condition. In addition, for reasons that will be explained more fully in this opinion *infra*, the trial court's division of debt was not inequitable, and the trial court did not err in ordering the parties to each repay their own debt. Contrary to defendant's contention, nothing in the record indicates that the trial court was fundamentally predisposed against defendant or actually biased or prejudiced against defendant. It is true that there was a great deal of conflicting testimony and that the trial court repeatedly resolved credibility issues in plaintiff's favor and against defendant. However, it is the function of the trial court to make credibility determinations. *Berger*, *supra* at 705. It is also true that the trial court used harsh language regarding defendant's credibility, stating that that it had "caught [defendant] in several lies in the course of the trial[,]" "that Defendant lied[,]" that "[t]he list of [defendant's] lies is long indeed[,]" and that "[d]efendant has repeatedly lied in her testimony." However, these opinions and conclusions were formed over the course of trial on the basis of facts introduced in evidence or events that occurred during trial and do not constitute a basis for disqualification. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Because there is no indication in the trial court's findings or rulings that the trial judge was actually biased or prejudiced against defendant, there is no basis to disqualify the trial court from hearing further matters in this case.

D. Trial Court's Ruling Regarding Division of Debt

Defendant argues that the trial court erred in ordering her to be solely responsible for debt on credit cards in her name. On appeal from a property division in a divorce action, an appellate court must first review the trial court's findings of fact for clear error. *Berger*, *supra* at 717. A finding is clearly erroneous if, after a review of the entire record, the court is left with the definite and firm conviction that a mistake was made. *Id.* The trial court's factual findings are accorded substantial deference. *Id.*; MCR 2.613(C). If the trial court's findings of fact are upheld, the appellate court must then decide whether the trial court's dispositional ruling was fair and equitable in light of those facts, and it will affirm the trial court's discretionary ruling unless it is left with the firm conviction that the division was inequitable. *Berger*, *supra* at 717-718.

The trial court made the following ruling regarding the parties' debt:

> With regard to any other debt, although there was some testimony about credit card debt at an earlier time period of the marriage, there was no specific presentation regarding current debts along with a rationale for division. Rather, each had sources of income coming into the household and each contributed to expenses. As far as the Court understands there is no debt in both of the parties'

> names. Therefore, the Court will not divide debt, but merely order that each party is responsible for whatever debts are in their respective names.

In addition, the trial court ordered that each party was responsible to repay any monies loaned to the couple by their parents.

Defendant argues that the trial court erred in making her solely responsible to pay off credit cards in her name because she used the credit cards to support the parties and plaintiff's education. She testified that at the time of trial, there was a $30,000 balance on four credit cards that were in her name. She asserted that the cards were used to pay family expenses. According to plaintiff, defendant had about $40,000 in credit card debt when the parties married. Plaintiff further testified that his parents primarily paid the parties' living expenses after they were married. In addition, plaintiff's mother testified that she and plaintiff's father, a neurosurgeon, assisted plaintiff and defendant financially by giving them $24,000 for a down payment for a home, $12,000 to $15,000 for appliances and remodeling, and $10,000 to $12,000 for furniture. Furthermore, plaintiff's mother testified that she and plaintiff's father paid for plaintiff's law school out of an educational fund they established and funded for him.

In addition, there was also evidence that during the marriage, plaintiff had a credit card in his name for which his parents were paying the bill. Plaintiff's mother guessed that she and plaintiff's father had paid $100,000 total for plaintiff's credit card purchases. Some of the charges to plaintiff's credit card included charges to Bed, Bath and Beyond, Gymboree (a children's clothing store), and restaurants. Defendant acknowledged that plaintiff's parents gave the parties funds in the amount of $165,000 over the course of the parties' relationship. However, she claimed that less than ten per cent of plaintiff's credit card purchases were for household use and that 90 percent of his credit card purchases were personal in nature. Plaintiff's mother testified that while plaintiff had not signed a promissory note, she reasonably expected plaintiff to repay the money and thought that he had a moral obligation to do so. Plaintiff testified that the financial assistance provided by his parents was not a gift and that he and defendant had discussions regarding repaying his parents during the marriage and that defendant agreed that the couple should repay plaintiff's parents when they had more money. Defendant denied such conversations, however, claiming that plaintiff said he deserved the money his parents gave them and that he was "going to ride this until I can't ride it any longer, so just leave it alone." Defendant also stated that plaintiff's parents never made any demand upon plaintiff and defendant to repay any money. According to defendant, the first time there was any suggestion that the monies provided by plaintiff's parents was a loan rather than a gift was after plaintiff filed for divorce.

The effect of the trial court's ruling ordering each party to pay any debts in their name, according to plaintiff, is that she was burdened with credit card debt that was marital debt and furthermore, that the trial court inequitably placed the greater debt burden on her. The trial court has the power to make credibility determinations regarding disputed joint debts, determine whether debts are joint debts or the individual responsibility of one party, and assign the debt to the party who incurred it. See *Lesko v Lesko*, 184 Mich App 395, 401; 457 NW2d 695 (1990), overruled on other grounds sub nom 194 Mich App 284 (1992). In this case, the trial court appears to have rejected defendant's contention that she used the credit cards to support the parties and pay for plaintiff's education. To the extent that the evidence conflicted regarding the source of defendant's credit card debt, the issue involves a credibility contest between the

parties, and this Court must defer to the trial court's determinations regarding witness credibility. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007). In light of the conflicting evidence, this Court must not substitute its judgment for that of the trial court. *Id.*

Furthermore, the trial court ordered each party to repay any debts to their respective parents. There was evidence that plaintiff's parents paid $100,000 for a credit card in plaintiff's name, and some of the purchases on this card were made from stores like Bed, Bath and Beyond, Gymboree and restaurants and certainly sound like household expenses. There was also evidence that defendant's parents had gifted or loaned money to the parties, but the amount of money was not nearly as great as the money provided to the parties by plaintiff's parents. Although we concur with the trial court's assessment that it is questionable whether plaintiff would ever repay his parents, there was evidence that plaintiff's parents expected to be repaid. The amount of money provided by plaintiff's parents was more than three times the amount of defendant's credit card debt. Therefore, contrary to defendant's argument on appeal, the trial court's division of debt was arguably even more favorable to defendant than plaintiff. In sum, the trial court's division of debt was not inequitable, and it was not inequitable for defendant to be charged with paying off credit cards in her name.

In support of her argument on appeal, defendant has attached to her appellate brief numerous pages of credit card account information, apparently to bolster her argument that the debt accumulated on her credit card during the marriage was, at least in part, marital debt. This credit card account information was not part of the lower court record. This Court is limited on appeal to reviewing only the trial court record, MCR 7.210(A), and a party may not enlarge the record on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). Accordingly, we decline to consider defendant's evidence regarding her credit card account.

III. Conclusion

In sum, for all the reasons articulated in this opinion, we affirm the judgment of divorce.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly