STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW J. MCDONALD, Plaintiff-Appellant,	UNPUBLISHED October 22, 2013
v	Nos. 313253; 314925 Oakland Circuit Court
CARRI LYNNE MCDONALD, Defendant-Appellee.	LC No. 2011-782931-DM

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of divorce and order granting in part and denying in part defendant's request for attorney fees in this divorce action. We affirm in part, reverse in part, and remand.

Plaintiff first argues that the trial court abused its discretion when it awarded defendant lifetime spousal support. We disagree.

"For an issue to be preserved for appellate review it must be raised, addressed, and decided by the lower court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Plaintiff filed a motion for reconsideration challenging the spousal-support award. However, because plaintiff did not raise that issue at the hearing set for that motion, and the trial court did not address it, this issue is not preserved for appellate review. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). "To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* at 328-329. This Court reviews a spousal-support award for an abuse of discretion, and the trial court's factual findings regarding spousal support for clear error. *Loutts v Loutts*, 298 Mich App 21, 25-26; 826 NW2d 152 (2012). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes," and "[a] finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made." *Id.* (citations omitted). "If the trial court's findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. We must affirm the trial court's dispositional ruling unless we are convinced that it was inequitable." *Id.* at 26 (internal citations omitted).

"The primary purpose of spousal support is to balance the parties' incomes and needs so that neither party will be impoverished, and spousal support must be based on what is just and reasonable considering the circumstances of the case." *Id.* at 32. MCL 552.23 provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

See also *Loutts*, 298 Mich App at 30.

In deciding whether to award spousal support, the trial court should consider several factors, including

> (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 alimony, (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. [*Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010).]

"The trial court should make specific factual findings regarding the factors that are relevant to the particular case." *Loutts*, 298 Mich App at 32.

In its September 7, 2012, opinion and order, the trial court explicitly addressed several of the *Myland* factors:

> Plaintiff will have total income of $207,800. Plaintiff has living expenses totaling $5,438 per month, child support payments totaling $2,718 per month, and rental property expenses totaling $8,868 [per month], for a total of $204,228 in expenses per year.
>
> Plaintiff and [d]efendant are 39 years old and were married for 12 years. Both parties have the ability to work, neither party has special needs, both parties have enjoyed the financial securities and high standard of living during the marriage, and both parties used their income to contribute to the estate. Both parties are in good physical health.
>
> Both parties will receive assets of substantial value. Defendant will not have access to her pension for at least eleven years and any invasion of her 403(b)

> [retirement savings account] will result in assessment of taxes and penalties. Plaintiff will be responsible for the debt associated with the real estate he receives, but will have cash assets, the ability to earn substantially more than [d]efendant, and will have immediate control over the assets he is awarded.

The court then found:[1]

> [C]onsidering [his] reasonable compensation amount of $164,000 per year, as well as other income available to [p]laintiff, . . . [p]laintiff has the ability to pay spousal support. The court finds that based upon all of the *Thames* factors, as well as the nature of the property awarded to the parties, [p]laintiff's ability to pay spousal support, [d]efendant's need for spousal support, as well as the parties' incomes and expenses discussed *infra* [sic], [d]efendant is entitled to spousal support. Plaintiff shall pay to [d]efendant the amount of $1,500 per month until the death of [d]efendant or until further order of the court.

The trial court's factual findings were not clearly erroneous. Plaintiff argues that the trial court made "clear factual errors concerning [plaintiff's] expenses and his ability to meet them on his income while paying alimony." However, he identifies no particular error, arguing instead that he does not have the ability to pay spousal support, and that defendant is not entitled to it.

Even though the trial court did not clearly err, this Court must determine whether the spousal-support award was "fair and equitable under the circumstances of the case." *Loutts*, 298 Mich App at 26. Plaintiff argues that the spousal-support award was inequitable because defendant's monthly income will exceed her expenses by approximately $1,275, and plaintiff will have a shortfall of approximately $1,900 a month. However, that calculation improperly included $8,868 a month in mortgage payments on the marital home, investment properties, and plaintiff's office building, all of which plaintiff received in the property division. Plaintiff's gross annual wages are $164,000, and defendant's are $87,934. The $1,500 monthly spousal-support award leaves plaintiff with $146,000 in annual income, and defendant with $105,934. Plaintiff's income still exceeds defendant's by about 38 percent after the spousal-support award, and there is no evidence that either party is "impoverished" by this arrangement. See *Loutts*, 298 Mich App at 30.

Plaintiff, a self-employed financial planner, testified at trial that he was primarily responsible for handling the family's finances: paying bills, planning for retirement, maintaining the minor children's higher-education savings funds, online banking, and depositing checks. He said that McDonald Financial, his financial-planning company, "manage[d] money for people" and administered corporate benefits, retirement-savings accounts, disability plans, health-insurance plans, and life-insurance plans. The trial court did not consider "the effect of

---

[1] *Thames v Thames*, 191 Mich App 299; 477 NW2d 496 (1991), cited in the trial court's spousal-support award, laid out 13 factors for trial courts to consider in determining whether to award spousal support. The updated list includes "the effect of cohabitation on a party's financial status." *Myland*, 290 Mich App at 695.

cohabitation on a party's financial status," (the 13th factor among the *Myland* factors but not included in the older *Thames* list). *Myland*, 290 Mich App at 695. Further, the trial court's ultimate disposition on the support award was not inequitable.

Plaintiff next argues that the trial court abused its discretion when it calculated the child-support award. We agree, and remand for recalculation of child support under the Michigan Child Support Formula (MCSF).

"For an issue to be preserved for appellate review it must be raised, addressed, and decided by the lower court." *Hines*, 265 Mich App at 443. Plaintiff filed a motion for reconsideration but did not raise this issue. Because he raises this issue for the first time on appeal,[2] it is not preserved for appellate review. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette*, 278 Mich App at 328. "To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* at 328-329. Child support orders are reviewed for an abuse of discretion, factual findings underlying the trial court's decisions are reviewed for clear error, and whether the trial court properly applied the MCSF is a question of law that is reviewed de novo. *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012).

"A trial court must use the [MCSF] when determining child support, and may deviate from the formula only if the formula would be unjust or inappropriate based on the facts of the case. The trial court must set forth in writing or on the record the reasons for the deviation." MCL 552.605(2); *Clarke*, 297 Mich App at 179. The trial court stated, in its opinion and order, that it awarded child support "pursuant to the Michigan Child Support Formula," attributing $287,500 in annual income to plaintiff and $87,934 to defendant, and finding that child care was not necessary "in light of the school schedules of the children as they correspond with [d]efendant's schedule."

Plaintiff argues that the trial court erred when it used income of $287,500 to calculate his child-support obligation because that figure double-counted funds already accounted for when his business was valuated for the property division, but he has not shown plain error on this issue. "Net income," for the purpose of calculating child support, means "all income minus the deductions and adjustments permitted by" the MCSF. 2008 MCSF 2.01(A).[3] "The objective of

---

[2] A scheduling order indicates that the parties were referred to the Friend of the Court "at [l]east 90 days before trial" on the issues of custody, parenting time, child support, and spousal support. The lower court file does not contain any Friend of the Court recommendations or any objections to those recommendations. It is not clear, from either the opinion and order or the judgment of divorce, whether the trial court performed its own calculations in determining the child-support award or adopted those of the Friend of the Court. The opinion and order states that the MCSF was used to calculate the award.

[3] The 2008 Michigan Child Support Formula Manual was effective from October 1, 2008 to December 31, 2012.

determining net income is to establish, as accurately as possible, how much money a parent should have available for support. All relevant aspects of a parent's financial status are open for consideration when determining support." 2008 MCSF 2.01(B); *Borowsky v Borowsky*, 273 Mich App 666, 673; 733 NW2d 71 (2007). Mary Ade, plaintiff's financial expert, testified that plaintiff's annual income was $287,500, comprising "his salary, his profit from McDonald Financial, a small amount of rental income, and some personal benefits that he receives through McDonald Financial." She said that plaintiff's "market compensation salary" was $164,000 and that plaintiff received profits of $84,809, personal perquisites valued at $25,000, and rental income of $13,691.

The MCSF provides that income includes wages, "other monies from all employers or as a result of employment," earnings generated from a business, rental income, distributed profits, and the market value of expense-reducing perquisites for which the parent did not pay. 2008 MCSF 2.01(C)(1)-(3), 2.01(D). The state friend of the court bureau, authorized by the Legislature, MCL 552.519(3)(a)(*vi*), specifically intended to include each of the categories into which Ade divided plaintiff's annual income: salary, profits, rental income, and perquisites. Plaintiff's contention that it was inequitable for the trial court to "double-dip" by counting his non-salary income once in dividing the marital assets and again in calculating child support further lacks merit because "[a] trial court is not limited to considering only a parent's actual income when assessing that parent's ability to pay support." *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005).

This Court recently examined the "double-dipping" concept in the context of spousal support. *Loutts*, 298 Mich App at 25-31. In *Loutts*, the trial court determined that the value of the plaintiff's business may be used either for the purpose of property division or spousal support, but not both. *Id.* at 31. This Court held that "the trial court erred by applying a bright-line test and failing to consider the specific facts and circumstances of this case." *Id.* Because trial courts have more discretion in awarding spousal support than child support,[4] it is logical that *Loutts* would also disapprove of reliance on a similar bright-line test for determining child support. Instead, the court must follow the MCSF, deviating from it "only if the formula would be unjust or inappropriate based on the facts of the case." MCL 552.605(2); *Clarke*, 297 Mich App at 179.

The trial court plainly erred when it did not demonstrate that it deducted plaintiff's "actual income taxes," pursuant to 2008 MCSF 2.07(B)(1), from the stipulated amount of his gross income.[5] As previously mentioned, the lower court record does not contain a Friend of the

[4] See MCL 552.23; MCL 552.605(2) ("[T]he court shall order child support in an amount determined by application of the [MCSF] . . . ."); *Ewald v Ewald*, 292 Mich App 706, 715; 810 NW2d 396 (2011) ("Trial courts must presumptively follow the MCSF when determining parents' child support obligations."); *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003) ("Whether to award spousal support is in the trial court's discretion . . . .").

[5] We note that neither party included this issue in their briefs, and failure to brief an issue can constitute abandonment. See *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

Court recommendation with respect to the child-support award, and it is not otherwise clear from the record how the trial court calculated the award. In the subsection of its opinion and order relating to child support, the court's only references to the parties' income were to the stipulated amounts of their gross incomes,[6] and the MCSF uses "net income," defined as "all income minus deductions and adjustments permitted by [the MCSF]." 2008 MCSF 2.01(A), 3.02(B).

On remand, the trial court should determine whether the original child-support award was correctly calculated, and, if not, recalculate the award. Then, because plaintiff's taxes will substantially reduce the funds from which to satisfy his child-support obligation, the trial court should determine whether the outstanding balances on the mortgages for which plaintiff is responsible are an "extraordinary level[]" of debt meriting a deviation from the MCSF, bearing in mind the formula's stated purpose of determining the parties' income, which is "to establish, as accurately as possible, how much money a parent should have available for support." 2008 MCSF 2.01(B); *Borowsky*, 273 Mich App at 673.

Plaintiff next argues that the trial court's custody and parenting-time determinations were against the great weight of the evidence. We disagree.

"For an issue to be preserved for appellate review it must be raised, addressed, and decided by the lower court." *Hines*, 265 Mich App at 443. Plaintiff filed a motion for reconsideration in which he argued that "the fact that the Court in its Opinion & Order did not grant [plaintiff] a single increase in his 'overnights' is inconsistent with the testimony and circumstances of this case." However, because plaintiff did not object to the trial court's determinations with respect to the established custodial environment or best-interests factors, this issue is not preserved for appellate review. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette*, 278 Mich App at 328. "To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* at 328-329. Orders relating to custody "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." MCL 722.28; *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010). "[A] trial court's findings regarding the existence of an established custodial environment and with respect to each factor regarding the best interest of a child under MCL 722.23 should be affirmed unless the evidence clearly

---

However, we consider the issue as not abandoned because clarification of the income-tax issue will assist us in addressing plaintiff's argument that the trial court erred when it did not deviate from the MCSF by deducting the mortgage payments on the properties he received in the property division from his available income. The fact that "[a] parent has a reduction in the income available to support a child due to extraordinary levels of jointly accumulated debt" permits, though does not require, a deviation from the formula. 2008 MCSF 1.04(E)(5).

[6] From the opinion and order: "The parties stipulated that [p]laintiff's income is $287,500 and [d]efendant earns $87,934 per year. . . . Plaintiff receives approximately 106 overnights per year. Defendant receives approximately 259 overnights per year. Pursuant to the [MCSF], [p]laintiff shall pay $2,718.37 per month in total support to [d]efendant for two children."

preponderates in the opposite direction." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008).

MCL 722.27(1)(c) provides:

> The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered.

See also *Pierron*, 486 Mich at 85-86. The trial court "may not change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id.* at 86. The court found "an established custodial environment exist[ed] with [d]efendant." It cited the testimony of Kathryn Cornell, a clinical social worker and therapist, that the minor children "rely on [d]efendant for psychological and emotional support" and "look to both [p]laintiff and [d]efendant for guidance, discipline, the necessities of life, and parental comfort," and considered "the age of the children, the physical environment, and the inclination of the custodian and the children as to permanency of the relationship."

The custodial-environment finding was neither plainly erroneous nor against the great weight of the evidence. The minor children lived primarily with defendant while this divorce case was pending; plaintiff was only able to begin parenting time on alternating weekends when the order for temporary supervised parenting time, due to plaintiff's psychological troubles, was lifted. While the property division awarded the marital home to plaintiff, the trial court considered plaintiff's intention to marry his fiancée and move her and her three children into the marital home, and concluded that, "[w]hile neither party offers the exact environment in which the children currently live, [d]efendant's plan to move with the [minor children] to a home nearer [to] her work place offers greater continuity and stability." Cornell said that the minor children were "more securely attached to [defendant]" and that defendant is "predictable and dependable. [The minor children] don't have questions about what's going to happen on [defendant's] weekends or when they're with [defendant]. They have questions about what's going to happen with [plaintiff] on [plaintiff's] weekend." Neither of the minor children told Cornell that they felt able to discuss issues relating to the parties' divorce with plaintiff; Madison "talk[ed] extensively with [defendant]," and Riley "doesn't like to talk about anything that's difficult." Cornell expressed concern, should the parenting-time schedule be changed to give the parties equal time, about "the feeling of a loss of psychological stability that is entailed by not having time with [defendant]."

Defendant said that plaintiff is "very agitated" around her and the minor children during parenting-time exchanges. She said the minor children are "exhausted" and "anxious," and would express a desire to sleep in defendant's bed, when they return from parenting time with plaintiff; Vanderbeck said they are "rude," "show less manners," and are "less tolerant" of each other "after the weekend they've been with [plaintiff]." While the record shows that plaintiff was largely a positive presence in the minor children's lives, the trial court's custodial-environment finding was not against the great weight of the evidence because the evidence does not "clearly preponderate[] in the opposite direction." *Berger*, 277 Mich App at 705.

Plaintiff argues that the trial court erred when it found that factor (d), the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), favored defendant. It is worth noting that plaintiff does not specifically contest the trial court's findings on any other factor; in its best-interests factors analysis, the court found that factors (d), (e),[7] and (g)[8] favored defendant, and the rest favored neither party. Therefore, even if plaintiff were correct that the trial court's determination that factor (d) favored defendant was against the great weight of the evidence, *Berger*, 277 Mich App at 705, the balance of the factors would still favor defendant. In any case, plaintiff's argument relating to factor (d), premised on his having been awarded the marital home and defendant's plans to move to Novi to be closer to the school at which she taught, lacks merit. The trial court found that defendant was favored on this factor because "[d]efendant's plan to move with the [minor children] to a home nearer her work place offers greater continuity and stability," and the minor children's living situation would have been changed regardless of the custody arrangement: if they lived primarily with defendant, they would live in a different city and attend different schools; if they lived primarily with plaintiff, they would have shared the marital home with plaintiff's fiancée and her three children. Because some degree of "continuity" and a "stable, satisfactory environment" was bound to be sacrificed due to the circumstances of the property division, the evidence did not "clearly preponderate[] in the opposite direction," *Berger*, 277 Mich App at 705, and the trial court's finding with respect to factor (d) was therefore not against the great weight of the evidence.

Plaintiff next argues that the trial court abused its discretion when it awarded defendant attorney and expert fees. We agree.

"For an issue to be preserved for appellate review it must be raised, addressed, and decided by the lower court." *Hines*, 265 Mich App at 443. The trial court indicated in its September 7, 2012, opinion and order, that it would hold an evidentiary hearing on the "reasonableness of the attorney fees requested by [d]efendant's counsel that were incurred after mediation," implying that it considered defendant entitled to an indeterminate amount of attorney fees. The October 19, 2012, judgment of divorce also referred to the then-forthcoming evidentiary hearing. Plaintiff's October 9, 2012, amended motion for reconsideration did not raise the attorney-fee issue. On December 11, 2012, the first day of the two-day evidentiary hearing, the trial court said that it "assessed attorney fees against [plaintiff] because of his conduct," and "[t]he issue here is not whether, but how much. We are not going to reargue whether or not attorney fees and expert fees should be ordered. We are only here to determine how much will be ordered in attorney fees and expert fees." Before being redirected toward the question of reasonableness, plaintiff's counsel argued that awarding defendant attorney fees would be a "windfall" to her, and that plaintiff had an inability to pay. The question whether to award attorney fees at all, therefore, was raised in the trial court but not addressed by it. An issue raised in the trial court, but not addressed there, is preserved for appellate review. *Loutts*,

[7] "The permanence, as a family unit, of the existing or proposed custodial home or homes." MCL 722.23(e).

[8] "The mental and physical health of the parties involved." MCL 722.23(g).

298 Mich App at 23-24. "We review a trial court's decision whether to award attorney fees for an abuse of discretion, the trial court's findings of fact for clear error, and any questions of law de novo." *Id.* at 24.

"The decision to award attorney fees, and the determination of the reasonableness of the fees requested, is within the discretion of the trial court." *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). In a domestic-relations action, "[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." MCR 3.206(C)(1); *Woodington v Shokoohi*, 288 Mich App 352, 369-370; 792 NW2d 63 (2010). The party seeking attorney fees must allege facts sufficient to show either that the party is unable to bear the expense of the action, and that the other party is able to pay, MCR 3.206(C)(2)(a), or that the attorney fees were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, MCR 3.206(C)(2)(b). *Woodington*, 288 Mich App at 370. "The party claiming entitlement to costs and fees has the burden of proving that the amount requested is reasonable." *Windemere Commons I Ass'n*, 269 Mich App at 682.

Plaintiff argues that the trial court did not specify the legal authority under which it awarded defendant attorney fees. He "assumed that [the trial court] intended its order to be a sanction under MCR 2.114," the court rule that governs sanctions. In fact, the trial court did not conclude that plaintiff's motion to partially vacate the mediation settlement agreement was frivolous; as plaintiff recognizes in the next section of his brief, the trial court in a domestic-relations case may grant a party's request for attorney fees based either on financial need or the other party's "refus[al] to comply with a previous court order, despite having the ability to comply." MCR 3.206(C)(2).

Neither of those conditions was satisfied. The trial court stated on the record that it "assessed attorney fees against [plaintiff] because of his conduct," a reference to the noncompliance provision, MCR 3.206(C)(2)(b), and wrote in its opinion and order that "[u]ntil June 2012, [d]efendant resisted providing requested discovery." In the same footnote, the trial court gave the clearest indication of its justification for the attorney-fee award: "The court notes that this matter was presented to the court as settled following mediation in January 2012. Plaintiff filed a motion to set aside the settlement and proceed to trial. The court held a hearing on February 15, 2012[,] and the court set aside the mediation settlement." The trial court's finding that plaintiff moved to "set aside the settlement and proceed to trial" was clearly erroneous. Plaintiff's February 8, 2012, motion requested only that the "consent agreement as to parenting time/child support be modified . . . and be incorporated in the parties['] Judgment of Divorce." The court's September 7, 2012, opinion and order provided that "[a]ttorney fees prior to mediation will not be considered," suggesting that the court intended to penalize plaintiff for his motion for relief from the parenting-time and child-support provisions of the settlement agreement, even though the court set aside the entire agreement and set a date for trial on its own initiative.

However, neither "resist[ing] provided requested discovery" nor moving to set aside a mediation agreement constitutes "refus[al] to comply with a previous court order, despite having the ability to comply." MCR 3.206(C)(2)(b). Because the record also shows no attempt to

support the attorney-fee award under the inability-to-pay provision, MCR 3.206(C)(2)(a), and there is no evidence or finding of fact concerning plaintiff's having refused to comply with a previous court order, there was no basis for the award. Defendant argues that the award should stand because sanctions "could have been imposed against [p]laintiff for his dishonesty and bad faith conduct," citing MCR 2.114(D), but the trial court made no factual findings of either.

Plaintiff next argues that this case should be reassigned on remand because the trial judge was biased against him. We disagree.

To preserve a motion for disqualification for appellate review, the motion "must be filed within 14 days after the moving party discovers the basis for disqualification, the moving party must include in the motion all grounds for disqualification known at the time the motion is filed, and the moving party must submit an affidavit." *Kloian v Schwartz*, 272 Mich App 232, 244; 725 NW2d 671 (2006). Because this issue was not raised in plaintiff's motion for reconsideration, and is raised for the first time on appeal, it is not preserved for appellate review. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette*, 278 Mich App at 328. "To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *Id.* at 328-329. "When this Court reviews a motion to disqualify a judge, . . . the applicability of the facts to relevant law is reviewed de novo." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

"The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case." *Bayati v Bayati*, 264 Mich App 595, 602; 691 NW2d 812 (2004). This Court may remand to a different judge "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Id.* at 603. That the judge reached the wrong legal conclusion is not a sufficient reason; rather, the moving party "must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views." *Id.*

The record does not substantiate plaintiff's claim of bias. The only example of partiality he provides is the spousal-support award. As discussed above, plaintiff's substantive argument with respect to that provision of the judgment of divorce, which he merely repeats for this issue, lacks merit. Even if it were successful, however, legal error is insufficient to justify reassignment on remand. *Bayati*, 264 Mich App at 603. Plaintiff cites no particular "past comments or expressed views" that tend to "demonstrate that the judge would be unable to rule fairly on remand." *Id.* Accordingly, reassignment to another trial judge is not appropriate.

The order granting in part and denying in part defendant's request for attorney fees is vacated. We reverse the child-support award, affirm the remainder of the judgment of divorce, and remand for recalculation of child support and a hearing on whether attorney fees are justified under MCR 3.206(C). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens