STATE OF CONFUSION
IN THE FAMILY COURT FOR THE COUNTY OF ANYWHERE

MOM,

Plaintiff,

-vs

DAD,

Defendant.

MOM'S BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT

The last one to leave Michigan should turn off the lights?

Introduction. This case is about deception, skillful and sly manipulation, and abuse of trust. This case makes clear why laypersons should never use do-it-yourself kits or do-it-yourself books to get divorced. This case is about how DAD, convinced his wife, MOM, not to use a divorce lawyer, how he took every asset that had any value at all in the parties' divorce, and then about how he took what meant more than the world to MOM. He took the children.

STATEMENT OF FACTS

The parties were divorced after 23 years of marriage by a Consent Judgment of Divorce entered by the Court on _____, 2005. The judgment was apparently not filed with the clerk of the court until two months later. It stated that it "was effective upon signing." In was filed in January 2006. The delay in filing the Judgment was likely to ensure that the parties were still legally married at the end of 2005, which allowed DAD to reap the tax benefits of the parties and to skim off the sizeable tax refund.

They have two minor children: DAUGHTER and SON. MOM was unrepresented by counsel during the divorce at the urging of DAD. They used one of the several do-it-yourself kits available, although from time to time, during an argument, DAD would tell MOM "oh, just call my lawyer."

The Judgment. The judgment is copied from that kit and completed in their own hand-writing.

Custody and parenting time. DAD cried when he begged MOM to share joint legal custody with him. He promised that he would never take the children away from her. He did not tell her that sharing joint physical custody would cut the child support in half. The judgment provided that the parties would share joint legal and joint physical custody of their children. The parenting time provision reads: "We want a reasonable parenting time that will allow us to negotiate our parenting time schedule so that it is convenient for both of us and the children."

Child support. At page 3 of the judgment, the Michigan Child Support Formula amount of child support, based upon the shared economic responsibility formula and 50/50 shared time, is stated as $1276 / month for two children and $830/month for one child. DAD, a licensed physician's assistant with _____ Associates, P.C. who also works part-time for _____, had 74% of the parties' combined income ($104,000 according to the 2005 IRS return) compared to MOM who had 26% of the parties' joint income.

Deviation from child support formula. Although there is no written

finding of fact justifying deviation from the support formula, nevertheless, a deviation of child support was permitted so that support, already reduced because of application of the shared economic responsibility formula, was reduced even farther to $1035/month + $25/month ordinary medical support for two children. *This child support was never paid*.

DAD subsequently, in a portion of 2006, paid the two mortgages on the parties' jointly titled house. He did not pay MOM the child support that was ordered in the Judgment. He later claimed that the parties had an agreement that he would pay MOM's share of the mortgage instead of child support. Of course, this was decidedly to his advantage since his child support payment would be paid out of after-tax dollars and would not be tax deductible to DAD; but the mortgage interest and property tax payments he made were tax deductible to him. MOM, by contrast, would have received the child support dollars as non-taxable dollars and could have used her share of the mortgage interest and property tax payments as deductions to offset her 2006 and 2007 income.

Opt-out. DAD convinced MOM to agree to an opt-out from the Friend of the Court, which was authorized by the judge at page 4. MOM was led to believe by DAD that by opting out of the Friend of the Court, the parties could make all decisions regarding child custody and parenting time without involving the court and would not have to comply with any set rules for custody or parenting time.

Property settlement. This paragraph provided for each party to keep the property in his or her own possession at the time of the entry of judgment. In handwriting, they added that once their home sells, and after payment of mortgage, second mortgage, student loan, they would divide any profit. [The student loans, of course, paid for DAD's advanced degree, so MOM would have been contributing to the advanced degree and physician's assistant license held by DAD, although she received no compensation for her contributions, contrary to Michigan law]. The foreclosure was caused by DAD ceasing to make payments on the first and second mortgages (unknown to MOM). Instead, he paid $1,200/month toward college expenses for his step-daughter (also unknown to MOM).

Standard language. The judgment contains the usual statutory provisions, including one regarding the domicile of the children and reference to the children's legal residence and MCL 722.31

Insurance. The judgment also contained the usual statutory language regarding extinguishment of the beneficiary rights of each party in any policy or contract of insurance of the other.

Pension interests. The judgment also contained the usual statutory language regarding extinguishment of rights of each party in pension, annuity, or retirement benefit of the other, whether vested or not, nor to any accumulated contribution in any pension, annuity, or retirement system belonging to the other, unless specified by the judgment. Because DAD concealed from MOM his interest in a 403b retirement plan (a defined contribution plan) and also his interest in a defined benefit plan, he walked away from the marriage with about $37,000 in the 403b plan and an unknown amount in the defined benefit plan.

DAD 's award in Judgment of Divorce. The parties had declared bankruptcy just prior to the entry of the divorce judgment. Some months after entry of the judgment, DAD quit paying the mortgage on the parties' home in which they had some $80,000 more or less in equity. The home was recently foreclosed upon by the bank. Upon information and belief, at some point after MOM moved to the state of _____ and either before or after the foreclosure, DAD entered the home and removed most, if not all, of the major appliances, and sold them, keeping the net sale proceeds. This "waste" of the real estate has undoubtedly significantly reduced the value of the real estate, thus creating to a larger deficiency after foreclosure for which the parties remain jointly liable. Thus, after 23 years of marriage, DAD walked away with:

- a professional degree that allows him to earn at least $100,000/year
- substantial pension benefits, in the form of a 403B Plan and a defined benefit plan. MOM had no knowledge of the existence or value of these property interests at the time of the divorce, had no knowledge that retirement interests were marital property, and these retirement interests were undisclosed by DAD. The value of these retirement

interests likely exceeds $70,000 or $80,000, all of which was exempted from the parties' bankruptcy, undeclared in the divorce, and awarded to DAD under the bland statutory language

- the cash value of 2 life insurance policies on the children's lives—whole life policies. DAD cashed in the policies and kept the proceeds of approximately $6,000, claiming that "the policies belonged to him." The paperwork from the insurance company indicates that "ownership is not clear," meaning that likely they were held under the Uniform Transfer to Minors Act.
- the sale proceeds from the appliances that he removed from the residence.
- A 2005 tax refund of $5,818.

DAD filed a joint return for the year 2005, despite the fact that the parties were divorced prior to the end of the year. IRS Publication 501 states: *"If you are divorced under a final decree by the last day of the year, you are considered unmarried for the whole year and you cannot choose married filing jointly as your filing status."* He took exemptions to which he was not entitled (for MOM and the parties' children). He used MOM's business losses to reduce his income, he later claimed that he had lost all of her documentation as to those losses, and he kept all or substantially all of the tax refund (between $5,000 and $6,000) – even though a tax refund for 2005 should have been joint marital property since the income earned by DAD in the year was joint property. The parties' judgment of divorce was signed by the judge on December 21, 2005. However, the judgment was apparently not filed with the clerk of the court or entered by the trial court until February 22, 2006. The date of signing an order or judgment is the date of entry. MCR 2.602(A)(2).

MOM's award in Judgment of Divorce. By contrast to the property awarded to DAD and the tax entitlements that he took, MOM was awarded only personal property. Some personal property, such as a pearl necklace, she gave to

DAD after the entry of divorce so that he could sell it on eBay for her. [DAD has an eBay business that he operates to supplement his income and MOM had no knowledge of how to sell goods on eBay]. DAD now refuses to give MOM the necklace. If he has sold it, he has not given her the sale proceeds.

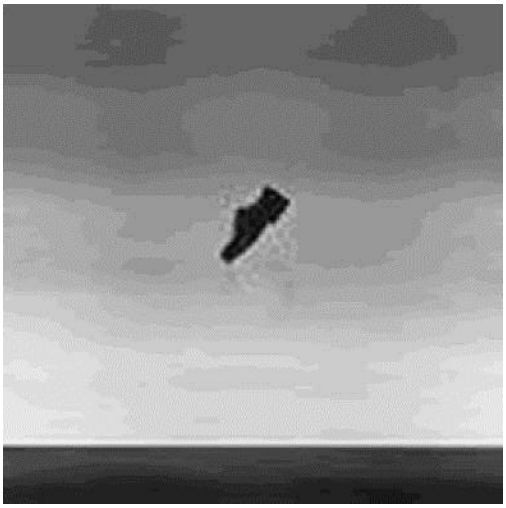
The parties' Internet dating. Prior to the time DAD moved from the marital dwelling in about February 2006, he was engaged in Internet dating and he convinced MOM to use the Internet to find a new love interest. Because MOM had never used email before, DAD set up a screen name for her on an AOL account that allowed the use of seven screen names and he showed her how to use email and how to use one of the on-line dating services. Because DAD set up the AOL email screen name for MOM, he knew her email address and he also knew her password to ditzybabe@aol.com. Little did MOM know that DAD was then reading her email and that he continued to read her email after the divorce was final.

DAD recently testified that MOM's email account ditzybabe@aol.com was "a family email account" and that he had been reading her email for some time—all in violation of Title 18 Section Chapter Chapter 121, the "Stored Wire and Electronic Communications and Transactional Records Access Act. 18 U.S.C. 2701 et seq., a felony punishable by 5 years in prison and/or a fine and also punishable by civil remedies.

When the parties discussed how Internet dating might affect their rights in the future with respect to child custody, particularly given the prospect that marriage would likely take one or both parties away from the State of Michigan, DAD reassured MOM that they would continue to cooperate in the care and custody of their children and not to worry about falling in love with someone who lived out of state. "I'll never take the children away from you," was his promise. DAD soon thereafter met a woman, _____, from the state of _____ on the Internet. Because DAD was then employed at about $80,000+/year (now nearly $100,000/year) and _____ had minimal employment, she moved to _____ , Michigan with her two minor children.

Subsequently, MOM met and married John, who lives and works in FAR AWAY STATE. DAD and MOM discussed her impending marriage and the move to FAR AWAY STATE. It was agreed that the children would remain in Michigan during the first year of her marriage to give MOM a chance to adjust. MOM believed DAD's assertion that the opt-out allowed them to make decisions regarding the sharing of custody and believed that their agreement was that in the school year following her marriage, the children would come to her, and the parties would thereafter alternate. She married in June 2007 and had the children with her for three weeks in August 2007. (Summer camps and fun with relatives consumed the rest of their summer).

The First Shoe Drops



Ten days after the children left FAR AWAY STATE for Michigan, through a law firm, DAD asked MOM to stipulate to entry of an order amending the judgment of divorce to provide joint legal custody, primary physical custody to him. The sole provisions of that proposed amended judgment were that:

> "the parties shall continue to have joint legal custody but DAD shall have primary physical custody of the minor children: DAUGHTER (DOB _____, 1992) and SON (DOB , 1996) . . . that DAD's prior child support obligation terminated as of August ___, 2007; and there is no present arrearage . . . that since June ____, 2007, the legal residence of the minor children has been with the DAD at the

following address: , , Michigan. . . and that in all other respects, the original Judgment of Divorce remains in full force and legal effect."

There were no provisions with respect to parenting time for MOM and the children. Nor were there any provisions about child support.

MOM was devastated. She had never intended to give up her children. She had remained blissfully unaware of the effects of the so-called "100-Mile Rule." She had relied upon DAD's promises and representations that because they had opted out of Friend of the Court services, they could make their own arrangements and agreements about custody and parenting time. She only learned after receiving DAD's proposed order that she was caught in the clutches of the 100-Mile Rule.

Mediation. The parties engaged in a full day of mediation in **November 2007.** It was unsuccessful.

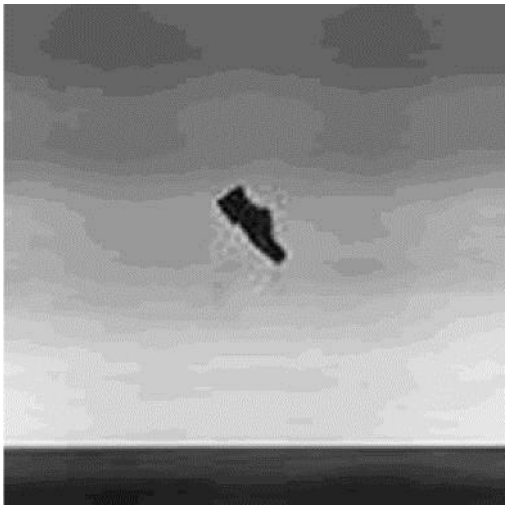
Child Support Arrearage. At mediation, DAD contended as to the issue of the $20,000+ child support arrearage that the parties had agreed prior to the entry of judgment that he would pay the mortgages rather than child support. MOM countered with contract black letter law, stating that if the parties had had any such agreement, it was subsumed in the judgment. Her other defenses to his claim were that the agreement would have had to be in writing to be enforceable because any oral agreement to pay the debts of another is unenforceable under the statute of frauds, MCL 566.132(2) and that DAD's first material breach of the agreement (which resulted in the loss of all equity in the parties' real estate and also created a substantial deficiency liability for both parties) made any such agreement unenforceable by DAD.

Child Custody. DAD alleged that the children should remain with HIM *in Michigan* because they were both doing well in school, and *staying in Michigan* allowed them to remain near their long-established friends, near family, and near the church that the children attended. MOM accepted her inferior legal position with regard to the impact of the 100-Mile Rule. Her focus was upon getting as much parenting time as possible. DAD did not disclose that he was considering a change in jobs that would take him out of the State of Michigan. This move would take him so far that he would literally be living

within two hours of Mom, making alternate weekend parenting during the school years possible and also allowing normal holiday and summer parenting time to occur.

Agreement. At mediation, DAD and MOM agreed upon generous parenting time for MOM and the children. They also agreed that the arrearages in child support owed to MOM closely approximated any child support she would owe to DAD for the duration of the children's minority. It took until late in January 2008 for their agreement to be approved in writing by DAD. The "Consent Order: First Amendment to Judgment of Divorce" was entered by this Court *on February 2008*.

And then the other shoe dropped



The ink was barely dry on the Consent Order: First Amendment to Judgment of Divorce, when DAD filed a motion to remove the children's residence from the State of Michigan.

What DAD failed to disclose at the time of mediation or *prior to the entry* of the amended Order was that he was job-hunting outside the State of Michigan. His allegations that he should be the custodial parent because he and only he could keep the children in Michigan near their family, friends, school, and church were just a ruse—were disingenuous just like everything else DAD had done in this divorce case.

In fact, MOM is informed that DAD knew in early February, if not earlier, that he

too would be moving from Michigan. *Had MOM had this valuable and important information, she would never have agreed to DAD having custody. The parties would have been on equal footing. .*

Just because DAD is the last to leave Michigan . . . just because he's the one who will turn out the lights . . . should not have deprived MOM of the custody of the parties' minor children.

DAD's failure to disclose such a material fact—**basic** to the issue of which parent should have custody when one of them moves from the State of Michigan—a material fact that he could have and should have disclosed ***before*** the Court entered the amended Order—is grounds for relief from the Order. A fraud is perpetrated upon a court when a material fact is concealed from that court. *Banner v Banner*, 45 Mich App 148, 154 (1973). Nothing could have been more material to consideration of whether MOM could overcome the negative impact of the 100-Mile Rule than the fact that DAD would also soon be moving from the State of Michigan to a location near her. In fact, DAD's protestations that the children's best interests could only be served by placing them in his custody because this would keep the children in Michigan with their friends, relatives, school, and church were false and material misrepresentations.

Relief on the basis of mistake, fraud, and grounds of equity under MCR 2.612(C)(1)(a), (c) and (d). See, for example, *Stamplis v St. John Health System, et al*., Docket No. 241801 (Mich.App. 06/01/2004), where the Court stated:

> It is a longstanding rule that parties are bound by their stipulations. See Thompson v Continental Motors Corp, 320 Mich 219, 224-225; 30 NW2d 844 (1948). *However, this does not mean that a party to a stipulation is forever without a defense. Because a stipulation is a type of contract, a party seeking to avoid a stipulation may use contract defenses*. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 394 (1997). *Accordingly, a stipulation may be set aside where there is evidence of mistake, fraud, or unconscionable advantage*. *Id*.

Similarly, those same facts, discovered by MOM ***after*** this Court had entered the Consent Order: First Amendment to Judgment of Divorce on February 20, 2008, but known to be untrue by DAD prior to entry of that Order, constitutes "newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial (or for a trial at all) under MCR 2.611(B)" justifying this Court's setting aside the prior Order and taking a long hard look at the best interests of the children.

WHEREFORE, MOM respectfully requests that this Court vacate the Consent Order entered on February 20, 2008 and that this Court allow the parties to proceed to trial on the issue of child custody. The questions are:

(1) Should DAD prevail because he has engaged in chicanery and duplicity and are the best interests of the parties' minor children served by permitting him to move from Michigan to _____ with the children OR

(2) Are the best interests of the parties' minor children served by awarding custody to MOM, who has already moved from Michigan to FAR AWAY STATE OR

(3) Are the best interests of the parties' minor children served by awarding custody of SON to MOM and of DAUGHTER to DAD, recognizing that split custody, although not the norm, can be the best option in some families, depending upon the family's unique dynamics.

Respectfully submitted,

_____ March ___, 20__
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