STATE OF MICHIGAN

46TH CIRCUIT TRIAL COURT – FAMILY DIVISION - KALKASKA COUNTY

JAMES MATTHEW KIK,

Plaintiff/Counter-Defendant,

File No. 06-9042-DM

V

HON. LYNNE M. BUDAY

AMBER DALE KIK,

Defendant/Counter-Plaintiff.

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BENCH OPINION AND ORDER

At a session of said Court held in the Courthouse
in the Village of Kalkaska, County of Kalkaska, State of Michigan,
on the 4th day of May, 2007.

PRESENT: HONORABLE LYNNE M. BUDAY, FAMILY DIVISION JUDGE

THIS MATTER came before the undersigned judge for a bench trial on February 15, 2007. Both parties and their respective legal counsel, as well as several witnesses, were present and participated in the proceeding. The only issue in dispute between the parties for purposes of the bench trial was custody, parenting time and support issues. The parties represented on the record that they stipulated to a property settlement. The Property Settlement Agreement stipulated to between the parties was filed with the Court

on February 20, 2007. The provisions of the Property Settlement Agreement filed with the Court on February 20, 2007, shall be incorporated into the provisions of the Judgment of Divorce.

On February 15, 2007, the Court received testimony from several witnesses, including Brian Fisher, Nelson Cannon, Cynthia Rowell, Carolyn Kik, James D. Kik, James Matthew Kik, Amy Fisher, Mary Lenon, Bambi Olsson, and Amber Dale Kik.

The following exhibits were introduced during the trial:

Plaintiff's Exhibit 1 - picture of the Rowell house.
Plaintiff's Exhibit 2 - picture of Kik house.
Plaintiff's Exhibit 3 - picture of Kik house.
Plaintiff's Exhibit 4 - picture of backyard at Kik's.
Plaintiff's Exhibit 5 - picture of Emma.
Plaintiff's Exhibit 6 - schedule of daycare at Mary's.
Defendant's Exhibit 7 - Christmas stocking made by Emma.
Defendant's Exhibit 8 - picture of Emma's bedroom.
Defendant's Exhibit 9 - Christmas card made by Emma.
Defendant's Exhibit 10 - picture of Emma's bedroom.
Defendant's Exhibit 11 - picture of wall of fame at Amber's.
Defendant's Exhibit 12 - picture of living/kitchen area.
Defendant's Exhibit 13 - American flag made by Emma.
Defendant's Exhibit 14 - picture of Emma.
Defendant's Exhibit 15 - picture of house inside.

At the conclusion of the evidentiary hearing, the parties were requested to file written closing arguments and transcripts were requested. The Court took the matter under advisement and indicated that it would render a written opinion in this matter after transcripts and closing arguments were provided. The parties were requested to file their closing arguments within twenty-one (21) days after the transcript was filed. The transcript was filed on March 5, 2007. The Plaintiff filed his closing argument on March 27, 2007, and the Defendant filed her closing argument on March 23, 2007.

FINDINGS OF FACT

1. Background History. The Plaintiff and the Defendant were married on September 28, 2002. Both parties were residents in the State of Michigan for 180 days prior to the filing of this Complaint and both resided in Kalkaska County at least ten (10) days prior to the filing of this action. There was one child born to the parties, Emma Cierra Kik, born August 9, 2003. Emma is now three and a half years old. The parties separated on or about January 1, 2006. The Defendant is not currently pregnant.

The divorce was filed by the Plaintiff on January 5, 2006. The Defendant's Answer and Counter-Complaint for divorce was filed on January 13, 2006. The

Plaintiff's Answer to the Counter-Complaint was filed on January 24, 2006. Both parties have filed motions requesting custody of the minor child. On February 14, 2006, an Order regarding Parenting Time was filed with the Court. This Order awarded parenting time to the Plaintiff father on Saturday from 10:00 a.m. to Sunday at 4 p.m. The Plaintiff father to receive three (3) consecutive Saturdays beginning January 28, 2006, and the Defendant mother receiving the fourth consecutive Saturday, with the schedule to repeat thereafter. Additionally, the Plaintiff father was awarded two (2) overnight visitations during the second and fourth week of each month beginning at 6 p.m. on Tuesday and concluding at 6 p.m. on Thursdays. The parties also agreed to exchange the minor child in Cadillac at a mutually agreed upon location. This schedule was to continue until the issue of custody was adjudicated. Under the Order dated February 14, 2006, the Plaintiff was to pay to Defendant child support in the amount of $100 per week.

After a hearing before the Referee on March 28, 2006, an agreement was reached by the parties and placed on the record based upon a review of the record. Plaintiff father was to receive parenting time on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and additionally on the off weeks two (2) overnights on Tuesday and Wednesday. The child support was to be $625.00 per month ($607.00 base support and $18.00 ordinary medical) and additionally the Plaintiff was to pay 50 percent of the child care expenses. This agreement was to be incorporated into the final judgment, however, was never reduced to a written order. The Plaintiff filed a motion on May 18, 2006, to enforce the terms of this agreement alleging that the Defendant was refusing his overnight times with the child. This motion was scheduled and adjourned for purposes of an evidentiary hearing before the Referee prior to the trial date, however, was never heard by the Referee. The trial was held on February 15, 2007, on the issue of custody. The Court is now challenged with the task of rendering an opinion which will resolve the custody dispute between the parties.

Based upon the record, the Court is satisfied that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. Therefore, the Court shall grant the parties request for a Judgment of Divorce dissolving the bonds of matrimony in this case.

2. Child Custody, Support and Parenting Time. The Michigan Child Custody Act of 1970, being MCLA 722.21, et seq; MSA 25.312(1), et seq, establishes the criteria and procedures for resolving child custody disputes.

MCLA 722.27 of the Child Custody Act states that a court cannot enter a new custody order or amend an existing order without first determining if there is an established custodial environment. Whether an established custodial environment exists is a preliminary and essential determination. The court must make clear findings on this issue before deciding custody. The burden of proof is on the parent wanting to establish or change the type of custody granted to each parent. If an established custodial environment exists, a change may be made only on clear and convincing evidence that the change is in the best interests of the child. If no established custodial environment

exists, custody may be decided by showing a preponderance of the evidence that the proposed custodial arrangement would be in the best interests of the child. See Hall v Hall, 156 Mich App 286, 401 NW2d 353 (1986).

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. MCLA 722.27(1)(c). The existence of an established custodial environment depends on a custodial relationship of a significant duration in which the child is provided the parental care, discipline, love, guidance, and attention appropriate to his or her age and individual needs. It is an environment in both the physical and psychological sense in which the relationship between the custodian and the child is marked by qualities of security, stability, and permanence. See Baker v Baker, 411 Mich 567, 309 NW2d 532 (1981).

Whether an established custodial environment exists is entirely a factual determination. The mere existence of a temporary custody order does not create an established custodial environment. The court must examine the underlying facts and apply the statutory definition

No prior order regarding custody exists in this matter. The court entered an Order on February 14, 2006, regarding parenting time only. Since the hearing before the Referee on March 28, 2006, the parties have, by mutual agreement, been operating under an arrangement whereby the Plaintiff father was to receive parenting time on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and additionally on the off weeks two (2) overnights on Tuesday and Wednesday.

Based upon the current custodial arrangement and the testimony presented to the court, both parents have provided parental care, discipline, love, guidance, and attention appropriate to the child's needs. The uncertainty of the situation because of the custody trial precluded the establishment of a custodial environment. Based upon the testimony, the minor child has looked to both parents with the same frequency for guidance, discipline and the necessities of life. The court concludes that no custodial environment exists under the facts of this case, therefore the burden of proof is by a preponderance of the evidence.

Once the court has made its findings on the record on whether an established custodial environment exists and determines the appropriate burden of proof it must then apply that burden to the best interest factors. See Underwood v Underwood, 163, Mich App 383, 414 NW2d 171 (1987). The best interests of the child means the sum total of the following factors to be considered, evaluated and determined by the court as defined in MCLA 722.23; MSA 25.312(3).

The evidence and the Court's findings in this case regarding the best interest of the minor child are as follows:

A. THE LOVE, AFFECTION, AND OTHER EMOTIONAL TIES EXISTING BETWEEN THE PARTIES INVOLVED AND THE CHILD(REN).

The Court heard testimony, which would substantiate a finding that both parents have love, affection and emotional ties to the minor child. Likewise, the evidence indicates that the minor child has love, affection and emotional ties with both parents. The Court finds that the parties are equal under factor (a).

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.

The testimony and evidence indicates that both parents have the capacity to provide the minor child with love, affection and guidance. The Plaintiff was described by Brian Fisher as a fantastic father, a great provider, well educated with family goals and family ties. Nelson Jerome Cannon described Plaintiff as a loving father with very good parenting skills and the Defendant as a loving mother. Amy Ellis described Defendant as a good mother, an involved mother with a close relationship to Emma. Both have been described as good parents with good parenting skills. Both have been described in the testimony as having a very close and loving relationship with Emma. Both spend quality time with the minor child and engage in appropriate activities with the Emma such that love, affection and guidance are shown on a regular basis. The record indicates that Emma is a good child with no real discipline problems. Emma is full of life, very bright, intelligent and sweet spirited, to the credit of both parents. Both parents are capable of meeting the child's basic needs.

Although the Defendant was Emma's primary caregiver at birth and during the first nine (9) months, the evidence indicates that the Plaintiff shared in taking care of Emma after she was born. The Plaintiff would work from 7:30 a.m. until 4:00 p.m. and take care of Emma in the evenings. When Emma was approximately eight (8) months old, the Defendant took a job with the golf course in April/May, 2004, working through September/October, 2004, in the evenings until 9 or 10 at night and the Plaintiff would take care of Emma after he came home from work. After Defendant was done working at the golf course, the Defendant took a job with H & R Block in January, 2005, and worked into the evenings and the Plaintiff would take care of Emma. The testimony and evidence indicates that Emma has been properly cared for by both parents and both have taken an active role in meeting Emma's needs. Before the separation, both shared equally in the responsibility of taking care of Emma, both were involved parents and had an equal emotional connection with Emma. There are no concerns raised in the testimony about either parent's ability to meet Emma's needs now.

Both parties appear to be interested in the continuation of the child's education. The child was enrolled in the Way to Grow Program in Kalkaska and now currently attends pre-school at Northland Cooperative Preschool at the Methodist Church in Stanwood. Emma currently attends daycare on Wednesdays and Thursdays at Cynthia

Rowell's home, which is next door to the Plaintiff's home. Cynthia Rowell described Emma as a happy child at daycare and she has friends there. Emma attended daycare at Cynthia Rowell's home five (5) days a week from August, 2005, until January, 2006, when the Defendant moved to Stanwood, and has continued with daycare every other Wednesday and Thursday since January 2006. Mary Lennon has done daycare for Emma in Stanwood since March, 2006, Monday through Thursday and occasionally on Friday. Ms. Lennon described Emma as a normal, happy little girl.

As far as religion, the testimony indicates that the child was baptized at Saint Paul's in Big Rapids which is where the parties were married. The Plaintiff testified that religion was an important factor to both parties when they were first married and both felt strongly about raising Emma in the church. The Plaintiff also admitted that after they were married it was a struggle for them to attend church, however, since the separation the Plaintiff has been more consistent with attending church and taking Emma with him on a regular basis. The Plaintiff attends church every week at Saint Mary's of the Woods Catholic Church in Kalkaska and takes Emma with him to church on a regular basis. The Plaintiff's testimony and actions appear to be sincere in raising Emma in the church.

The Defendant testified that she also attends church at Saint Paul's in Big Rapids which is where Emma was baptized. The Defendant testified that she was more regular in attending church during the summer, however, has not been regular in attendance during the winter months. The Defendant testified that she has allowed Emma to make the decision as to whether or not she attends church. However, the court agrees with the Plaintiff that this is not a decision which should be left up to a young child. The Plaintiff testified that the Defendant has admitted to him that she does not take Emma to church on a regular basis and does not feel that it will make a difference.

Although the parties struggled to attend church while they were married, the Plaintiff appears to be more consistent in attending church with Emma on a regular basis now that the parties have separated. The court must remain neutral with respect to each of the parties religious beliefs, however, both parties agreed that religion was an important factor when they were first married and when they started their family. Since the parties have separated, the Plaintiff is the parent who has actively participated in Emma's religious upbringing while the Defendant has allowed Emma to make the decision on whether she attends church.

The Court concludes that both parties are equal in their capacity and disposition to provide Emma with love, affection, and guidance and to continue with her education in this future. As to raising Emma in her religion, the Court concludes that this factor favors the Plaintiff. Therefore, factor (b) slightly favors the Plaintiff.

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.

The Plaintiff is employed as a physical therapist at Munson Medical Center and earns $70,000 per year, plus he receives medical, dental and optical coverage and has retirement benefits. The Defendant works only part time at Agility Health making $11 per hour and works five (5) days a week. The Defendant's gross pay is $1,000 per month. The Defendant has been accepted to Baker College and plans to attend school online and work part time at Agility Health so that she can spend more time with the child. Based upon a review of the testimony the Plaintiff is financially in a better position to provide the minor child with food, clothing, medical care, the basics and other necessities. The Court finds that this factor favors the Plaintiff.

D. THE LENGTH OF TIME THE CHILD HAS LIVED IN A STABLE, SATISFACTORY ENVIRONMENT, AND THE DESIRABILITY OF MAINTAINING CONTINUITY.

The Plaintiff continues to reside at the marital home of the parties located at 2185 Driftwood, Kalkaska, Michigan 49646. Emma was born on August 9, 2003, and moved into the home located at 2185 Driftwood in September, 2003. Emma lived at the home located at 2185 Driftwood from September, 2003, until the Defendant left the marital home in January, 2006. The Plaintiff has refinanced the home in his name to provide a stable, loving and constant home environment for Emma. Emma has her own bedroom and swing set in the back yard.

The Defendant left the marital home in January, 2006, and moved to Stanwood, living first with her parents and now in a mobile home provided by her parents. Emma has her own room there, with a swing set in the back yard, sand box and trampoline. It is troubling that the Defendant cleaned out Emma's room in Kalkaska, leaving nothing for the Plaintiff. The Defendant made no effort the keep the home the way it was for Emma, but removed everything from Emma's room and moved it to a new one. The Defendant's parents pay the taxes on the mobile home and the Defendant lives there rent free. The agreement with her parents is that she goes to school and gets an education without worrying about a place to live. The Defendant only pays for the utilities, the insurance and the upkeep on the home. The Defendant testified that moving back to Kalkaska is not an option.

Clearly the child has lived in the marital home the longest length of time. The marital home is a stable, satisfactory and loving home environment. This is the home environment where Emma was raised and the parents planned for her to attend school. Emma recognizes this home as her original home and it is very familiar to her. The Plaintiff has refinanced the home to provide a stable and constant home environment for

Emma. It would be in Emma's best interest to maintain continuity with her living in her original home in Kalkaska. The Court finds that factor (d) favors the Plaintiff.

E. THE PERMANENCE, AS A FAMILY UNIT, OF THE EXISTING OR PROPOSED CUSTODIAL HOME OR HOMES.

Both parties have testified that they have been involved in other relationships since the parties separated. The permanence and stability of these new relationships are unknown. Both parties have immediate and extended family members close to them and the minor child. The Court finds that the parties are equal under factor (e).

F. THE MORAL FITNESS OF THE PARTIES INVOLVED.

This factor evaluates the parties' relative moral fitness as it relates to their ability to function as a parent and not as to who is the morally superior adult. Based upon a review of the Court's record, this is not a factor which could be weighed in either parties direction. Neither party has any criminal history or other illegal or offensive behaviors. Both parties have used profanity towards one another and acted inappropriately. There is no question that this divorce proceeding has brought out the worst in both parties. The Court finds that the parties are equal under this factor.

G. THE MENTAL AND PHYSICAL HEALTH OF THE PARTIES INVOLVED.

Each party appeared physically healthy to the Court, and neither party reported any significant health problems that would prevent them from effectively parenting the minor child. No expert testimony was presented that would allow the Court to draw a conclusion as to any significant mental health deficits which would affect their ability to parent the minor child. Therefore, the Court finds that the parties are equal under factor (g).

H. THE HOME, SCHOOL, AND COMMUNITY RECORD OF THE CHILD.

There is no established school record for the minor child. While living in Kalkaska, the minor child attended the Way to Grow Program. Currently the child attends preschool at Northland Cooperative Pre-School at the Methodist Church in Stanwood. Both parties appear to be mutually interested in the continuation of the child's education, however, at this point there is no established school record for the child.

Emma attends day care at Cynthia Rowell's home in Kalkaska, which is next door to the Plaintiff's home, every other Wednesday and Thursday. Emma is happy at daycare and has friends there. Emma attended daycare at Cynthia Rowell's home five (5) days a week from August, 2005, until January, 2006 when the Defendant moved to Stanwood, and has continued with daycare every other Wednesday and Thursday since January 2006. Mary Lennon has done daycare for Emma in Stanwood since March, 2006, Monday through Thursday and occasionally on Friday. Ms. Lennon described Emma as a normal, happy little girl.

The Court finds that both parties are equal under factor (h).

I. THE REASONABLE PREFERENCE OF THE CHILD, IF THE COURT CONSIDERS THE CHILD TO BE OF SUFFICIENT AGE TO EXPRESS A PREFERENCE.

Neither parent requested that the Court conduct an interview with the minor child. The parties have basically agreed that the minor child is too young to express a preference. Therefore, the Court shall not conduct an in-camera interview with the minor child. The court concludes that the parties are equal under this factor.

J. THE WILLINGNESS AND ABILITY OF EACH OF THE PARENTS TO FACILITATE AND ENCOURAGE A CLOSE AND CONTINUING PARENT-CHILD RELATIONSHIP BETWEEN THE CHILD AND THE OTHER PARENT.

Based upon a review of the testimony, the Court has concerns regarding the Defendant's willingness and ability to facilitate and encourage a close and continuing parent-child relationship between the child and the Plaintiff.

The Plaintiff testified that after January 1, 2006, he did not see Emma until the third week in January. The Plaintiff did not see the minor child for three (3) weeks. The Plaintiff asked to see Emma and the Defendant refused until an order was in place. The original Order which was entered on February 14, 2006, was for three (3) consecutive Saturdays from 10 to 4 p.m. and every other Wednesday and Thursday. According to the Plaintiff, they reached an agreement in front of the Friend of the Court Referee last March, 2006, and switched to an alternate weekend schedule from Friday at 6 p.m. to Sunday at 6 p.m., and then on Wednesday and Thursday.

After the parties were in front of the Friend of the Court Referee in March, 2006, the Defendant decided to retain Emma and not give her to the Plaintiff. The Plaintiff did not see Emma for six (6) weeks from April 1st until after May, 2006. The Plaintiff described that they would meet for the exchange and the Plaintiff would stand there holding Emma telling her that she did not have to go with her father and then look at the Plaintiff and say "you're not taking her". Then Defendant would get in her car and leave with Emma and they would do the same thing the next week. The Plaintiff testified that after mediation on May 16, 2006, he was able to see the child again.

The Defendant's attempt to suggest that these failed exchanges and denial of parenting time was Plaintiff's fault is unacceptable and lacks credibility. The Defendant should have facilitated and encouraged Emma to go with her father. No doubt, based upon the testimony, the exchanges have been a difficult process and Emma has had trouble separating from both parents. Both parties must act appropriately during these exchanges, not argue in front of the child and facilitate the exchange of the child between each other. It is expected that the custodial parent will promote a close and continuing

relationship with the non-custodial parent. The Defendant's mother, Bambi Olsson, indicated that she had to step in and remind her daughter that it was time to go because it was Jim's time with Emma.

Although the Defendant had the opportunity to demonstrate a willingness and ability to facilitate a close and continuing relationship between Emma and the Plaintiff, the Defendant failed to do so. The Defendant failed to promote a situation where Emma would feel more comfortable with the exchange. The Defendant's solution was not to allow the Plaintiff to take Emma for parenting time.

Given the length of time that the Plaintiff went without seeing his daughter, the Court is not satisfied that the Defendant is capable of facilitating or encouraging a close and continuing relationship between Emma and her father. The Plaintiff, on the other hand, appears to be better able to facilitate and encourage a close relationship between Emma and her mother. The Plaintiff recognizes that the Defendant has an emotional connection with Emma and has indicated that he would not try to take Emma from her mother. The Court also took note that when given the opportunity to change the only one willing to do so was the Plaintiff by traveling to Stanwood to visit with Emma.

The Court finds that factor (j) favors the Plaintiff.

K. DOMESTIC VIOLENCE, REGARDLESS OF WHETHER THE VIOLENCE WAS DIRECTED AGAINST OR WITNESSED BY THE CHILD.

There is no evidence or information provided to the Court to suggest that this factor would weigh in favor of one party over the other. Therefore, the Court finds that both parties are equal on this factor.

L. ANY OTHER FACTOR CONSIDERED BY THE COURT TO BE RELEVANT TO A PARTICULAR CHILD CUSTODY DISPUTE.

There has been little stability for Emma this past year under the current parenting time schedule. The current parenting time schedule is confusing for Emma and both parties agree that it would not be in the child's best interest to continue with this schedule, especially given the fact that she will be starting Kindergarten soon. The Court must make a decision on who should have primary physical custody. In the Court's opinion, several factors, including factors (c), (d) and (j), weigh strongly in favor of the Plaintiff having physical custody of the minor child.

The Plaintiff is well educated with strong family values, financially secure and better able to provide for the minor child and meet all of her needs. The Plaintiff has refinanced the home in Kalkaska, which Emma recognizes as her original home, to provide a stable, loving and constant home environment for Emma. It is important to continue the continuity of this home environment for Emma.

The Court finds that it would be in the best interest of the minor child for both parties to have joint legal custody. The factors favor the Plaintiff for primary physical custody of the minor child. The Defendant shall be entitled to have parenting time as set forth under the guidelines of the 46th Circuit Trial Court unless otherwise agreed between the parties. The parties should begin to exercise a summer parenting time schedule effective immediately, a week on and week off, and move to the alternating weekend schedule as set forth under the guidelines when Emma begins pre-school in the upcoming 2007-2008 school year. Both parties shall share equally in transportation and shall continue to meet at the Wexford County Sheriff's Department for the exchange unless otherwise agreed between the parties.

The Plaintiff must comply with the Order which was entered on February 14, 2006, to pay child support to the Defendant as previously agreed and shall be required to pay any outstanding amounts which are due and owing to the Defendant up to the date of this Court's Opinion. As a result of this Court's decision to place physical custody of the minor child with the Plaintiff, this matter shall be referred to the Friend of the Court for a child support review and recommendation, and for the establishment of a new support order effective as of the date of this court's opinion.

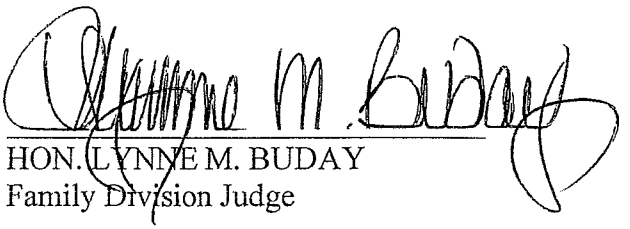
2. Equitable Property Division.

The parties have stipulated to a property settlement. The terms and conditions of this property settlement shall be incorporated into the provisions of the Judgment of Divorce.

ORDER

Pursuant to MCR 2.602(B)(1) a Judgment of Divorce in the usual form for practice before this Court, which comports with the foregoing decision and includes all of the necessary provisions, shall be prepared and submitted to the Friend of the Court for review and then to the Court for signature and entry pursuant to MCR 2.602.

IT IS SO ORDERED.



HON. LYNNE M. BUDAY
Family Division Judge

Dated: May 4, 2007

cc: James Matthew Kik, Plaintiff
Craig W. Elhart, Attorney for Plaintiff
Amber Dale Kik, Defendant
Joseph C. Fisher, Attorney for Defendant
46th Circuit Trial Court, Friend of the Court

I certify that on this date the original order was filed with the Court and copies were served on the parties listed above by mailing it via first class mail to their addresses of record.

Dated: May 4, 2007

Joan Brand

Joan Brand, Court Clerk