STATE OF MICHIGAN

COURT OF APPEALS

HEATHER K. STRAMPEL, Plaintiff-Appellee,	UNPUBLISHED March 11, 2014
v	No. 318714 Clinton Circuit Court
PURNENDU S. SARKAR, Defendant-Appellant.	LC No. 10-022313-DM

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Defendant appeals the August 19, 2013, order granting plaintiff's motion to change domicile from Michigan to Nevada. The same order denied defendant's motion for change of custody of the parties' minor child. Defendant appeals as of right. We affirm.

As background information, plaintiff and defendant, who had one child together, divorced in February 2011. The parties were awarded joint legal custody, and plaintiff was awarded primary physical custody. After the divorce, plaintiff lived in Michigan, and defendant lived in California. Plaintiff lived with her parents and worked as a substitute teacher, making $75 per day when she taught. Plaintiff had the opportunity to teach full time in Nevada, making $35,000 per year. Although the initial opportunity was only a one-year contract, plaintiff thought that the opportunity for more work was higher in Nevada. On July 8, 2013, plaintiff moved the trial court to allow her and the child to change their domicile to Nevada. On July 29, defendant moved to change the child's custody. A hearing was held on July 31, and the trial court granted plaintiff's motion and denied defendant's motion in an order entered August 19, 2013. But before that order was entered, defendant on August 14 moved ex parte requesting (1) a stay in the proceedings to enforce judgment, (2) relief from judgment, and (3) reconsideration. In a hearing held on September 3, 2013, the trial court denied defendant's ex parte motions.

On appeal, defendant first argues that the trial court erred in denying his motion to stay the proceedings and in allowing plaintiff to remove the child from Michigan prior to the expiration of the automatic stay in MCR 2.614(A)(1). A trial court's decision on a legal issue, like the interpretation and application of court rules, is reviewed de novo on appeal. *Huntington Nat Bank v Ristich*, 292 Mich App 376, 383; 808 NW2d 511 (2011).

MCR 2.614(A)(1) provides that the execution of a judgment cannot occur until 21 days after entry of the judgment. The rule also indicates that

> [i]f a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from judgment is filed and served within 21 days after entry of the judgment or within further time the trial court has allowed for good cause during that 21-day period, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order deciding the motion, unless otherwise ordered by the court on motion for good cause. [MCR 2.614(A)(1).]

However, because no order had been issued at that time defendant filed his motion, the trial court denied defendant's requests for a stay and relief from judgment because it determined that those requests were premature. We agree with the trial court's rationale. MCR 2.614(A)(1) provides for a stay of execution "[i]f a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from judgment is filed and served within 21 days *after* entry of the judgment," which did not occur here. The trial court acknowledged that MCR 2.614 also has an automatic stay provision. But defendant did not use appropriate legal routes to remedy any purported violation on plaintiff's part. The trial court correctly informed defendant that "we could have addressed it on an emergency basis, but as it was[,] that wasn't done."

Moreover, because, as discussed *infra* in this opinion, we find that defendant's underlying claims are without merit, we find that any error on the part of the trial court related to defendant's ex parte motions is harmless under the circumstances.

Next, defendant argues that the trial court erred in granting plaintiff's motion for a change in domicile and in denying defendant's motion for a change in custody.

We first will address the trial court's decision on plaintiff's motion for a change in domicile.

> We review a decision on a petition to change the domicile of a minor child for an abuse of discretion. We review the trial court's findings in applying the MCL 722.31 factors under the great weight of the evidence standard. Under this standard, we may not substitute our judgment on questions of fact unless the facts clearly preponderate in the opposite direction. [*Gagnon v Glowacki*, 295 Mich App 557, 565; 815 NW2d 141 (2012) (citations and quotation marks omitted).]

MCL 722.31(1) indicates that if a child's custody is governed by court order then that child has a legal residence with each parent. MCL 722.31(1) also provides that a parent may not change the legal residence of the child to a location more than 100 miles from the original residence unless the other parent consents or by court order. MCL 722.31(2). The trial court must consider the following factors, while focusing on the child, when determining whether to grant a motion to change domicile:

> (a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.
>
> (b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the

> parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.
>
> (c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.
>
> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. [MCL 722.31(4).]

"The party requesting the change of domicile has the burden of establishing by a preponderance of the evidence that the change is warranted." *McKimmy v Melling*, 291 Mich App 577, 582; 805 NW2d 615 (2011). Here, the only factor at issue was factor (a). Defendant argues that the trial court did not explain how the move would benefit the child and was therefore against the great weight of the evidence.

When the trial court granted plaintiff's motion, the trial court explained that plaintiff had met her burden and stated:

> I do find that the plaintiff has met her burden under MCL 722.31. You know, right now she—she's substitute teaching, she doesn't have a full time [job], she is her only sole source of income, her parents have generously assisted her financially, but she couldn't have housing of her own based on her employment situation. She has no [health] care, she has no long-term financial planning mechanism, no pension, no 401K. She testified as to what efforts she has made to find employment in the area to remain here, that wasn't—her first instinct was not to go to some other state, she has been unable to do that. That this job will give her all of those things I mentioned and enable [her] to live on her own with her [child] . . . I do find that [factor] A is met.

The trial court's finding in regard to the move improving plaintiff's quality of life was not against the great weight of the evidence. Plaintiff testified that she was only substitute teaching with no benefits in Michigan but had accepted a full-time teaching job with benefits in Nevada. Plaintiff indicated that she would have a salary of $35,000 per year with full benefits and would be able to establish her own household. In Michigan, plaintiff was living with her parents and depending on them for financial assistance. "It is well established that the relocating parent's increased earning potential may improve a child's quality of life." *Rittershaus v Rittershaus*, 273 Mich App 462, 466; 730 NW2d 262 (2007). Additionally, during the hearing, defendant did not offer any evidence to contradict plaintiff's testimony in regard to how the move would benefit plaintiff, and defendant agreed that plaintiff establishing her own household would be a positive

accomplishment for plaintiff. Plaintiff further testified that the proposed school in Nevada was comparable to the child's current school in Michigan. Thus, the trial court's ultimate finding on this factor is not against the great weight of evidence.

Defendant testified that he was concerned about plaintiff's new relationship with a man who lived in Nevada and that it would negatively impact defendant's relationship with the child. Defendant also indicated he was concerned about the high crime rates and activities normally associated with Las Vegas. However, defendant testified that if plaintiff terminated her new relationship, then he would have no objections to the move. Thus, the only genuine argument raised by defendant concerning quality of life was the fact that plaintiff was in a new relationship; even then, defendant presented no actual evidence that the relationship would negatively impact the child. Furthermore, defendant testified that he did not believe it was healthy for the child to be living with plaintiff's parents and that it would be good for plaintiff to get her own home. Based on the testimony, the trial court did not err in determining that the move would also improve the child's quality of life. The trial court thus did not abuse its discretion in granting plaintiff's motion to change domicile because plaintiff met her burden under MCL 722.31.

We next turn our attention to the trial court's decision on defendant's motion to change custody. With regard to this motion, defendant argues that the trial court erred by failing to conduct a best-interest analysis as required by MCL 722.23.

Before modifying a custody award the trial court must find that there is proper cause or a change of circumstances that the modification will be in the child's best interests. MCL 722.27(1)(c); *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009). The party moving to modify custody must establish by a preponderance of the evidence an appropriate ground that would justify the trial court taking action. *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). Only once proper cause or a change in circumstances has been proven may the trial court engage in a review of the statutory best-interest factors. *Id.*

On appeal, defendant argues that the trial court erred by failing to take testimony on the best-interest factors. Defendant argues that there was significant evidence on the record that a change of custody would be in the child's best interests. However, defendant does not address the trial court's determination that defendant failed to make the requisite threshold showing of proper cause or a change in circumstances that would justify revisiting custody. *Id.*

Here, defendant cannot show that trial court erred in failing to address the best-interest factors because defendant has failed to challenge the trial court's determination concerning proper cause or a change in circumstances. Accordingly, defendant has failed to establish any error.

Finally, defendant argues that the trial court erred by failing to conduct a meaningful evidentiary hearing on the child custody issue and that defendant did not have enough time to conduct meaningful discovery and therefore was denied the opportunity to be heard and properly defend himself.

To the extent that defendant argues that the hearing on his motion for a change in custody should not have been held because it occurred only two days after he filed his motion, any error is waived. The only party who objected at the hearing related to defendant's motion was plaintiff – defendant willingly accepted the trial court's decision to address both motions at the same time. Accordingly, defendant's willing participation has effectuated a waiver of the issue. See *Davis v Chatman*, 292 Mich App 603, 619; 808 NW2d 555 (2011). Moreover, even if defendant's lack of an objection at the hearing was simply deemed to be a forfeiture instead of a waiver, defendant still would not prevail. Forfeited issues are reviewed for plain error affecting substantial rights, *In re Smith Trust*, 274 Mich App 283, 285-286; 731 NW2d 810 (2007), and because defendant failed to establish the necessary proper cause or change in circumstances in order to change the child's custody, the trial court was "precluded from holding a child custody hearing," *Vodvarka*, 259 Mich App at 508. Thus, no child custody hearing was warranted in the first place, and defendant has not demonstrated any plain error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter