

STATE OF MICHIGAN
COURT OF APPEALS

CLARISSA A. MARGITAN,

Plaintiff-Appellee,

v

GEORGE M. MARGITAN,

Defendant-Appellant.

UNPUBLISHED

September 24, 2009

No. 286008

Wayne Circuit Court

LC No. 04-406318-DM

Before: M. J. Kelly, P.J., and K. F. Kelly and Shaprio, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order modifying parenting time and denying defendant's motion for attorney fees. We affirm.

I. Basic Facts and Procedural Background

The parties were divorced in September 2004. The judgment of divorce awarded the parties joint legal and physical custody of their two children. Defendant was awarded "reasonable and liberal" parenting time, including, but not limited to, every other weekend from Thursday evening until Monday morning, as well as one overnight during the week on alternate weeks. The judgment also provided that attorney fees would be awarded in the event one party successfully sought enforcement of any provision of the judgment against the other party.

At the time of the divorce, the parties lived in Flatrock, Michigan. In 2006, plaintiff moved with the children to Davison, located 87 miles from Flatrock.

Post judgment proceedings were contentious. Defendant moved for change of custody, in large part because of plaintiff's move to Davison. Defendant's motion was denied and no appeal was taken. There were also several hearings related to enforcing different provisions in the judgment. On occasion, police were called as a result of the interaction between the parties. The Friend of the Court (FOC) conducted several investigations into the various issues presented by the parties.

Both parties experienced difficulties with defendant's exercise of parenting time. Plaintiff moved for modification of the parenting time schedule and requested that the trial court order a specific drop-off and pick-up location, a specific time for the exchange, and a specific time to conclude defendant's parenting time on the weekends. The FOC referee recommended

that defendant's parenting time be modified to three weekends per month from Friday evening until Sunday evening. Defendant timely filed objections,¹ and also requested attorney fees incurred from his previous motions to enforce several provisions in the judgment.

After affording the parties an opportunity to address the trial court and entertaining oral argument, the trial court adopted the recommendation of the FOC referee, ordered four days of makeup parenting time for defendant and denied the request for attorney fees because the request was untimely. The trial court further recommended that defendant file a petition for additional makeup parenting time and also that defendant move for rehearing on the attorney fees issue, to include documentation of the fees incurred.

II. Modification of Parenting Time

On appeal, defendant argues that the trial court erred by failing to conduct an evidentiary hearing before modifying parenting time. Defendant submits plaintiff's modification request constituted a change in the established custodial environment, thus requiring that plaintiff present clear and convincing evidence at an evidentiary hearing that the change was in the children's best interests. We disagree.

The goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances, *Foskett v Foskett*, 247 Mich App 1, 6; 634 NW2d 363 (2001), and a trial court may modify a custody award only if the moving party first establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508-509; 675 NW2d 847 (2003). When a party fails to show a change of circumstances or proper cause sufficient to revisit a custody determination, the trial court may not hold a child custody hearing." *Brausch v Brausch*, ___ Mich App ___; ___NW2d ___ (2009).

At the hearing before the trial court, defendant did not argue, or even suggest, that modification of the parenting time schedule would amount to a change of circumstances. Likewise, on appeal, defendant does not suggest any facts or circumstances that would warrant an evidentiary hearing or review by the trial court of the custodial provisions in the judgment of divorce.² Accordingly, the trial court did not err in failing to hold an evidentiary hearing. *Id.*

¹ Neither the recommendation nor defendant's objections are contained within the lower court record.

² We also note that when arguing his objections to the proposed change in the parenting time schedule, defendant specifically concurred in the new parenting time schedule and requested make up parenting time to compensate for lost overnight parenting time under the new schedule. The trial court granted an additional four overnights nights and instructed defendant to file a petition for further makeup parenting time as the issue was not properly before the court. Our review of the record does not reflect that at the time this appeal was taken, defendant took the opportunity to avail himself of that opportunity. Under these circumstances, we find no error requiring reversal where defendant acquiesced in the trial court's ruling and thereafter failed to

(continued...)

III. Attorney Fees

Defendant also argues that the trial court erred by denying his request for attorney fees pursuant to a provision in the judgment of divorce, which provides:

[I]n the event any of the terms contained in this agreement are not complied with by either party, and the other party must seek enforcement by the court, then the party not in compliance shall be liable for costs, sanctions, and attorney fees.

Defendant sought attorney fees for successfully prosecuting motions that were granted the previous year.

In general, this Court reviews a trial court's grant or denial of attorney fees for an abuse of discretion, and any findings of fact on which the award is based are reviewed for clear error. *Reed v Reed*, 265 Mich App 131, 164; 693 NW2d 825 (2005). However, in this case, defendant's motion was premised on a provision in the judgment of divorce. "A divorce judgment entered upon the settlement of the parties . . . represents a contract, which, if unambiguous, is to be interpreted as a question of law." *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008).

At the time of the hearing, defendant did not have any documentation to support his request for attorney fees. The trial court denied defendant's request for attorney fees because he failed to seek relief within a reasonable time. But, after denying the motion, the trial court specifically invited defendant to file a motion for rehearing with supporting documentation of any attorney's fees that he had incurred and, presumably, to address the timeliness issue.

Defendant submits that the trial court's decision was an abuse of discretion, but he fails to address whether the untimeliness of his request was a valid basis for denial of attorney fees. His failure to address the basis for the trial court's decision precludes appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (appellate relief is precluded where the appellant fails to address the basis of the trial court's decision).

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro

(...continued)

petition the trial court to obtain the relief he seeks. An appellant cannot contribute to error by plan or design and then argue error on appeal. *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991).