STATE OF MICHIGAN

COURT OF APPEALS

HALYNA KALYNOVYCH, Plaintiff-Appellee,	UNPUBLISHED February 19, 2015
v	No. 321942 Oakland Circuit Court
IGOR KALYNOVYCH, Defendant-Appellant.	LC No. 2012-802124-DM

Before: SERVITTO, P.J., and STEPHENS and M. J. KELLY, JJ.

PER CURIAM.

In this custody dispute, defendant appeals as of right from an opinion and order of the trial court granting plaintiff sole legal and physical custody of YK, the parties' youngest child. Because the record is insufficient to allow meaningful review of the trial court's best-interests determination, we vacate the trial court's opinion and remand for a new child custody hearing.

I. FACTS

Plaintiff and defendant first married in 1995 in Ukraine. Two children were born of that marriage, VK and YK. The parties divorced in Ukraine in 2008, but remarried in 2009. In 2010, the family left Ukraine and moved to Hamtramck. Plaintiff filed for divorce in 2012. After multiple substitutions of counsel, interpreters, and adjournments, the court held a two-day bench trial. Both parties were represented by counsel at the first day of the trial. However, on March 12, 2014, the trial court allowed the attorneys for both parties to withdraw. The trial court questioned the parties, who were the only witnesses, with the assistance of a translator. Because the parties had agreed that VK could live with defendant, the trial court made no findings regarding VK. Plaintiff was awarded sole physical and legal custody of YK. However, the actual divorce judgment awarded the parties joint legal custody of VK with sole physical custody to defendant.

II. DISCUSSION

A. COURT INTERPRETERS

Defendant argues that his due process right of meaningful access to the courts was denied by the use of multiple interpreters each of whom he alleges made a number of errors. He also argues that these interpreters were not certified or qualified in violation of MCR 1.111 and that

he is entitled to relief due to their lack of certification or qualification. We are not persuaded by either argument.

Defendant did not raise either issue in the trial court, and accordingly, neither is preserved. *Loutts v Loutts*, 298 Mich App 21, 23; 826 NW2d 152 (2012). Because the issues are unpreserved, our review is for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). To avoid forfeiture, defendant must demonstrate that an error occurred, that the error was plain, meaning it was clear or obvious, and that the error affected his substantial rights. *Id*. at 328-329. For an error to have affected defendant's substantial rights, it must have been outcome-determinative. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

Defendant argues that the use of interpreters, both of whom he asserts made many errors in translating, denied him meaningful participation in the proceedings. He submitted a writing by his older son which was undated to support the existence of translation errors. Neither in that writing, nor anywhere in his pro se brief, did defendant note even an exemplary translation error. Rather, as he admits, "the full extent of any errors cannot be specified." Defendant "may not leave it to this Court to search for a factual basis to sustain or reject [his] position." *Forest Hills Co-Operative v Ann Arbor*, 305 Mich App 572, 613 n 5; 854 NW2d 172 (2014). Further, without illustrating what errors were made, defendant cannot demonstrate that the outcome of the proceedings would have been different without the alleged errors. Accordingly, he is not entitled to relief. *Grant*, 445 Mich at 552-553; *Rivette*, 278 Mich App at 328-329.

MCR 1.111(F)(1) requires that a certified interpreter, or if no certified interpreter is reasonably available, a qualified interpreter, be utilized by the court. Certified interpreters must pass a "foreign language interpreter test," meet requirements established by the State Court Administrative Office (SCAO), and register with the SCAO. MCR 1.111(A)(4). Qualified interpreters providing in-person translation services must also meet the SCAO's requirements and register individually with the SCAO. MCR 1.111(A)(6)(a) and (b). However, qualified interpreters are not required to pass a foreign language interpreter test. MCR 1.111(A)(6)(a)-(c). Instead, the trial court must determine, after voir dire, that the interpreter is competent. MCR 1.111(A)(6)(a)-(c).

Because MCR 1.111 was adopted on September 11, 2013 it only applies to the second day of the bench trial, March 20, 2014. See *Reid v AH Robins Co*, 92 Mich App 140, 143; 285 NW2d 60 (1979) ("[A]mendments to court rules operate only prospectively."). Defendant asserts that the interpreter who was present on March 20, 2014, was uncertified. The record on this issue is scant. The transcript of the trial contains no discussion regarding whether the translator was certified and, in fact, does not even offer the translator's complete name. In the absence of any record of certification, it is not inappropriate to determine that the translator was not certified. It is also appropriate with this record to find that the translator was not SCAO qualified. The rule provides that when no certified or qualified interpreters are "reasonably available," a court may appoint an interpreter that is neither certified nor qualified so long as "the court determines through voir dire" that the interpreter is "capable of conveying the intent and content of the speaker's words sufficiently to allow the court to conduct the proceeding without prejudice to the limited English proficient person." MCR 1.111(F)(1)-(2). The court inquired of the translator and was informed that he attended Oakland University and had been educated in

the Ukraine through the 11th grade. Additionally, the court exhorted the translator to ask questions if any terms used were unclear. On this record we cannot determine that the translator met the requirements of MCR 1.111(F). The court did violate the rule when it failed to make a finding that after multiple adjournments, several of which were due to failure of any translator to appear, that neither a certified nor qualified translator was reasonably available.

Defendant is not entitled to relief for this failure because he has not demonstrated prejudice. As was discussed, defendant points to no actual errors in translation, and accordingly, cannot demonstrate that the outcome of the trial would have been different had a certified or qualified interpreter been utilized. Accordingly, he is not entitled to relief. *Grant*, 445 Mich at 552-553; *Rivette*, 278 Mich App at 328-329.

B. ATTORNEY WITHDRAWAL

Defendant argues that the trial court abused its discretion when it allowed defendant's attorney to withdraw. He also argues that the trial court's decision denied his procedural due process rights. We disagree.

A trial court's decision regarding a motion to withdraw as counsel is reviewed for an abuse of discretion. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). Defendant's due process claims were not raised in the trial court, and accordingly, are unpreserved. *Loutts*, 298 Mich App at 23. We therefore review these claims for plain error affecting substantial rights. *Rivette*, 278 Mich App at 328.

"[A]n attorney who has entered an appearance may withdraw from the action only on court order." *Coble v Green*, 271 Mich App 382, 386; 722 NW2d 898 (2006). See also MCR 2.117(C)(2). Although the MRPC "do not expressly apply to" a motion to withdraw, this Court has found it logical "to consider the question of withdrawal within the framework of our code of professional conduct." *Withdrawal of Attorney*, 234 Mich App at 432. Pursuant to MRPC 1.16(b)(4), a lawyer may withdraw from the representation if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled[.]" Pursuant to MRPC 1.16(b)(5), an attorney may withdraw if "the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client[.]"

In his motion to withdraw as defendant's counsel, Kevin Yaldoo, defendant's second attorney in this case, alleged that on February 20, 2014, defendant informed Yaldoo that he was unhappy with Yaldoo's services and wished to discharge him. Yaldoo alleged that he asked defendant to pay an outstanding balance due at that time, and that defendant "refused to acknowledge any [of] the outstanding fees." Yaldoo further alleged that defendant refused "to comply with the terms of the fee agreement and to pay his outstanding balance." At the hearing regarding the motion, the trial court asked Yaldoo if he had been paid by defendant for his services, and Yaldoo confirmed that he had not. Based on this fact, the trial court granted the motion. Thus, while not explicitly stated, it is clear that the trial court granted the motion for the reason stated in MRPC 1.16(b)(4), defendant's failure to fulfill a substantial obligation.

Defendant's argument first focuses on MRPC 1.16(b)(5), and whether withdrawal was required to prevent an unreasonable financial burden on Yaldoo. Defendant's argument is without merit because the trial court granted the motion pursuant to MRPC 1.16(b)(4), not MRPC 1.16(b)(5). To the extent defendant relies on this Court's opinion in *Withdrawal of Attorney*, 234 Mich App 421, his argument lacks merit because that case only concerned MRPC 1.16(b)(5). *Id*. at 431-437.[1]

Defendant argues that the trial court abused its discretion because he was entitled to notice of Yaldoo's intent to withdraw and an opportunity to obtain substitute counsel, citing this Court's opinion in *Bye v Ferguson*, 138 Mich App 196; 360 NW2d 175 (1984). *Bye* is distinguishable. In *Bye*, the trial court permitted defense counsel to withdraw the morning of trial without notice to the defendant, who had not appeared for trial. *Id*. at 200. This Court held that the defendant was entitled to notice before withdrawal and the opportunity to obtain new counsel. *Id*. at 206-207. Here, the record shows that defendant was notified of Yaldoo's intent to withdraw. On February 24, 2014, Yaldoo filed a proof of service stating that he had served the motion to withdraw on "[d]efendant Igor Kalynovych by first-class mail . . . ." Yaldoo also filed a notice of a hearing regarding his motion to withdraw, which was directed toward defendant. Further, after the trial court granted the motion, it ordered Yaldoo to notify defendant by mailing a copy of the order of withdrawal to defendant. And although the March 20, 2014 trial date was not adjourned, defendant had eight days between the date the trial court granted Yaldoo's motion to withdraw and the date of the trial, time in which he could have obtained new counsel. In sum, the record demonstrates that defendant did have notice of Yaldoo's intent to withdraw and an opportunity to obtain new counsel. *Bye* lends no support to defendant's position.

Defendant also asserts that the alleged lack of notice and of an opportunity to obtain substitute counsel amounted to a denial of his due process right to a meaningful opportunity to be heard because it resulted in defendant proceeding to trial without an attorney. However, as discussed, defendant was provided notice of Yaldoo's intent to withdraw and with an opportunity to obtain substitute counsel. Further, defendant waived this issue. Waiver is the intentional relinquishment or abandonment of a known right. *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254; 776 NW2d 145 (2009). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *Id*. at 255. Before the second day of the custody hearing began, the following exchange occurred:

> *The Court:* All right. Both of you are here today without counsel, correct?

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[1] Defendant argues that the trial court failed to consider the burden on defendant created by proceeding without an attorney and whether substitute counsel was available. In *Withdrawal of Attorney*, 234 Mich App at 435, this Court recognized the need to balance counsel's obligation to a client, "the extent of the financial burden, and the availability of substitute counsel[]" when an attorney seeks withdrawal under MRPC 1.16(b)(5) due to an unreasonable financial burden on the client. The case does not speak to what considerations are appropriate when withdrawal is sought for the reason stated in MRPC 1.16(b)(4).

Defendant: Yes – Yes, correct.

The Court: Are you prepared to proceed to trial?

Plaintiff: Yes.

Defendant: Yes.

Thus, rather than ask for an adjournment, defendant chose to proceed without an attorney. In doing so, he waived any contention that he was denied due process by proceeding to trial without an attorney, eliminating any error. *Id.* at 254-255.

C. DUE PROCESS

Defendant argues that his due process rights were violated by the lengthy delay between the first and second day of the custody hearing and the conduct of the hearing itself. We disagree. Defendant did not preserve his due process challenges by raising them in the trial court, rendering them unpreserved. *Loutts*, 298 Mich App at 23. Accordingly, we review the issues for plain error affecting substantial rights. *Rivette*, 278 Mich App at 328.

The fundamental requirement of procedural due process is a meaningful opportunity to be heard. *In re Rood*, 483 Mich 73, 92; 763 NW2d 587 (2009). Defendant argues that the delay between the first and second days of trial resulted in a denial of due process. He offers no authority supporting his position, and accordingly, has abandoned the issue. *Badiee v Brighton Area Schools*, 265 Mich App 343, 379; 695 NW2d 521 (2005) ("A party may not state their position and then leave it to this Court to search for authority in support of that position."). Nor has he demonstrated any way in which the delay altered the outcome of the trial, precluding relief under the plain error standard of review. *Grant*, 445 Mich at 552-553; *Rivette*, 278 Mich App at 328.

Further, defendant approved of the majority of the adjournments. On October 14, 2013, the trial court adjourned the second day of trial to December 2, 2013, after defendant's first attorney withdrew because she was discharged by defendant. Yaldoo, then defendant's attorney, approved the substance of the order adjourning the trial to December 2, 2013. Defendant, through Yaldoo, requested the next adjournment in a motion filed on November 15, 2013. This motion resulted in an adjournment to January 31, 2014. Thus, the majority of the adjournments were approved by defendant's counsel. A party may not assign error to something his own counsel deemed proper. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002) (citation omitted).

Defendant argues that the conduct of the custody hearing denied him due process. Once again, he offers no authority to support his argument, and has abandoned the issue. *Badiee*, 265 Mich App at 379. Further, his argument does not show any entitlement to relief. He argues that the trial court did not allow him to ask any questions of plaintiff. However, the record does not show that defendant ever sought to ask any questions of plaintiff, and accordingly, does not demonstrate that defendant was denied the opportunity. He argues that he "was questioned about a criminal record but plaintiff was not." However, he offers no evidence that plaintiff had a criminal record that would have been disclosed had such questioning occurred, and accordingly,

cannot demonstrate that the lack of such questions had any effect on the trial, precluding relief under the plain error standard. *Grant*, 445 Mich at 552-553; *Rivette*, 278 Mich App at 328. Finally, he states that he "tried to present evidence as to the plaintiff's credibility but was denied." It would appear that defendant is referring to his attempt at the end of the trial to respond to plaintiff's testimony:

> *The Interpreter:* He [(defendant)] wants to say something.
>
> *The Court:* What? Do—do you not [sic] respond to anything she said. You had your turn.
>
> *The Interpreter:* He says that it was a lot of lies –
>
> *The Court:* Okay, I'm done. I'm done.

Although the trial court prevented defendant from presenting further testimony refuting plaintiff's version of the facts, defendant had already contested plaintiff's version of the facts during his own testimony. He offers no explanation of what further testimony he could have offered that would have altered the outcome of the trial, and accordingly, has not demonstrated plain error. *Grant*, 445 Mich at 552-553; *Rivette*, 278 Mich App at 328.

D. BEST INTERESTS

Defendant argues that the trial court's best-interests determination was against the great weight of the evidence. Because the record is insufficient to allow meaningful review of the trial court's best-interests determination, we vacate the trial court's opinion and remand for a new child custody hearing.

As this Court stated in *McIntosh v McIntosh*, 282 Mich App 471, 474-475; 768 NW2d 325 (2009):

> We apply three standards of review in child custody cases. First, the trial court's findings of fact are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates in the opposite direction. The trial court need not comment on each item of evidence or argument raised by the parties, but its findings must be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction. This Court defers to the trial court's determinations of credibility. Second, a trial court commits clear legal error under MCL 722.28 when it incorrectly chooses, interprets, or applies the law. Third, discretionary rulings are reviewed for an abuse of discretion. [Quotation marks and citations omitted.]

Defendant first argues that the trial court erred when it found that YK's established custodial environment was with both parties. Even if such an error occurred, it would be harmless, and accordingly, does not require reversal. *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994). "[T]he trial court's determination whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the child[]." *Kessler v Kessler*, 295 Mich App 54, 62; 811 NW2d 39 (2011). If an established

custodial environment exists with one or both parents, the trial court may not alter this environment unless clear and convincing evidence demonstrates that a change is in the child's best interests. *Pierron v Pierron*, 282 Mich App 222, 244-245; 765 NW2d 345 (2009), aff'd 486 Mich 81 (2010). The trial court determined that YK's custodial environment was established with both parties, and accordingly, applied the clear and convincing evidentiary standard to its best interests determination. The same evidentiary burden would have applied if the trial court found that an established custodial environment existed with defendant alone. *Id*. Thus, even if defendant is correct, such a determination would have made no difference in the proceedings. Accordingly, any potential error was harmless and would not require reversal. *Fletcher*, 447 Mich at 889.

Defendant challenges the trial court's findings in regard to eight of the statutory best interest factors, MCL 722.23(a), (b), (c), (d), (e), (h), (i), and (k). After reviewing the record and the trial court's opinion, we have found that the trial court's conclusions regarding five of these factors, (b), (d), (e), (i), and (k), were not against the great weight of the evidence. However, in child custody matters, "the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 452; 705 NW2d 144 (2005). And while the trial court need not make exceedingly detailed findings, its findings "must [also] be sufficient for this Court to determine whether the evidence clearly preponderates in the opposite direction." *McIntosh*, 282 Mich App at 474. In regard to the three additional factors challenged by defendant, the record and the trial court's findings are insufficient to allow meaningful review.

Factor (a) considers "[t]he love, affection, and other emotional ties existing between the parties involved and the child." MCL 722.23(a). The trial court found this factor favored neither party, stating, "Both parties profess a strong love and affection for [YK]." While we do not doubt that both parties love YK, we have found no such "profession" of love for YK in the record, nor did the trial court provide any insight regarding where it derived this information. Further, the trial court did not discuss, nor does the record disclose, the love, affection, or emotional ties YK has to either party. The record contains no evidence that would allow meaningful review of the trial court's decision in regard to factor (a).

In regard to factor (c), "The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . [,]" MCL 722.23(c), the trial court found this factor neutral, referring only to the fact that both plaintiff and defendant were employed, and stating their income. "Factor c does not contemplate which party earns more money; it is intended to evaluate the parties' *capacity* and *disposition* to provide for the children's material and medical needs." *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Thus, the trial court's sole reliance on the parties' income was insufficient. The evidentiary record lacks any discussion of to what extent each party provides YK with food, clothing, or medical care. While the record discloses that each party may have the financial capacity to provide for YK's material and medical needs, the record is devoid of any evidence of the disposition of each party to do so, and does not allow for meaningful review of the trial court's finding.

In regard to factor (h), "The home, school, and community record of the child[,]" MCL 722.23(h), the trial court first stated that "[YK] primarily lives with [p]laintiff in her Madison

Heights home." This statement was against the great weight of the evidence and inconsistent with the trial court's finding regarding MCL 722.23(d). With respect to MCL 722.23(d), the trial court stated, "[YK] resides with both parents on a shared parenting time schedule." The testimony at trial demonstrated that the parties shared custody of YK pursuant to the court's order, which gave each party equal time with YK. Further, while the trial court stated where YK attended school and what extracurricular activities he participates in, the trial court did not discuss YK's record in those areas. The evidentiary record contains no such information.

We also note that in regard to two factors not challenged by defendant, MCL 722.23(f) (the moral fitness of the parties involved) and MCL 722.23(g) (the mental and physical health of the parties involved), the trial court found these factors neutral on the basis that "no evidence was presented" regarding the factors. In essence, the trial court simply declined to consider these factors because it did not find the necessary evidence in the record. "To determine the best interests of the child[] in child custody cases, a trial court must consider *all* the factors delineated in MCL 722.23(a)-(l) . . . ." *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001) (emphasis supplied). If the evidentiary record contained no evidence pertaining to these factors, the record is also insufficient "for this Court to determine whether the evidence clearly preponderates against the trial court's findings." *MacIntyre*, 267 Mich App at 452.

We are also troubled by the fact that the lack of evidence concerning these five factors is largely attributable to the trial court. Having allowed both attorneys to withdraw, the trial court conducted the trial itself. It alone questioned both parties, controlling what evidence would be brought out. Compounding the problem is the fact that the parties had a limited ability to communicate, as each required the aid of a translator in order to participate in the proceedings. In a sense, the trial court "effectively deprive[d] this Court of a complete factual record on which to impose the requisite evidentiary standard necessary to ensure that the trial court made a sound determination regarding custody." *Foskett*, 247 Mich App at 11. "[D]ecisions that will profoundly affect the lives and well-being of children cannot be left to little more than pure chance. These critical decisions must be subject to meaningful appellate review." *Id*. As this Court explained in *Foskett*:

> Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 "and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing." *Bowers* [*v Bowers*, 190 Mich App 51,] 56[; 475 NW2d 394 (1991)]. The trial court need not necessarily engage in elaborate or ornate discussion because brief, definite, and pertinent findings and conclusions regarding the contested matters are sufficient. MCR 2.517(A)(2); *Fletcher*[, 447 Mich at 883]. In this case, although the trial court set forth its findings, those findings were nevertheless not independently supported or otherwise corroborated by the evidence on the record and thus amenable to appellate review. In the absence of a reviewable record, we are unable to determine whether there is any support for the trial court's conclusions. A trial court has discretion to be sure, but it does not and cannot have unbridled discretion. The trial court's ultimate decision must comport with the great weight of the evidence. *Id*. [*Id*. at 12-13.]

Vacated and remanded for a new child custody hearing. We do not retain jurisdiction.[2]

/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly

[2] We also note that the trial court erred by simply accepting the parties' agreement that defendant would have custody of VK without making its own independent finding. "The trial court cannot blindly accept the stipulation of the parents, but must independently determine what is in the best interests of the child." *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). However, because he is now 18 years old, the trial court lacks jurisdiction to enforce a custody order regarding VK. *Hayford*, 279 Mich App at 327. Thus, the issue is now moot. *BP7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief.").