

STATE OF MICHIGAN
COURT OF APPEALS

MATTHEW J. MARKLE,

Plaintiff-Appellant/Cross-Appellee,

v

CORINNE R. MARKLE,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

August 14, 2007

No. 266341

Van Buren Circuit Court

LC No. 03-051076-DM

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Plaintiff and defendant appeal and cross-appeal by right the judgment of divorce that was entered on October 3, 2005, and that incorporated a January 12, 2005 stipulation of the parties regarding custody and parenting time for the parties' two minor children. We affirm.

We first address defendant's jurisdictional arguments. Defendant claims that the trial court erred when it determined that Michigan was the home state of the minor children under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq.* Defendant argues that plaintiff failed to properly commence the child custody proceeding under MCL 722.1209 and MCR 3.206(A)(3), that Michigan could not be the children's home state because they did not reside in Michigan with plaintiff "at least six consecutive months immediately before the commencement of the proceeding," MCL 722.1102(g), and that plaintiff failed to disclose a proceeding for a protective order she initiated in Texas at the time he executed a required UCCJEA affidavit. According to defendant, the Texas court had jurisdiction pursuant to § 204(1) of the UCCJEA. We disagree with all of these claims.

We review de novo whether a trial court has subject matter jurisdiction. *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003). Once jurisdiction is established, a trial court's decision to exercise jurisdiction in a custody proceeding is reviewed for an abuse of discretion. *Fisher v Belcher*, 269 Mich App 247, 253; 713 NW2d 6 (2005). Moreover, because this issue also involves interpretation of the UCCJEA, it presents a question of law that this Court reviews de novo. *Atchison, supra* at 534-535.

The UCCJEA became effective in Michigan on April 1, 2002, and was designed to:

- (1) rectify jurisdictional issues by prioritizing home-state jurisdiction;
- (2) clarify emergency jurisdictional issues to address time limitations and domestic-violence issues;
- (3) clarify the exclusive continuing jurisdiction for the state that entered the child-custody decree;
- (4) specify the type of custody proceedings that are governed by the act;
- (5) eliminate the term “best interests” to the extent it invited a substantive analysis into jurisdictional considerations; and
- (6) provide a cost-effective and swift remedy in custody determinations. [Atchison, *supra* at 536.]

Defendant first argues that Michigan did not have jurisdiction because plaintiff failed to properly commence the child custody proceeding. The UCCJEA imposes specific pleading requirements. Each party in a child custody proceeding must, in his/her first pleading or in an attached sworn statement, provide information under oath regarding the children’s present address, the places the children have lived during the last five years, the names and present addresses of the persons with whom the children have lived during that period, and the existence of other custody proceedings. MCL 722.1209(1). Our court rules contain parallel pleading requirements. See MCR 3.206(A). If the required information is not furnished, the court may, upon the motion of a party or sua sponte, stay the proceeding until it is. MCL 722.1209(2).

The record discloses that plaintiff filed his complaint for divorce and a petition for temporary custody on May 28, 2003. On June 2, 2003, the Friend of the Court (FOC) mailed plaintiff SCAO form MC 416 to complete the necessary UCCJEA affidavit. On June 4, 2003, defendant filed an application for a protective order in the 359th Judicial District Court, Montgomery County, Texas, and the Texas court entered a temporary ex parte order. Plaintiff was served a copy of the temporary ex parte order on June 12, 2003. Plaintiff’s completed UCCJEA affidavit was received by the FOC on June 16, 2003.

Defendant argues that plaintiff was aware of the Texas protective order proceeding at the time he executed his UCCJEA affidavit, but he failed to disclose the proceeding as required by ¶ 4 of the form. But defendant has not supplied proof that, and the record is unclear whether, plaintiff was aware of the Texas proceeding at the time he executed the affidavit. It is true that the FOC *received* plaintiff’s UCCJEA affidavit on Monday, June 16, 2003, *after* plaintiff had been served a copy of the temporary ex parte order on Thursday, June 12, 2003. But if one allows time for mailing and processing and considers that a weekend intervened, defendant is unable to prove that plaintiff *executed* his UCCJEA affidavit *after* receiving notice of the Texas protective order proceeding. This Court will not search for factual support for a party’s claims. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Thus, defendant's argument that plaintiff failed to properly disclose the Texas proceeding in his UCCJEA affidavit is without merit.

We note that plaintiff filed on July 9, 2003 a petition for ex parte interim custody, child support, and parenting time. Attached to the petition was plaintiff's affidavit averring that defendant had petitioned the Texas court for a personal protection order against him. Thus, plaintiff complied with his "continuing duty to inform the court of a proceeding in this or another state that could affect the current child-custody proceeding." MCL 722.1209(4).

We also note that while court proceedings were ongoing in both Michigan and Texas, the respective judges discussed the procedural issues surrounding the litigation. They agreed that the trial court in Michigan would conduct a hearing to determine if Michigan was the home state of the minor children six months before plaintiff filed the complaint for divorce. The trial court ultimately determined that Michigan was the home state of the minor children and that it had jurisdiction under the UCCJEA.

On de novo review, we agree with the trial court that when the plain language of the UCCJEA is applied to the facts of this case, Michigan, not Texas, had jurisdiction to make an initial child custody determination. MCL 722.1201 provides:

(1) Except as otherwise provided in section 204, a court of this state has jurisdiction to make an initial child-custody determination only in the following situations:

(a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

(b) A court of another state does not have jurisdiction under subdivision (a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 207 or 208, and the court finds both of the following:

(i) The child and the child's parents, or the child and at least 1 parent or a person acting as a parent, have a significant connection with this state other than mere physical presence.

(ii) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

(c) All courts having jurisdiction under subdivision (a) or (b) have declined to exercise jurisdiction on the grounds that a court of this state is the more appropriate forum to determine the custody of the child under section 207 or 208.

(d) No court of another state would have jurisdiction under subdivision (a), (b), or (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child-custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child-custody determination.

MCL 722.1102(d) defines “child-custody proceeding” as “a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue.” MCL 722.1102(d) provides that “[c]hild-custody proceeding” includes “a proceeding for . . . protection from domestic violence.” MCL 722.1102(e) provides that “commencement” means “the filing of the first pleading in a proceeding.” MCL 722.1102(h) defines “[i]nitial determination” as “the first child-custody determination concerning a particular child.” MCL 722.1102(c) defines “child-custody determination” as “a judgment, decree, or other court order providing for legal custody, physical custody, or parenting time with respect to a child,” and includes “a permanent, temporary, initial, and modification order.”

Defendant concedes that the Texas court did not have jurisdiction to make an initial child custody determination under MCL 722.1201(1)(a), (b), (c), or (d). She relies, however, on the language in MCL 722.1201(1), “[e]xcept as otherwise provided in section 204,” to argue that the Texas court had jurisdiction under Tex Fam Code Ann 152.204(a). We disagree. The corresponding Michigan provision, MCL 722.1204(1), provides:

A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

Defendant filed her application for a protective order in the Texas Court on June 4, 2003, alleging abuse had occurred in Michigan during April 2003. But the Texas court did not have temporary emergency jurisdiction because although the minor children were present in the state, it was *not* necessary in an emergency to protect the children; neither the children nor defendant were subjected to or threatened with mistreatment or abuse. Defendant and the minor children had been away from Michigan and plaintiff for over one month when the application for the protective order was filed. Defendant’s allegations of abuse in Michigan during April 2003, but not reported until June 2003, simply did not constitute a necessity in an emergency sufficient to confer temporary emergency jurisdiction on the Texas court. See *Dillon v Medellin*, 409 So2d 570, 575 (La, 1982), and *Nazar v Nazar*, 505 NW2d 628, 636 (Minn, 1993) (a child in an asylum state may not be found to be in an emergency state of mistreatment or abuse because of conditions purportedly existing in its home state).

Defendant argues that Michigan was not the children’s home state because the children were removed from Michigan on April 25, 2003, and plaintiff did not file for divorce and temporary custody until May 28, 2003. Defendant argues that because MCL 722.1102(g) defines “home state” as being “the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately before the commencement of a child-

custody proceeding,” and she removed the children from Michigan on April 25, 2003, the state of Michigan cannot be the home state for the minor children. We reject defendant’s reading of the UCCJEA because it would defeat the purpose of the statute. It would allow a parent to remove the minor children from the state and leave the other parent with no recourse unless the other parent filed for custody on the exact date of the children’s removal.

MCL 722.1102(g) delineates the state in which the child lived with the parent for at least six months *immediately* before the commencement of the proceedings as the home state. The term “immediately” means “without delay, straightaway, or without any delay or lapse of time.” Black’s Law Dictionary (5th ed). Giving the statutory term its plain meaning, *Atchison, supra* at 535, it seems clear that Michigan is not the home state as defined in MCL 722.1102(g). The children had not lived in Michigan for six consecutive months *immediately* before commencement of the proceedings.

But MCL 722.1201(1)(a) provides alternative jurisdictional bases for a Michigan court to make an initial child custody determination: (1) where Michigan “is the home state of the child on the date of the commencement of the proceeding, or [2] was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from the state but a parent . . . continues to live in this state.” Thus, while Michigan is clearly not the home state as defined by MCL 722.1102(g), it was the only state in which the children had lived up until defendant removed them to Texas one month before plaintiff filed his complaint for divorce. Consequently, Michigan was the home state of the minor children “within 6 months before the commencement of the proceeding,” and the children were absent from Michigan, but plaintiff continued to live in Michigan. The trial court correctly determined Michigan had jurisdiction under the second clause of MCL 722.1201(1)(a). This “extended home state rule” was specifically included in the UCCJEA to “allow[] a left-behind parent to commence a custody proceeding within 6 months of a child’s removal from the home State.”¹ Here, after defendant took the minor children to Texas, plaintiff, who was left behind, properly petitioned for an initial custody determination in Michigan, which had home state jurisdiction within six months of the children’s removal. The children’s absence from Michigan did not deprive the state of jurisdiction. Thus, while defendant correctly argues that Michigan was not the home state by definition, Michigan had jurisdiction under MCL 722.1201(1)(a).

Defendant also argues that because the Texas court signed the July 30, 2003 protective order, it “had not determined that Michigan was the more appropriate forum” under § 206(2) of the UCCJEA. See MCL 722.1206(2). Contrary to defendant’s argument, under MCL 722.1206(1), the trial court had the authority to exercise its jurisdiction in this case, because, “at the time of the commencement of the proceeding,” a child-custody proceeding had *not* been commenced in a court of another state (Texas) having jurisdiction substantially in conformity with the UCCJEA. Defendant did not file her application for a protective order in the Texas court until June 4, 2003. Even if the Texas court’s July 30, 2003 protective order was, as

¹ United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin, 12/01, p 5.

defendant argues, an implicit determination that Michigan was not a more appropriate forum, the trial court was not required to dismiss plaintiff's child custody proceeding because it was commenced before defendant commenced the protective proceeding in Texas.

Defendant next argues that the trial court erred by failing to give full faith and credit to the Texas protective order after defendant filed an affidavit and notice of entry of foreign judgment and notice of registration of foreign child custody/protective order in Michigan. We disagree. We review de novo the constitutional question presented. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 620; 692 NW2d 388 (2004).

The Full Faith and Credit Clause “requires that a foreign judgment be given the same effect that it has in the state of its rendition.” *Blackburne, supra* at 620, quoting *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 406; 509 NW2d 829 (1993). With respect to the UCCJEA, § 303(1) provides:

A court of this state shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction that was in substantial conformity with this act or the child-custody determination was made under factual circumstances meeting the jurisdictional standards of this act and the child-custody determination has not been modified in accordance with this act. [MCL 722.1303(1).]

Here, the Texas court issued its protective order on July 30, 2003, and defendant filed an affidavit and notice of entry of foreign judgment and notice of registration of foreign child custody/protective order in Michigan on August 8, 2003. Defendant's notice of registration of the protective order provided that “[as] of the date of registration of the order [sic] is enforceable in the same manner as a child custody determination issued by a court of this state.”

The trial court addressed the Texas protective order in its order after home state determination. The trial court determined that “[b]ecause the Montgomery County court did not proceed under the UCCJEA, this court (Michigan) believes that any order in this Montgomery County Protective Order action is not binding or res judicata as to the custody determination of the minors.” We agree.

To the extent the Texas protective order constituted a custody determination, the trial court was not bound to give full faith and credit to the protective order because the Texas court did not “exercise[] jurisdiction that was in substantial conformity with” the UCCJEA, and the “child-custody determination was [not] made under factual circumstances meeting the jurisdictional standards of [the] act” MCL 722.1303(1). The trial court properly determined that, “without question, Michigan is the home state of the children,” and that Michigan was the proper forum in which to litigate “all custody issues in this case.” The trial court properly declined to give full faith and credit to the Texas protective order regarding custody because Michigan had jurisdiction to determine that issue pursuant to the UCCJEA.

Next, defendant argues that the trial court erred in denying her motion for summary disposition on the basis of insufficient service of process. This Court reviews summary disposition rulings de novo. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 287; 731 NW2d 29 (2007). Although defendant did not specify the subrule of MCR 2.116(C) under which she

sought relief, it is apparent that MCR 2.116(C)(3) pertains to insufficient service of process. We conclude the trial court properly denied defendant's motion.

Plaintiff filed for divorce on May 28, 2003. Defendant acknowledges that she was served with plaintiff's complaint, his custody petition, and affidavit on July 10, 2003. Defendant only challenges the manner in which service was affected, which she argues violated MCL 600.1835(1). That statute provides, in pertinent part:

All persons going to, attending, or returning from, any court proceedings in any action in which their presence is needed are privileged from service of process if service could not have been made on them had they not gone to, attended, or returned from the proceedings.

Defendant alleges that plaintiff's process server "threw the papers at her" while she "was attending a hearing in the 359th Judicial District of Montgomery County, Texas" on July 11, 2003. Defendant supports this allegation with an affidavit by her Texas attorney.

"Service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses." *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986). While defendant is correct that MCL 600.1835 provides a privilege from service of process in a civil suit under certain circumstances, *Moch v Nelsen*, 239 Mich App 681, 683; 609 NW2d 848 (2000), defendant ignores the plain language of the statute providing that the privilege exists only "if service could not have been made on them had they not gone to, attended, or returned from the proceedings." MCL 600.1835(1).

Here, defendant was not privileged from service of process because she could have been served regardless of her attendance at the July 10, 2003 hearing. Defendant suggests that plaintiff did not know her correct address on the date service was effected; therefore, she could not have been served had she not attended the court proceedings on July 10, 2003. There is no record evidence to support such an assertion. When defendant first moved to Texas in April 2003, she resided with her parents in Montgomery County, where she applied for the protective order on June 4, 2003. At the end of July 2003, defendant moved to Nederland, Texas, located in Jefferson County, where she ultimately filed for divorce in October 2003. A service certification indicates that defendant was served by mail with the pertinent documents at her address in Nederland, Texas on July 29, 2003. Further, an affidavit of defendant's attorney indicates that defendant's address as of August 6, 2003 was Nederland, Texas. Moreover, plaintiff executed an affidavit averring that defendant provided him with her current address at all times; that she was living with her parents in Montgomery County at the time she was served in this case; that she moved to Nederland, Texas near the end of July 2003; that she apprised him of her new address upon moving; and that he accordingly employed the new address to effect service from that point forward, including service of the ex parte interim order on July 29, 2003. Thus, defendant has not provided evidentiary support for her assertion that plaintiff did not know her address as of July 11, 2003.

The trial court denied defendant's motion for summary disposition on the record on May 12, 2004, but did not enter a separate order effectuating its ruling. Instead, the trial court addressed defendant's argument regarding service in its order for home state determination:

Finally, the defendant mother argues that since she was served in a courtroom with the summons and complaint from the Michigan action, that service is defective. This argument does not have merit for two reasons. First, the service on the defendant mother has nothing to do with the jurisdiction over the minor children. That issue is factual in the first review, i.e., what is the home state, and a legal issue in the second review, i.e., if there is a finding after an evidentiary hearing that establishes home state as a matter of law the home state shall conduct the custody proceedings with or without jurisdiction over the mother.

The trial court's determination implicitly denied defendant's motion for summary disposition on the basis of insufficient service of process. While the trial court did not address the efficacy of defendant's argument concerning MCL 600.1835(1), summary disposition in favor of defendant was not warranted under that statute. And this Court may affirm the trial court when it reaches the correct result, even if for a different reason. *MOSES, Inc v Southeast Michigan Council of Gov'ts*, 270 Mich App 401, 423; 716 NW2d 278 (2006).

We now turn to plaintiff's appeal. He contends the trial court erred when incorporating into the judgment of divorce the terms regarding parenting time to which the parties stipulated on January 12, 2005. Specifically, plaintiff argues that the trial court erred by including defendant's Wednesday evening visits, alternating weekends, and alternating holidays into the custody and parenting time provisions in the judgment. Plaintiff contends those terms were intended to be temporary and to remain in effect only from January 12, 2005, until defendant's anticipated return to Texas at the beginning of Summer 2005. Plaintiff asserts that defendant's returning to Texas was an integral part of the negotiations leading to the January 12, 2005, stipulation, and the temporary terms were contingent on defendant's leaving the state. Plaintiff does not argue that the trial court erred in determining the best interests of the children. Rather, plaintiff asks this Court grant him the benefit of his bargain, i.e., to remove the parenting time provisions he believed would only be temporary.

We reject plaintiff's invitation to strictly apply contract principles to the parties' stipulation. While stipulations accepted by the trial court are generally construed in the same manner as contracts, those principles do not control child custody disputes. *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000). Also, we must affirm all custody orders on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). We review for abuse a court's discretionary rulings regarding custody or parenting time. *Phillips, supra* at 20. An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Shulick v Richards*, 273 Mich App 320, 323-325; 729 NW2d 533 (2006).

This case was scheduled for trial on January 12, 2004. On that date the parties' attorneys announced to the court that although they had yet to agree on a division of the marital property, the parties had reached a settlement on all but two aspects of the primary issues of custody and

parenting time with the minor children. Plaintiff's attorney was the main spokesman regarding the terms of the parties' settlement. The parties asked the court to decide two unresolved issues: (1) whether plaintiff should have three or four weeks' parenting time during the children's summer vacation, and (2) whether defendant should have additional Wednesday parenting time for the rest of the then current school year. Pertinent to plaintiff's appeal, his attorney stated, "*while* the Defendant remains in Michigan, which *is expected* to be until the beginning of the summer of 2005, she has a job that is supposed to expire around that time. Okay. And she will be entitled to regular alternate weekends and alternating holidays." Plaintiff's attorney also stated, regarding the unresolved Wednesday parenting time issue, "we are talking about that pertaining to this period while [defendant] is still here in the State of Michigan finishing up this job, *which we expect* and which is reported to us is going to end near the beginning of summer." The trial court requested clarification that when the parties referred to holidays, they meant those holidays recognized in the Van Buren County parenting time policy. The trial court later confirmed that "the every other holiday *while* [defendant] is in Michigan is not something I decide, that was something that the parties decided and [I] just wanted to clarify that meant holidays pursuant to the [county] handbook"

After extended colloquy between the court and counsel regarding the terms of the settlement, the court requested that counsel and the parties confirm the settlement, which they did. The trial court noted it was "satisfied that [the settlement] is a fair agreement reached after fair negotiations," and commended the parties and their attorneys for reaching an agreement. The trial court especially praised the parties because "what you did today was really the best possible thing you could have done for your kids."

On January 13, 2005, the trial court entered an order regarding the two unresolved parenting time issues. The court awarded plaintiff twenty-four days of parenting each summer. The court also awarded defendant parenting time on Wednesday evenings commencing January 19, 2005, "and continuing until the school year for '05-'06 commences or until the defendant mother returns to Texas to exercise her summer parenting time, whichever happens first."

After the January 12 settlement and January 13 order, the parties could not agree on a proposed judgment of divorce. Numerous other hearings were held and various orders entered. Eventually, the trial court signed a judgment on September 30, 2005, which was entered on October 3, 2005. Plaintiff appeals the following parenting time provisions:

6. The Defendant is awarded weekly visits every Wednesday from 3:00 p.m. to 8:30 p.m. commencing January 19, 2005 and continuing until the school year for 2005-2006 commences or until the Defendant returns to Texas to exercise her summer parenting time, whichever happens first. (From Order Regarding Parenting Time Matters—entered January 12, 2005).

7. During the time the Defendant remains in Michigan the Defendant shall have the children every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. Unless specified above, the defendant shall have the children . . . every other holiday as specified in the Van Buren County Parenting Time Policy.

First, we decline to address plaintiff's arguments regarding ¶ 6. That provision by its own terms has expired and any issue on appeal regarding Wednesday parenting time is now

moot. Either party may, however, move to modify the parenting time provisions in the judgment based on changed circumstances.

With respect to the alternate weekend and holiday parenting time, we conclude that no basis exists to reverse the trial court. Plaintiff has not established that the trial court clearly erred in determining the parties had not made their custody and parenting time stipulation contingent on defendant's moving out of Michigan at the end of the 2004-2005 school year. Moreover, plaintiff makes no argument that the trial court's ruling is contrary to the best interests of the children. Consequently, we find no abuse of discretion in the trial court's rulings regarding custody or parenting time. *Phillips, supra* at 20.

Stipulations are agreements between the parties and, as such, are generally construed as contracts. *Id.* at 21. But contract principles do not govern child custody matters. *Id.* Our Supreme Court has opined that "where the parties have agreed to a custody arrangement," the trial court is not required "to conduct a hearing or otherwise engage in intensive fact-finding." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004). Instead, the court must "satisfy itself concerning the best interests of the children. When the court signs the order, it indicates that it has done so. A judge signs an order only after profound deliberation and in the exercise of the judge's traditional broad discretion." *Id.* at 193. The record indicates such is the case here.

The parties stipulated to certain custody and parenting time terms. On the record, one of those terms was that "while the defendant remains in Michigan," she would have regular parenting time on alternate weekends and alternating holidays. While plaintiff's counsel noted that plaintiff was only expected to be in Michigan until the beginning of the summer of 2005, he did not limit the alternate weekend and holiday visitation to the period leading up to the summer of 2005. Plaintiff's expectation that defendant would leave Michigan when her job was scheduled to end at the beginning of Summer 2005 was just that—an expectation. Defendant's choosing to remain in Michigan was not beyond the realm of possibility. Plaintiff's failure to provide in the stipulation for the possibility that defendant would remain in Michigan does not alter the terms of the stipulation and does not warrant a distinction, as plaintiff argues, between temporary and permanent terms. A party may not stipulate to a matter in the trial court and then argue on appeal that the resulting action was error. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

In custody disputes, the "overriding concern and the overwhelmingly predominant factor is the welfare of the child[ren]." *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 595; 532 NW2d 205 (1995). MCL 722.25 specifically directs that in a custody dispute between parents, the best interests of the children control. Defendant has had alternate weekend and holiday parenting time for more than two years, and the record does not reflect that such visitation is not in the children's best interest. Indeed, as noted already, plaintiff advances no argument at all that the parenting time provisions in the judgment are contrary to the children's best interests. Thus, on this record, the trial court properly exercised its discretion when incorporating the terms of the parties' stipulation regarding custody and parenting time into the judgment of divorce.

In the last issue on appeal, defendant argues that the trial court erred when it retained child support arrearages arising out of an initial ex parte interim order when the children were with defendant in Texas. We review the trial court's decisions regarding child support for an

abuse of discretion. *Gehrke v Gehrke*, 266 Mich App 391, 395; 702 NW2d 617 (2005). We do not find that the trial court abused its discretion by preserving the child support arrearage arising from the ex parte interim order.

At an April 26, 2005 hearing, plaintiff's attorney argued that the judgment of divorce should preserve child support arrearages that arose out of the July 11, 2003 order. Defendant's attorney objected to "retroactive child support," but the trial court clarified that plaintiff was "not asking for retroactive application," but rather, "simply asking that the arrears that accrued from the non-payment from the issuance of the order be preserved." Defendant argued that the trial court should "set it aside because [plaintiff] never had the children." The trial court indicated that it could find "equitable reasons to forgive [the] arrearage," and that "the arrearage in any situation is subject to . . . equitable relief." The parties reiterated their positions at later hearings.

The essence of defendant's argument is that she should not have to pay any child support arrearages arising out of the ex parte interim order because the children were with her in Texas during the period in which the child support payments were accruing. Although defendant requested the trial court to set aside the ex parte interim order as part of her relief requested in her motion for summary disposition, she failed to follow the proper procedure. She filed a motion to dismiss, not a motion to rescind. MCR 3.207(B)(5) instructs a defendant to "file a written objection to th[e] order or a motion to modify or rescind th[e] order" with the clerk of the court within 14 days after she was served with a copy of the order and serve a true copy of the objection or motion on plaintiff and the FOC. The record reveals that defendant did not file an objection to the ex parte interim order until June 4, 2004, nearly one year after entry of that order. Therefore, the trial court properly determined, on May 14, 2004, that defendant had not objected to the ex parte interim order. On this record, regardless of defendant's arguments, she failed to properly challenge the ex parte order.

Despite defendant's procedural failings, it appears that plaintiff and the trial court concurred that the amount of defendant's child support arrearages should be reduced to reflect the time the minor children were with defendant. Abatement was appropriate in this case. The child support formula recommends that support be abated by 50 percent when a child resides with a noncustodial parent for six consecutive nights or longer. 2004 Michigan Child Support Formula (MCSF) 3.06. Under the ex parte order, defendant was clearly the noncustodial parent. Therefore, she was entitled to an abatement of support during the time before the judgment when she was a noncustodial parent and was ordered to pay support but actually had the children living with her.

Additionally, this case involves precisely the type of situation where cancellation of child support arrearages may be warranted, and the trial court indicated as much. Because child support payments are not subject to retroactive modification, cancellation of arrearages is generally not available. See *Waple v Waple*, 179 Mich App 673, 674-677; 446 NW2d 536 (1989). But the unavailability of retroactive relief does not apply to an ex parte interim support order. MCL 552.603(3); *Thompson v Merritt*, 192 Mich App 412, 421; 481 NW2d 735 (1991). A payer who has an arrearage under a support order may seek relief from the arrearage by moving "for a payment plan to pay arrearages and to discharge or abate arrearages." MCL 552.605e(1). The trial court laid out the proper procedure for defendant to follow to make an equitable argument for cancellation of the child support arrearages and insinuated that it would grant defendant equitable relief. But because defendant had not properly sought relief from the

arrearages at the time the judgment of divorce was entered, the trial court did not abuse its discretion in preserving the arrearages.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski