STATE OF MICHIGAN

COURT OF APPEALS

LUKE NATHANEAL BOWMAN, Plaintiff-Appellant,	UNPUBLISHED February 13, 2018
v	No. 339702 Van Buren Circuit Court
CHELSEY ANN BOWMAN, Defendant-Appellee.	LC No. 16-065846-DM

Before: MARKEY, P.J., and M. J. KELLY and CAMERON, JJ.

PER CURIAM.

Plaintiff, Luke Bowman, appeals by right the trial court order dismissing his complaint for divorce for failure to meet the residency requirements of MCL 552.9(1).[1] Because the trial court failed to make factual findings to support its decision, we reverse and remand for further proceedings. However, we affirm the trial court's decision to deny a stay of the child-custody proceedings pending the outcome of an appeal in the Georgia Court of Appeals.

I. BASIC FACTS

The parties married in Georgia in 2009. Their first child, NB, was born in Georgia in 2011. Their second child was born in Michigan in 2013. Throughout the marriage, the parties lived in various states, including Michigan, Georgia, and Wisconsin. Relevant to this appeal, the parties lived in Georgia for about 9 or 10 months after NB was born. They then moved to Decatur, Michigan in May or June 2012, and they stayed there for about 6 months before moving to Kalamazoo, Michigan. In April 2014, they moved back to Decatur, Michigan. From there, starting in September 2014, the parties and their children moved to Wisconsin for about a year. Although there was conflicting evidence on how long Chelsey Bowman and the children

[1] For ease of reference, we will refer to the parties by their first names.

remained in Wisconsin,[2] Luke testified that he was laid off from his job at the end of June. He then took a contract job in Indiana.[3]

Luke testified that from August 2015 until the end of 2015, he worked in Indiana. He stated that while he was working in Indiana, his residence remained in Decatur, Michigan. According to Luke, while he was in Indiana, he worked about five days a weeks and stayed with his cousin at his cousin's house. However, he testified that he did not maintain a residence in Indiana and that the job was only a temporary job that he took while waiting for an apprenticeship position to open up. He added that although he and Chelsey had considered renting a house in Indiana, they ultimately decided to purchase a house in Michigan instead. He stated that he had no mailing address in Indiana and that he could return home—which he identified as his parents' home in Decatur, Michigan—on a moment's notice. Luke explained that while he was working in Indiana, he "came home on every—all my days off."

On November 26, 2015, the parties and their children traveled to Georgia to visit with Chelsey's family for Thanksgiving. Chelsey testified that she originally intended to return to Michigan with the children after the vacation. On November 30, 2015, Luke left Georgia to return to work. The children remained in Georgia with Chelsey. According to Luke, Chelsey was going to purchase a vehicle and drive back to Michigan with the children. Instead, Chelsey and the children remained in Georgia, and Chelsey refused to return the children to Michigan.

On December 11, 2015, Chelsey filed a complaint regarding custody and a complaint for separate maintenance in a Georgia trial court. The Georgia trial court entered an ex parte custody order granting Chelsey temporary custody until further order of the court.

On January 8, 2016, Luke filed a verified complaint for divorce in Van Buren County, Michigan. He also filed a motion requesting that the children be returned to Michigan and that he be granted sole legal and physical custody over them. The trial court held a hearing regarding whether the children should be returned to Michigan and whether Michigan was the proper forum to resolve the custody dispute. Both parties testified at the hearing regarding where the children had resided prior to the instant custody dispute. Thereafter, the trial court determined that Georgia was the more appropriate forum to exercise jurisdiction in the initial child-custody determination. Relevant to the instant appeal, the trial court stated that it would retain jurisdiction over the divorce proceedings "provided that [Luke] can show the necessary requirement for residency under the laws of the State of Michigan."[4]

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[2] Luke testified that Chelsey and the children remained in Wisconsin until July 2015. Chelsey, however, testified that she left Wisconsin with the children in October 2015 and that she then spent some time living in Decatur, Michigan with Luke's family.

[3] Chelsey testified that Luke went straight from Wisconsin to Indiana.

[4] MCL 722.1207(4) provides:

This Court granted Luke's motion for leave to appeal.[5] The issues raised on appeal related solely to whether the trial court erred by declining jurisdiction over the child-custody portion of the case. This Court determined that the trial court had failed to comply with the requirements set forth in MCL 722.1206(2) of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), MCL 722.1101 *et seq*. *Bowman v Bowman*, unpublished per curiam opinion of the Court of Appeals, issued October 10, 2016 (Docket No. 331870); unpub op at 1. Accordingly, this Court remanded to the trial court "to comply with the requirement of MCL 722.1206(2) that it communicate with the Georgia court." *Id*. at 6. This Court directed that "if, after communication between the two courts, the Georgia court does not determine that Michigan is a more appropriate forum to resolve the child-custody dispute, the trial court shall dismiss this case." *Id*.

On remand, the trial court communicated with the Georgia trial court, which did not determine that Michigan was a more appropriate forum than Georgia. Luke appealed the Georgia court's decision to exercise jurisdiction under the UCCJEA to the Georgia Court of Appeals. He then argued to the Michigan trial court that it should stay the proceedings in the child-custody portion of the case pending the resolution of the Georgia appeals process. The trial court, however, declined to stay the child-custody proceedings and entered an order dismissing the child-custody portion of the case for lack of jurisdiction.

In addition, the trial court dismissed the divorce proceedings. The record reflects that in his complaint for divorce, Luke asserted that he had resided in Van Buren County for at least ten days before filing the complaint and that he had resided in Michigan for at least 180 days before filing the complaint. Relevant to this appeal, Chelsey denied that Luke had resided in Michigan for the requisite 180 days before filing his complaint. She also challenged his ability to meet the residency requirements at the evidentiary hearing regarding the children's residency. Although the trial court acknowledged that there was a factual dispute regarding Luke's residency, it never made any findings on the issue. Instead, it held that provided that Luke could establish residency, it would maintain jurisdiction over the divorce proceedings. Then, in the proceedings on remand, relying on a footnote in this Court's opinion, the trial court held—without making any factual findings—that Luke failed to meet the residency requirements of MCL 552.9(1).

This appeal follows.

> (4) A court of this state may decline to exercise jurisdiction under this act if a child-custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

Thus, although the trial court's decision to bifurcate the child-custody proceedings and the divorce proceedings was unusual, it was not an error of law.

[5] *Bowman v Bowman*, unpublished order of the Court of Appeals, entered April 11, 2016 (Docket No. 331870).

II. JURISDICTION

A. STANDARD OF REVIEW

Luke argues that the trial court erred by dismissing his complaint for divorce based on a failure to meet MCL 552.9(1)'s residency requirements. If a party cannot meet the residency requirements in MCL 552.9(1), the trial court cannot exercise jurisdiction over the parties' divorce. We review de novo whether a trial court lacks jurisdiction. *Berger v Berger*, 270 Mich App 700, 702; 747 NW2d 336 (2008). However, whether a party has satisfied the jurisdictional requirements in MCL 552.9 presents a factual question, which this Court reviews for clear error. *Id*. "A finding is clearly erroneous if, on all the evidence, the Court is left with the definite and firm conviction that a mistake has been made." *Id*. " 'Questions of domicile and intent are also questions of fact.' " *Kar v Nanda*, 291 Mich App 284, 287; 805 NW2d 609 (2011), quoting *Leader v Leader*, 73 Mich App 276, 283; 251 NW2d 288 (1977). Here, however, although there was some testimony relating to it, the trial court made no factual findings regarding Luke's residency. Rather, the trial court determined that it was bound by a footnote in this Court's earlier opinion. "Whether the law-of-the-case doctrine applies is a question of law that we review de novo." *Duncan v Michigan*, 300 Mich App 176, 188; 832 NW2d 761 (2013).

B. ANALYSIS

The first question we must determine is whether the law of the case doctrine bars consideration of whether Luke can satisfy the residency requirements in MCL 552.9(1). In *In re Wayne Co Treasurer*, 265 Mich App 285, 297; 698 NW2d 879 (2005), we explained:

> Under the law of the case doctrine, if an appellate court resolves a legal issue and remands to the trial court for further proceedings, the legal question determined by the appellate court will not be decided differently in a subsequent appeal in the same case if the facts remain materially the same. Stated another way, the doctrine is applied when the prior appeal involves the same set of facts, the same parties, and the same question of law . . . . [quotation marks and citations omitted.]

Generally, law of the case applies regardless of the correctness of the prior opinion. *Sumner v Gen Motors Corp (On Remand)*, 245 Mich pp 653, 662; 633 NW2d 1 (2001). Further, under some circumstances, it also applies to dicta in a prior opinion. *Bauer v City of Garden City*, 163 Mich App 562, 571; 414 NW2d 891 (1987). In *Bauer*, we explained:

> The problem with dicta, and a good reason that it should not have the force of precedent for later cases, is that when a holding is unnecessary to the outcome of a case, it may be made with less care and thoroughness than if it were crucial to the outcome. Because the legal holdings in published cases are binding not only on the parties to those case, but also on all later parties in all later cases, allowing dicta to be precedent would have the unfair effect of binding litigants who have never had the opportunity to argue the issue to a remark of the court, which may not be the best expression of the court's studies. The same argument, however, does not apply to the actual litigants before the court when the decision is made.

> These litigants *have* had an opportunity to argue the issue decided, if it is properly before the court. Courts make brief judgments all the time, but these judgments are nonetheless binding on the parties to the particular lawsuit. *If an issue is properly before this Court, the Court's decision on the question is binding on the lower court and on any later panels which hear the case, under the doctrine of the law of the case.* [*Id*. (second emphasis added).]

Here, the issue of Luke's residency under MCL 552.9(1) was never properly before this Court in the prior appeal. Instead, although it had been raised in the trial court, the trial court had not yet made a definitive ruling on it. Further, when we granted leave to appeal, we did not instruct the parties to address whether Luke could satisfy the residency requirements in MCL 552.9(1). Instead, we directed the parties to consider an issue related to the child-custody proceedings that had not been raised in the application for leave to appeal.[6]

Moreover, in addition to not being raised or briefed in the earlier appeal before this Court, this Court's opinion only tangentially touched on the residency requirement in MCL 552.9(1). In a single footnote, this Court stated:

> Interestingly, the trial court maintained jurisdiction over the parties' divorce proceedings, despite testimony that plaintiff had not resided in Van Buren County for the required statutory period or, arguably, the State of Michigan for the necessary period. The trial court thus bifurcated the divorce and child custody issues. [*Bowman*, unpub op at 4 n 2.]

It engaged in no legal analysis of the issue and merely reflected this Court's surprise that the trial court had not addressed the jurisdictional requirements for the divorce proceedings at the same time that it addressed the jurisdictional issues surrounding the child-custody proceedings. Accordingly, we do not believe that the law of the case doctrine applies to the dicta comments in this Court's earlier opinion. See also *People v Goliday*, 153 Mich App 29, 33; 394 NW2d 476 (1986) ("Our Court has [] declined to apply the law of the case doctrine where the issue in the subsequent appeal was not squarely presented in the first appeal, and where the discussion in the earlier appeal was dicta."); *Cicelski v Sears, Roebuck & Co*, 132 Mich App 298, 306; 348 NW2d 685 (1984) (declining to apply the law of the case doctrine because the issue in the subsequent appeal was not "squarely before" the court in the prior appeal and amounted to mere dicta).

Having determined that the law of the case is inapplicable, we turn to the merits of the trial court's decision to dismiss the divorce complaint based on Luke's failure to meet the residency requirements of MCL 552.9(1). Under MCL 552.9(1), "[a] judgment of divorce shall not be granted by a court in this state in an action for divorce unless the complainant or defendant has resided in this state for 180 days immediately preceding the filing of the complaint and, . . . the complainant or defendant has resided in the county in which the complaint is filed for 10 days immediately preceding the filing of the complaint." The statutory residency

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[6] *Bowman v Bowman*, unpublished order of the Court of Appeals, entered April 11, 2016 (Docket No. 331870).

requirements are jurisdictional, and a divorce is void if it does not comply with the residency requirements. *Kar v Nanda*, 291 Mich App 284, 287; 805 NW2d 609 (2011).

Here, although the testimony certainly reflects that, for the majority of the 180 days preceding the filing of the complaint for divorce, Luke was physically in Indiana. However, physical presence for the entirety—or even the majority—of the residency period is not required by MCL 552.9(1). See *Leader*, 73 Mich App at 281 (finding that the complainant satisfied the 180-day residency requirement despite the fact that she was "physically outside the State of Michigan during most of the jurisdictional period."); see also *Berger*, 277 Mich App at 703 (stating that the 10-day residency requirement does not require the complainant or the defendant to maintain a continuing physical presence in the county for the 10 days immediately preceding the filing of the complaint for divorce). Further, as this Court explained in *Kar*, 291 Mich at 290, "intent is the preeminent factor for determining residence" and "an already established domicile is not destroyed by a temporary absence when there is no intention to change domicile." Here, although there was testimony at the child-custody hearing that Luke was physically present in Indiana, there was also testimony that he intended to reside in Michigan. Specifically, he testified that he returned to Michigan on his days off, that his family was in the process of moving back from Wisconsin to Michigan while he was in Indiana, that he and Chelsey were looking to purchase a home in Michigan, and that he kept his Michigan mailing address while he was in Indiana. Chelsey, on the other hand, offered testimony suggesting that the parties intended to leave Michigan permanently. She testified that when they left Wisconsin, their intent was to move to Indiana. She further testified that they looked at houses in Indiana and that they did not enroll their son in school in Michigan because they were going to move to Indiana. She explained that although the plan was for her and the children to return to Michigan after Thanksgiving, they were only temporarily staying in Michigan until they found a place in Indiana. Given the conflicts between the parties' testimonies concerning where Luke intended to reside, it is plain that there remains a factual dispute on this issue. Because the trial court has yet to make any findings on this issue, there is nothing for this Court to review. Accordingly, we remand to the trial court to determine whether Luke's complaint for divorce met the residency requirements in MCL 552.9(1).

III. STAY

Luke additionally argues that the trial court should have granted a stay of the proceedings pending the resolution of his appeal in Georgia. In support, he directs this Court to MCL 722.1206(2), which provides:

> (2) Except as otherwise provided in section 204, before hearing a child-custody proceeding, a court of this state shall examine the court documents and other information supplied by the parties as required by section 209. If the court determines that, at the time of the commencement of the proceeding, a child-custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this act, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this act does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the child-custody proceeding.

Luke contends that, until the Georgia Court of Appeals reaches a decision, the Georgia court has yet to make a decision, so the proceedings must be stayed until such a time.

However, nothing in MCL 722.1206(2) requires the appellate process be exhausted before Michigan can dismiss a child-custody proceeding. Further, in our prior opinion, we directed the trial court to communicate with the Georgia court and to dismiss this case if "the Georgia court does not determine that Michigan is a more appropriate forum to resolve the child-custody dispute." *Bowman*, unpub op at 6. The trial court did communicate with the Georgia trial court and, as a result of that communication, dismissed the case. Nothing in our prior opinion prevented such a result. Further, although we acknowledge that neither the statute nor our prior opinion would bar the trial court from granting a stay, it exercised its discretion to not grant a stay. Here, absent authority compelling a stay or facts demonstrating that the denial of a stay would prejudice Luke in the event that Georgia rules in his favor, we see no error in the trial court's decision. Accordingly, we affirm the trial court's decision to deny a stay of the child-custody proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Thomas C. Cameron