

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LISA A. BRIGHAM,

UNPUBLISHED

May 3, 1996

Plaintiff-Appellant,

v

No. 183676

LC No. 82-249661-DM

KEVIN S. BRIGHAM,

Defendant-Appellee.

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Before: Sawyer, P.J., and Neff and R. D. Gotham,\* JJ.

PER CURIAM.

Plaintiff appeals as of right from the order of the circuit court granting defendant's motion to change physical custody of the parties' minor children. We reverse and remand for proceedings consistent with this opinion.

I

Plaintiff first argues that the trial court erred in ordering custody to be changed. On the record presented, we agree.

Reversal is required in this case because the record below was insufficient to support the trial court's order. First, although it was undisputed that the children lived with plaintiff for four to five years before defendant's motion, no determination was made regarding whether a custodial environment existed. MCL 722.27(1)(c); MSA 25.312(7)(1)(c).

Further, no hearing was held to determine whether clear and convincing evidence existed warranting a change in custody, or to determine the best interest of the children. Rather, it appears that the trial court based its decision to change custody on two factors: (1) that plaintiff failed to appear for the scheduled hearing; and (2) that the children were made temporary wards of the court in a probate matter.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Regarding plaintiff's failure to appear, we conclude that, to the extent the trial court was attempting to sanction plaintiff for her failure, the sanction, although technically authorized, was too harsh considering the importance of this matter and the alternatives available. See MCR 2.506(F).

Next, with regard to the probate matter, on our review of the record we could not determine the disposition of that proceeding. Contrary to the trial court's assertion in its written opinion, the record indicates only that a petition had been filed, not that the children were made wards of the court. Further, the petitions provided that defendant failed to assist in the problems leading to the instigation of the probate proceedings.

Accordingly, because the record is inconclusive regarding the evidence presented to warrant a change of custody, and nonexistent regarding the best interest of the children, we conclude that the trial court erred in ordering custody to be changed. See *Fletcher v Fletcher*, 447 Mich 871; 526 NW2d 889 (1994).

We order this matter remanded for an evidentiary hearing to allow the appropriate findings of fact and conclusions of law to be made. The trial court should consider all up-to-date information presented by the parties. *Id.* at 889.

## II

Plaintiff next argues that the trial court erred in denying her motion for immediate return of the children because defendant violated the automatic stay provision in MCR 2.614.

Like the trial court, we find MCR 2.614(A)(2)(e) inapplicable. However, we conclude that because the court's post-judgment order concerning custody was final, MCR 7.203(A)(3), the automatic stay applied. See, also, *Loyd v Loyd*, 182 Mich App 769, 782; 452 NW2d 910 (1990). We find no reason to hold MCR 2.614(A)(1) inapplicable to this proceeding merely because the court issued a "final order," rather than a "judgment," see MCR 2.602; MCR 7.202(8)(a). Further, the trial court gave no other justification for refusing to enforce the provision. See *Id.*; *Lyons v Lyons*, 125 Mich App 626, 630 n 5; 336 NW2d 844 (1983).

However, in light of the serious nature of the allegations in this case and the probate matter, and the fact that the children have resided with defendant for over a year, we conclude that interest of the children will be best served by leaving them with defendant pending the resolution of this matter on remand. MCR 7.216(A)(7).<sup>1</sup>

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Roy D. Gotham

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<sup>1</sup> Further, we know of no rule that requires the custody order be reversed simply because the court rule was not followed. Additionally, plaintiff's attack on the court's ruling is technically moot because the twenty-one day period in MCR 2.614(A)(1), has long since passed. See *Loyd, supra* at 783.