

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN ALLEN PHILLIPS

Plaintiff-Appellee,

v

DARIEN JESSICA ROSS (VAN SOELEN),

Defendant-Appellant.

UNPUBLISHED

July 26, 1996

No. 186384

LC No. 92-001789

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right both the trial court's interim order and final order modifying physical custody of the parties' minor child. We vacate those orders and remand to the trial court.

Defendant gave birth to the parties' minor child in December 1988. Although the parties never married, they shared the same home until June 1992. In June 1993, a temporary custody order was issued wherein the parties were awarded joint physical custody, consisting of alternating weekly custody intervals. In August 1993, defendant was awarded primary physical custody, with liberal visitation extended to plaintiff. Defendant subsequently received permission to move the minor child to Texas.

In July 1994, while the minor child was visiting plaintiff in Michigan for the summer months, the trial court heard arguments on a motion by plaintiff. Although defendant acknowledged that the hearing was set for the purpose of clarifying his visitation rights, he proceeded to argue that his visitation should be extended indefinitely because the setting provided by plaintiff in Texas was unacceptable for the minor child. Defendant attempted to argue her position to the trial court, but she was cut short by the trial judge. Neither party was sworn to testify at the hearing. Thereafter, the trial court issued an interim order indefinitely extending plaintiff's visitation on the condition that plaintiff subsequently file a petition for change of custody. No provision was made for visitation on behalf of defendant. In August 1994, plaintiff petitioned for a formal change in custody, and on May 12, 1995, following a hearing on the matter, the trial court issued an order granting primary physical custody to plaintiff.

On appeal, defendant argues that the trial court committed clear legal error when it issued an interim order modifying the parties' prior custody arrangement because (1) the court failed to hold an evidentiary hearing; (2) the court failed to make any determination that "proper cause" or "changed circumstances" existed to warrant such a modification of custody; and (3) the court failed to make any factual findings or conclusions of law concerning the existence of an established custodial environment or whether such a change was in the child's best interest. We agree.

All custody orders must be affirmed 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; MSA 25.312(8); *Fletcher v Fletcher*, 447 Mich 871, 876-877, 900; 526 NW2d 889 (1994). A court commits "clear legal error" when it incorrectly chooses, interprets or applies the law. *Id.*, 881. Orders regarding custody and visitation cannot be modified, absent an agreement of the parties, unless the court first holds an evidentiary hearing. *Mann v Mann*, 190 Mich App 526, 530, 532-533; 476 NW2d 439 (1991); *Pluta v Pluta*, 165 Mich App 55, 60; 418 NW2d 400 (1987). A change in custody is properly made only upon a showing of "proper cause" or a "change in circumstances," and in accordance with the best interests of the child as set forth in of the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* *Stringer v Vincent*, 161 Mich App 429, 433; 411 NW2d 474 (1987). To make these determinations, a trial court must conduct an evidentiary hearing. *Id.*; *Mann, supra*. A trial court's characterization of its change of custody as temporary or interim does not relieve the obligation to comply with the mandate of §7(1)(c) to conduct an evidentiary hearing to determine "by clear and convincing evidence" whether a change in custody is in the best interests of the child. *Mann, supra* at 531; MCL 722.27(1)(c); MSA 312(7)(1)(c).

In this case, trial court issued the July 1994 interim order modifying the parties' physical custody arrangement (although characterized only as an extension of visitation) without first conducting an evidentiary hearing wherein it considered admissible sworn testimony and evidence. The trial court heard only unsworn and unsupported arguments, and failed to make any findings concerning the child's best interests. The trial court further failed to make a determination whether "proper cause" and/or a "change in circumstances" existed which would warrant modification of the custody order. Accordingly, we find that the trial court failed to follow the mandates of MCL 722.27(1)(c); MSA 312(7)(1)(c), and thus, a clear legal error has been committed.

Such an error was prejudicial and harmful. The issuance of the interim order essentially deprived defendant of any significant contact with the minor child and created a situation which ultimately favored plaintiff in the court's subsequent determination of custody in 1995. Because the result of the trial court's improper order was sole custody to plaintiff without visitation being awarded to defendant, the trial court subsequently found that plaintiff had created an established custodial environment. But for the improper July 1994 order, plaintiff would never have had the opportunity to present such evidence to the court. Due to the prejudicial error, the interim order must be vacated.

Defendant next argues that the trial court's final custody opinion and decision constitutes clear legal error because the court impermissibly adopted the recommendations of the Friend of the Court (FOC) rather than reaching its own independent conclusions. We agree. A trial court may consider a Friend of the Court report, but it must exercise its own discretion and reach its own conclusions. *Truitt v Truitt*, 172 Mich App 38, 42-43; 431 NW2d 454 (1988). In this case, the majority of the trial court's findings were recorded verbatim from the FOC report. The trial court never conducted its own hearing, and it inserted findings and conclusions that were either unsupported by the record, or clearly refuted by the testimony presented. A review of these findings makes it clear that the trial court impermissibly "rubber-stamped" the FOC's report and recommendation. Accordingly, the trial court's actions constitute clear error requiring a new hearing. *Id.* at 44.

Because we find that defendant will receive a new hearing, we need not address her argument that the trial court erred in finding that she had not created an established custodial environment for the minor child. Any determination would be merely speculative, as it is unknown what environment defendant could have established had the trial court not erroneously granted full custody to plaintiff.

Pursuant to MCL 722.27(1)(e); MSA 312(7)(1)(e), a trial court, "for the best interests of the child," may appoint a guardian ad litem or counsel for the child. Similarly, MCR 5.916(A) permits the appointment of a guardian ad litem for a minor child "if the court finds that the welfare of the party requires it." In this case, we believe that the best interests of the child would be served if a guardian ad litem were to be appointed to protect the child's welfare. Accordingly, upon remand, we direct the trial court to appoint a guardian ad litem for the minor child. *In re Dixon*, 417 Mich 986; 334 NW2d 373 (1983).

We vacate both the July 1994 interim order and the May 1995 opinion and order changing physical custody to plaintiff, and remand to the trial court for proceedings consistent with this opinion. Upon remand, the trial court shall appoint a guardian ad litem for the minor child. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald