STATE OF MICHIGAN

COURT OF APPEALS

BRENDA ADAMS,

Plaintiff-Appellant,

v

DAVID FOGLESONG, II,

Defendant-Appellee.

UNPUBLISHED

No. 185024
LC No. 91-20470-DS

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

SCHMUCKER, J. (concurring).

I concur.

I am writing separately because I disagree with my colleagues on the necessity of holding an evidentiary hearing. Requiring courts to hold evidentiary hearings when a party is not present would be a wasteful and useless exercise by the trial court. The party who fails to appear is in default and the contested issues should be decided in favor of the moving party. The majority opinion relies on *Currey v Currey*, 109 Mich App 111; 310 NW2d 913 (1981) and *Adams v Adams*, 100 Mich App 1; 298 NW2d 871 (1980). In *Currey*, plaintiff did not appear at the change of custody hearing but plaintiff's counsel appeared. *Id.* at 114. In *Adams*, neither the plaintiff nor the minor child appeared but plaintiff's attorney was present. *Id*. At 8.

If the plaintiff had been represented by counsel at the change of custody hearing, a meaningful hearing could have been conducted, but to conduct a hearing with neither the plaintiff nor her counsel present would be a meaningless exercise.

I concur in the result in this case because the defendant's motion for change of custody fails to set forth why it is in the best interests of the child that a change of custody occur. Defendant's motion essentially restates the visitation dispute, the unlawful relocation from Michigan, and the plaintiff's failure to allow the defendant parenting time. If the defendant's petition had set forth allegations on each specific factor under the child custody act and if plaintiff failed to appear, in person or through counsel,

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

then I would not require the court to hold an evidentiary hearing. However, since the petition in this case does not adequately address the best interests of the child as required by the child custody act, the court should not have granted the motion without making additional findings on the record. MCL 722.23; MSA 25.312(3).

/s/ Chad C. Schmucker