

STATE OF MICHIGAN
COURT OF APPEALS

EVELYN JO FISHER,

Plaintiff-Appellee,

v

MARK DOUGLAS FISHER,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 190661
LC No. 94-479529

Before: Corrigan, P.J., and Taylor and D. A. Johnston,* JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff sole legal and physical custody. We reverse and remand.

Defendant first argues that the trial court abused its discretion by temporarily changing custody solely on the basis of the Friend of the Court (FOC) referee's recommendation without holding an evidentiary hearing. We agree.

The divorce judgment awarded temporary legal custody of the minor child jointly to the parties and physical custody to plaintiff. After a dispute regarding the minor child's schooling, plaintiff sought temporary sole custody by filing an emergency motion to modify custody. The FOC referee issued his recommendation on the morning that the hearing regarding plaintiff's motion was held. The record discloses that the trial court, rather than basing its decision on evidence introduced at a hearing, merely adopted the FOC referee's report. There is nothing in the record that shows that the parties agreed to adopt the FOC referee's recommendation. In fact, the judgment of divorce indicates that if the parties objected to the FOC referee's recommendation, they were entitled to a hearing.

Under MCR 3.210(C)(5), a party must have an opportunity to review or file his objections to the FOC report. Further, as construed, subsection (7)(1)(c) of the Child Custody Act [MCL 722.27(1); MSA 25.312(1)], precludes a temporary change of custody without first holding a hearing. *Mann v Mann*, 190 Mich App 526, 531; 476 NW2d 439 (1991). In that case, this Court held that,

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

permitting a court to temporarily change custody solely on the basis of an FOC referee's recommendation and without holding a hearing would circumvent and frustrate one of the purposes of the Child Custody Act--to minimize the prospect of unwarranted and disruptive changes of custody. *Id.* at 531-532. The rationale was that without considering admissible evidence, live testimony, affidavits, documents, or other admissible evidence, a court could not properly make the findings of fact necessary to support its action under § (7)(1) of the Child Custody Act. *Id.*

The necessary hearing on the recommendation pursuant to subsection (7)(1)(c) was not held. Accordingly, the trial court clearly erred by granting plaintiff sole legal and physical custody, and we must remand the case to the trial court for compliance with the required procedures.

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

/s/ Maura D. Corrigan

/s/ Clifford W. Taylor

/s/ Donald A. Johnston