

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY SCARL,

Plaintiff-Appellant,

v

PAULA LEE,

Defendant-Appellee,

v

LINDA HAMEL,

Third-Party-Appellee.

UNPUBLISHED

December 2, 1997

No. 200777

Wayne Circuit Court

LC No. 95-507437-DC

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

In this custody dispute, plaintiff appeals as of right the November 16, 1996, order of Wayne Circuit Judge Michael J. Callahan awarding joint legal custody of Brandy Lee to plaintiff Anthony Scarl¹ and third-party Linda Hamel,² and awarding physical custody of Brandy to Hamel.

The only parties involved in the trial of this matter were plaintiff, who lives in Ohio, and Hamel, who lives in Detroit. Brandy's mother, defendant Paula Lee, lives in Canada and did not appear for any of the proceedings. Plaintiff filed an appeal of the trial court's decision, and this Court obtained jurisdiction of the matter on January 24, 1997.

On either September 18 or 19, 1997, the parties appeared before Judge Callahan on third-party plaintiff's motion to show cause for failing to return the child after visitation. Apparently, plaintiff had allowed Paula to take Brandy to Paula's home in Canada for a visit and Paula failed to return Brandy to plaintiff, who was then unable to return Brandy to Hamel. During the hearing on the motion to show cause, and without notice to either plaintiff or Hamel, Judge Callahan ordered that physical custody of Brandy be given to Paula, ordered an investigation regarding Paula's home, and ordered a

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

review of the issue of custody following the investigation.³ Judge Callahan also recused himself from further proceedings in this matter “due to the fact that I cannot be fair due to the misrepresentations of the parties.”

Hence, Brandy has apparently been living with Paula in Canada pursuant to Judge Callahan’s September 19, 1997, order changing custody. However, the trial court did not have jurisdiction to amend the custody order once this Court obtained jurisdiction. MCR 7.208(A). Further, Paula was not involved in the custody trial and therefore Judge Callahan had no evidence before him that could possibly have caused him to believe that it was in Brandy’s best interest to change custody. Under these unusual circumstances, we believe that it is in the best interests of the child to order a new custody trial in which all three parties can present proofs. Thus, pursuant to MCR 7.216(A)(7), we remand this case to the trial court for a new trial before a different judge within twenty-eight days of the release of this opinion.

Remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan

¹ Anthony Scarl is Brandy’s father.

² Hamel is Brandy’s maternal grandmother.

³ Apparently, this change of custody was made in response to Brandy’s letter to Judge Callahan wherein she indicated that she wanted to live with Paula.