

STATE OF MICHIGAN
COURT OF APPEALS

DEIDRE A. HOLMES,

Plaintiff-Appellant,

v

KELLY S. COLEMAN,

Defendant-Appellee.

UNPUBLISHED

July 18, 2006

No. 268303

Saginaw Circuit Court

LC No. 01-039186-DP

Before: Donofrio, P.J., and O’Connell and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order regarding custody of the parties’ minor child. We vacate the trial court’s October 20, 2005 custody order (the initial custody order) and the January 27, 2006 custody order (the final custody order) and remand for further proceedings.

A trial court may modify or amend a child custody order for proper cause shown or for a change of circumstances if modification is in the child’s best interests. MCL 722.27(1)(c). However, plaintiff argues that the trial court erred in changing custody to defendant while plaintiff was deployed to Iraq because she did not have notice of the proceedings and the trial court did not first conduct a hearing. We agree and vacate the initial custody order.¹ The court’s initial custody order was clearly erroneous because it was entered without first providing plaintiff with notice or finding any emergency that might justify temporary, ex parte relief.² The

¹ In the November 28, 2005, hearing after the initial custody order was issued, the trial court indicated that the order was not intended to be a custody order “because the [c]ourt never used the term legal or physical custody in any of its orders.” While the trial court did not specifically use those modifiers, the initial order was captioned as a custody order and expressly awarded defendant “custody.” Therefore, the trial court’s findings in this regard were clearly erroneous.

² We note that the trial court’s actions were an understandable response to plaintiff’s wrongdoing in the guardianship proceedings. The court apparently sought to remedy plaintiff’s unjust attempt to secure her mother’s guardianship over the child during her deployment without first providing defendant with notice of the proceedings. Although this was inappropriate, the trial court should not have conducted custody proceedings without first notifying plaintiff and
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failure to provide reasonable notice and an opportunity to be heard raises serious due process concerns. *Heltzel v Heltzel*, 248 Mich App 1, 19; 638 NW2d 123 (2001); *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). Furthermore, the lack of notice or appointed representation prevented plaintiff from exercising her federal rights as a deployed servicewoman. 50 USC Appx 521, 522.

The trial court compounded this initial error by neglecting to hold a de novo hearing after plaintiff objected to the referee's recommendations, MCL 552.507, and by failing to place any justification on the record for its denial of plaintiff's motion for a de novo hearing. If a referee hearing is held and one of the parties objects to the referee's recommendation, the trial court must hold a de novo hearing. *Cochrane v Brown*, 234 Mich App 129, 133-134; 592 NW2d 123 (1999). Also, absent particular findings and legal reasons for its actions, we cannot determine whether the trial court properly exercised its discretion in revising the original custodial arrangement. *Foskett v Foskett*, 247 Mich App 1, 13; 634 NW2d 363 (2001).

Fortunately, our Legislature recently provided us with an adequate remedy for these errors. According to MCL 722.27, a returning soldier or sailor may ask the trial court to return the custodial status of the child to where it was before deployment, and the trial court will then return the parties to the *status quo ante*. Although this statute was not enacted until after the trial court rendered its second custody order, the remedy it affords plaintiff fits this situation perfectly. Therefore, we vacate the trial court's custody orders and direct the trial court to comply with the statute. If defendant can demonstrate why the *status quo ante* custodial arrangement no longer suits the child's best interests, then he may move the trial court to take up the issue anew, with proper notice to both parties and a final adjudication by the court following a proper hearing or stipulation to a referee's findings.

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

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto

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providing her with an opportunity to be heard.