

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA L. CHAMBERS,
Plaintiff-Appellee,

v

STANLEY K. BUTTS,
Defendant-Appellant.

UNPUBLISHED
February 15, 2007

No. 270985
Wayne Circuit Court
Family Division
LC No. 99-922370-DC

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from a custody order granting plaintiff temporary sole legal and physical custody of their minor daughter.¹ We vacate and remand.

At the outset, we note that we are not evaluating the trial court's decision to issue bench warrants against defendant or the trial court's authority to take appropriate action based on the entry of an apparently fraudulent order dated July 20, 2006. While defendant's conduct in this case appears less than commendable, the sole issue before us is whether defendant was entitled to an evidentiary hearing at which the factors enumerated in MCL 722.23 would be considered.

As noted in *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004),

[w]e apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [Citations and quotation marks omitted].]

¹ We note that plaintiff's jurisdictional challenge is meritless. See MCR 7.202(6)(a)(iii).

Custody disputes are to be resolved in the best interests of the children, using the factors set forth in MCL 722.23. *Thompson, supra* at 356. Moreover,

[i]n rendering his or her custody determination, the finder of fact must state his or her factual findings and conclusions under each best interest factor. These findings and conclusions need not include consideration of every piece of evidence entered and argument raised by the parties. However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings.” [*MacIntyre v MacIntyre*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005).]

A court may not permanently or temporarily change custody without holding an evidentiary hearing. *Mann v Mann*, 190 Mich App 526, 530; 476 NW2d 439 (1991).

On September 14, 2000, upon stipulation of the parties, the court ordered that the parties share joint legal and physical custody of their daughter. The court ordered that plaintiff would have physical custody of their daughter during the summer when their daughter was not in school and that defendant would have physical custody of their daughter during the school year. However, on January 23, 2004, the court granted plaintiff temporary legal and physical custody of their daughter because of a pending child protective services investigation against defendant.

Even though the child protective services allegations against defendant were dropped, plaintiff informed the court that she did not wish to reinstate the joint custody agreement the parties entered into in 2000. At the August 5, 2004, motion hearing, the court asked the parties if they had any objections to the recommendation of the Family, Evaluation, Mediation, and Counseling Unit (FEMC), and defendant replied that he did. At that time, defendant requested “an immediate trial date” and the court assured defendant that he would get a notice in the mail regarding the trial date.

On October 18, 2004, the court vacated its temporary custody order.

The record shows that, on December 1, 2004, the court adopted the parenting time recommendation of the FEMC, which recommended that the parties share joint legal custody but that plaintiff retain sole physical custody of their daughter. Plaintiff moved the court to compel defendant to comply with its December 1, 2004, order, and, on June 9, 2006, the court heard plaintiff’s motion.

During the June 9, 2006, hearing, plaintiff argued that defendant failed to comply with the court’s orders to participate in mediation and substance abuse treatment or evaluation. Plaintiff further argued that, even though she was granted physical custody of their daughter, defendant refused to give their daughter back to her. According to plaintiff, defendant attempted to rely on the joint custody order that the court issued in 2000. Plaintiff requested that the court order that defendant return their daughter to her.

During the hearing, the court asked the parties when the school year ended, and plaintiff informed that court that it ended “next week.” The court then told that parties that defendant was required to return their daughter to plaintiff at the end of the school year. Dissatisfied with the court’s response, defendant indicated that he would be appealing the court’s order, but the court

replied, “sir, there’s nothing to file an appeal from,” and it informed defendant that it was merely ordering an expedited investigation. After the proceedings ended, the court drafted an order that granted plaintiff temporary sole legal and physical custody of their daughter and mandated that defendant immediately return their daughter to her.

Defendant argues that the trial court erred when it ordered a temporary modification of custody without granting him an evidentiary hearing. We agree.

Even though the court informed defendant that it was not making another custody determination at that time and that it was merely ordering an expedited investigation into the custody matter, the court issued a temporary custody order in plaintiff’s favor. A court speaks through its written orders and not through its oral pronouncements. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). When the court granted plaintiff temporary sole legal and physical custody of their daughter in its June 9, 2006, order, it changed its December 1, 2004, custody order, which granted the parties joint legal custody and plaintiff sole physical custody. In doing so, the court modified its custody order without an evidentiary hearing.

The trial court erred when it changed custody without granting defendant an evidentiary hearing. When changing a custody determination, the court is required to make specific findings of fact regarding each of the twelve factors. See *Grew v Knox*, 265 Mich App 333, 337; 694 NW2d 722 (2005), and *Daniels v Daniels*, 165 Mich App 726, 730-731; 418 NW2d 924 (1988). Specific findings of fact regarding each of the twelve factors that are to be taken into account in determining the best interests of the child must be made, whether a court is establishing custody in an original matter or altering a prior custody order. *Grew, supra* at 337. Even if custody is changed on a temporary basis, a hearing is required. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999).

The trial court changed its prior custody order and it did so without granting defendant an evidentiary hearing and without making any factual findings. Although plaintiff argues that, according to MCR 2.504(B)(1) and (2), the trial court may enter orders to facilitate the prompt and just disposition of an action if a party fails to comply with a court order, plaintiff’s broad reading of these court rules is inaccurate. The principles of statutory interpretation govern when interpreting and applying a court rule; therefore, when interpreting a court rule, the plain meaning of the rule prevails. *People v Walters*, 266 Mich App 341, 346; 700 NW2d 424 (2005). MCR 2.504(B)(1) and (2) clearly and unambiguously provide a means for a defendant to move for dismissal of a plaintiff’s claim if that plaintiff fails to comply with court rules or orders or fails to show a right to relief. Although it may be true that defendant refused to comply with the court’s orders, including its order to mediate, MCR 2.504(B) is limited and applies only to the involuntary dismissal of a plaintiff’s claim. For the reasons stated, we find that the trial court erred when it granted plaintiff temporary sole and legal custody of their daughter without granting defendant an evidentiary hearing.

We vacate the order granting plaintiff temporary sole legal and physical custody and remand to the trial court for an evidentiary hearing concerning the change of custody. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter