

STATE OF MICHIGAN
COURT OF APPEALS

PETER MOLLOY,

Plaintiff/Counter-
Defendant/Appellee,

v

WENDY MOLLOY,

Defendant/Counter
Plaintiff/Appellant.

FOR PUBLICATION
December 15, 2000
9:05 a.m.

No. 224179
Wayne Circuit Court
Family Division
LC No. 98-835819-DM

Updated Copy
February 2, 2001

Before: Collins, P.J., and Jansen and Zahra, JJ.

ZAHRA, J. (*concurring*).

I concur in the majority's reasoning and conclusion that remand to the trial court is necessary because the trial court failed to comply with MCL 722.26a(1)(b); MSA 25.312(6a)(1)(b) before ordering joint legal and physical custody of the litigants' minor child. I also concur in the majority's conclusion that the judgment of the trial court should be affirmed in all other respects. I write separately, however, because I conclude that defendant failed to preserve the issue whether the trial court improperly extended the in camera interview of the litigants' minor child to matters beyond the reasonable preference of the child. MCL 722.23(i); MSA 25.312(3)(i). Because, in my opinion, the issue on which the majority declares a conflict under MCR 7.215(H)(2) is not preserved, I conclude that *Hilliard v Schmidt*, 231 Mich App 316; 586 NW2d 263 (1998), does not determine the outcome of this case.

As observed by the majority, plaintiff brought a pretrial motion in limine to allow plaintiff to solicit testimony from the litigants' ten-year-old minor child relating to issues of fault. The trial court issued a written order granting the motion to allow such evidence. The order further states that the litigants "stipulated to [the] order on the record." The trial court speaks through its written orders. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997), citing *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Moreover, the written order is consistent with the record. While arguing in support of allowing testimony from the minor child, the litigants and the court had the following exchange:

[*Plaintiff's counsel*]: I . . . ask Sister Counsel to agree that when, your Honor interviews the child that perhaps, based upon some questions that we could write up and give to your Honor, in advance, perhaps those matters could be touched upon while your Honor, talks about the—to the child about reasonable preference and things of that sort.

The Court: Well, generally when I do question the children, I ask them about the relationship between their parents and some of the things that they're [sic] observed. So I would be inclined to consider incorporating questions that Counsel present during my personal interview. I would, of course, like to review those questions beforehand. And I will let you now [sic] which questions I will be asking because I don't want to put the child on the spot. And that will be something that we'll have to take up as a preliminary matter on the 18th.

[*Defendant's counsel*]: Your Honor, I'm not inclined to even present questions.

The Court: Okay.

[*Defendant's counsel*]: I have enough faith in this Court that the Court will ask the child questions in such a way not to pit the child mother against father. And I am not going to prepare questions to have the child testify to fault as to his parents.

The Court: Right.

Defendant's failure to preserve this issue is particularly significant because she is claiming a due process error. Due process is a flexible concept, which calls for such procedural

protections as a particular situation demands. *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976). At its core, due process requires that a litigant be given notice and an opportunity to be heard before the litigant may be deprived of a vested right. *Id.* at 332. In this case, the October 8, 1999, hearing on plaintiff's motion in limine provided defendant with both notice and an opportunity to be heard regarding the scope and manner by which the minor child would be questioned by the court. Defendant, having voluntarily relinquished her opportunity to address this issue, should not be permitted to complain about a denial of process.

Accordingly, I would affirm the judgment of the trial court with regard to the question whether the in camera interview of the minor child impermissibly extended beyond the question of the child's reasonable preference relating to custody. I reached this decision not because I am required to do so on the basis of the precedential effect, pursuant to MCR 7.215(H)(I), of *Hilliard, supra*. Rather, I reach this decision because defendant failed to preserve the question.

/s/ Brian K. Zahra