

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS JACOBS,

Plaintiff/Counterdefendant-
Appellant,

v

MARY BARKS,

Defendant/Counterplaintiff-
Appellee.

UNPUBLISHED

July 17, 2003

No. 247285

Lenawee Circuit Court

LC No. 97-018934-DM

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the order changing custody of the minor children from joint legal custody by the parties to legal custody by defendant alone.¹ We reverse and remand for a child custody hearing.

Plaintiff argues that the trial court erred by failing to hold an evidentiary hearing before changing custody. We agree.

A hearing is required before custody can be changed. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999); *Mann v Mann*, 190 Mich App 526, 529-530; 476 NW2d 439 (1991); see also MCR 3.210(C). Custody disputes are to be resolved in the child's best interest. The trial court must determine the best interests of the child as defined in MCL 722.23, and must make findings on each factor. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001).

This Court reviews questions of law in child custody cases for clear legal error. MCL 722.28; *Fletcher v Fletcher*, 447 Mich 871, 877-878; 526 NW2d 889 (1994), after remand 229 Mich App 19; 581 NW2d 11 (1998). Here, the trial court clearly erred by failing to hold an evidentiary hearing before changing custody of the boys. *Schlender, supra*. The court changed

¹ The judgment of divorce provided for joint legal custody, with defendant having primary physical custody.

legal custody because the parties could not “agree on anything.”² While the parties’ inability to share the decision-making authority regarding important decisions that affect the children’s welfare might be “proper cause shown” to consider changing legal custody of the boys, the court is still required to consider the best interest factors before changing custody. MCL 722.27(1)(c);³ *Mann, supra* at 530-531. The lower court record indicates that the court had presided over several show cause hearings, but never heard evidence regarding custody and did not make any findings on the best interest factors. Under these circumstances, we reverse the order changing custody of the children and remand the matter to the trial court for an evidentiary hearing to determine if a change in custody is in the best interest of the children.⁴

Plaintiff requests this court to reassign the case to a different judge on remand. Since plaintiff did not request disqualification of the judge in the trial court, this issue is not preserved. MCR 2.003; see *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997). Regardless, a careful study of the lower court record reveals no judicial bias. See *In re Smith*, 244 Mich App 153, 160; 624 NW2d 504 (2000); *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995), aff’d as modified on different grounds 451 Mich 457; 547 NW2d 686 (1996). Therefore, remand to a different judge is not required.

Reversed and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

² The record reveals that the parties appeared before the court on many occasions, several of which related to plaintiff’s objections to defendant unilaterally making decisions regarding medical and psychological care for the children.

³ MCL 722.27(1)(c) provides in pertinent part that:

The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

⁴ Plaintiff’s assertion that defendant did not file a motion requesting that the court grant her sole legal custody of the boys is misplaced. Several of defendant’s petitions in the trial court requested that the court grant her sole legal custody. Although the court did not address this issue when defendant originally raised the issue, the issue was before the court and the court did not impermissibly raise the issue sua sponte. *Mann, supra* at 538 (reversing a trial court’s grant of sole legal custody to the father when the father had not requested sole legal custody).