

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER BOWLING,

Plaintiff-Appellant,

UNPUBLISHED
December 13, 2016
APPROVED FOR
PUBLICATION
January 26, 2017
9:00 a.m.

v

BRADLY MCCARRICK,

Defendant-Appellee.

No. 331583
Ingham Circuit Court
Family Division
LC No. 09-001821-DS

Advance Sheets Version

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiff-mother, Jennifer Bowling, appeals by leave granted the trial court's order changing physical custody of the parties' son, MM, from herself to defendant-father, Bradly McCarrick.¹ We vacate the order and remand.

The parties have two children together, KM and MM, and their judgment of divorce provided for joint legal custody as to both children.² Pursuant to prior orders, Bowling had physical custody of MM, and McCarrick had physical custody of KM. The orders also provided that each party had parenting time with the child not in the party's physical custody. The instant matter concerns McCarrick's motion to change physical custody of MM.

MCL 722.27(1)(c) provides that the trial court may "modify or amend" a previous child custody judgment or order "for proper cause shown or because of change of circumstances" if doing so is in the best interests of the child. When a current order governs the custody of a

¹ *Bowling v McCarrick*, unpublished order of the Court of Appeals, entered June 3, 2016 (Docket No. 331583).

² McCarrick informed the trial court that he had another child and two stepsons who live with him and his wife. Bowling informed the trial court that she had four children total. No other information about these children is contained in the record.

minor child, the party requesting a change in custody bears the initial burden of proving “either proper cause or a change of circumstances sufficient to warrant reconsideration of the custody decision.” *Gerstenschlager v Gerstenschlager*, 292 Mich App 654, 657; 808 NW2d 811 (2011). The moving party must meet this burden by “a preponderance of the evidence . . . before the trial court can consider whether an established custodial environment exists . . . and conduct a review of the best interest factors.” *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003).

McCarrick’s motion to change custody was immediately referred by the trial court to the Ingham County Friend of the Court for a “conciliation conference.” Although the Michigan Court Rules do not refer to conciliation, conciliation is provided for in Ingham Circuit Court Local Administrative Order 2006-2, and it is described in the Ingham County Friend of the Court Handbook. It appears that the Ingham Circuit Court requires that all domestic cases involving issues of custody, parenting time, domicile, residence, and support be referred to a conciliation conference and that, at this conference, the parties meet with a conciliator from the Friend of the Court office, who employs mediation techniques in an attempt to help the parties resolve the dispute. Both Local Administrative Order 2006-2 and the Ingham County Friend of the Court Handbook state that if the parties are unable to reach agreement at the conciliation conference, the conciliator will make a recommendation to the circuit court that will become the court’s order unless either party files an objection, in which case a hearing will be held.

The parties attended the conciliation conference but were unable to reach an agreement. No record of the conference has been provided to us, and neither Local Administrative Order 2006-2, nor the Friend of the Court Handbook indicates that a record of conciliation conferences is to be maintained. The conciliator issued a report and recommendation on December 2, 2015, opining that there was proper cause or change of circumstances such that a change in physical custody could be considered. The report went on to recommend that primary physical custody of MM be changed from Bowling to McCarrick and set forth various reasons for that conclusion in the context of the statutory best-interest factors. Bowling timely filed an objection to the conciliator’s recommendation, and a hearing was held before the trial court on January 13, 2016.³

Plaintiff’s appeal centers on her assertion that the trial court may not consider a conciliator’s report with regard to either the proper-cause threshold question or the best-interest factors. We agree that the law is clear that a conciliator’s report may not be considered in regard to the threshold question. MCL 552.505(1)(g) authorizes the Friend of the Court, on order from the trial court, “[t]o investigate all relevant facts, and to make a written report and recommendation to the parties and to the court, regarding child custody or parenting time, or both, if ordered to do so by the court.” But, that statute also explicitly states that “[i]f custody

³ According to the Ingham County Friend of the Court Handbook, “[i]f objections are filed within the 21 days, a referee hearing will be held.” Although a referee hearing was not held, a hearing on the objections was heard by the trial court. The parties received a “Notice of Hearing” informing them of the hearing on Bowling’s objections.

has been established by court order, the court shall order an investigation *only if the court first finds* that proper cause has been shown or that there has been a change of circumstances.” *Id.* (emphasis added). Here, the trial court referred the matter to the Friend of the Court before it had made this determination. Indeed, in ultimately determining that there was proper cause, the court relied on the conciliator’s report. Moreover, the court’s ruling on the threshold question may have been influenced by the portion of the report addressing best interests, which would have put the best-interest cart before the threshold horse.⁴ Given this error, we vacate the trial court’s orders finding proper cause and changing custody and remand for further proceedings.⁵

We vacate the change-of-custody order and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

⁴ We recognize that as to the proper-cause question, an evidentiary hearing is not always required. *Vodvarka*, 259 Mich App at 512. However, in order to forgo a hearing, the trial court must determine whether “there are contested factual issues that must be resolved in order for the court to make an informed decision on the motion [to change custody].” MCR 3.210(C)(8). A trial court’s decision under MCL 722.27(1)(c) must be based on admissible evidence. *Mann v Mann*, 190 Mich App 526, 532; 476 NW2d 439 (1991).

⁵ We have not addressed whether the conciliator’s report may be relied on by the trial court in making a best-interest determination should the court find proper cause to consider a change in custody. Given that this record does not clearly set forth the training, job responsibilities, or authority of the conciliator in Ingham County, and given the lack of any statewide court rule governing conciliation, we cannot determine if the conciliator’s report would fall within MCL 552.505(1)(g) and MRE 1101 (applicability of the rules of evidence). Accordingly, if the trial court finds proper cause to consider a change in custody, it would be prudent for the trial court to conduct a full evidentiary hearing on the best-interest factors rather than to rely on a conciliator’s report.