STATE OF MICHIGAN

COURT OF APPEALS

THEODORE J. ZULKOWSKI III,

Plaintiff-Appellee,

and

ROBIN COOK,

Appellee,

v

JAMIE C. ZULKOWSKI, a/k/a JAMIE C. HOCKEMA,

Defendant-Appellant.

UNPUBLISHED
July 16, 2002

No. 236633
Macomb Circuit Court
LC No. 92-003679-DM

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

This case is an appeal stemming from a remand to the trial court by the Michigan Supreme Court. The case arises out of an ongoing custody dispute between defendant-mother and her child's custodian, Robin Cook, the paternal grandmother. Defendant and plaintiff-father married in 1991. The marriage produced one child, Dillon. During 1992, the parties separated and defendant left the marital residence. During the separation, plaintiff resided with Robin Cook and she became Dillon's primary caretaker. Pursuant to a court order, defendant visited Dillon once a week and on alternate weekends.

Defendant and plaintiff finally divorced in 1993. Pursuant to the judgment of divorce, defendant and plaintiff shared joint legal and physical custody of Dillon, with the day-to-day care awarded to Robin Cook. Defendant thought that the custody situation was a temporary solution until she was able to improve her situation.

By 1995, defendant's circumstances had dramatically improved[1] and she moved the court to modify the divorce judgment to allow her to provide day-to-day care of Dillon. The court

[1] She relocated to Indiana near her family, obtained a technical degree, remarried, resided in a stable home environment and changed jobs.

eventually referred the matter to the Friend of the Court. In 1999, the referee recommended that physical custody of Dillon remain with Robin Cook. In making the recommendation, the referee initially noted that, because defendant challenged the propriety of Dillon's custody in his established custodial environment with Robin Cook, defendant had the burden of establishing, by a preponderance of the evidence, that modification of custody was in Dillon's best interests. Robin Cook moved the court to change permanent custody of Dillon, to which defendant objected. On June 24, 1999, the court, after conducting a de novo hearing, affirmed the referee's recommendation and granted legal and physical custody of Dillon to Robin Cook.

After appealing to this Court on three occasions,[2] the Michigan Supreme Court, on defendant's application, vacated the trial court's June 24, 1999, order and remanded the matter to the trial court for a hearing on defendant's petition for custody. *Zulkowski v Zulkowski*, 463 Mich 932; 622 NW2d 65 (2000). The Supreme Court's order[3] directed the trial court to reconsider the standard adopted by the Michigan Court of Appeals in *Rummelt v Anderson,* 196 Mich App 491, 496; 493 NW2d 434 (1992), for resolving custody disputes involving a natural parent and a third party in light of the United States Supreme Court's decision in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000).[4] *Zulkowski, supra* at 932.

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[2] Defendant initially filed a claim of appeal, which this Court dismissed, without prejudice, for failure to cure a defect in the filing. *Zulkowski v Zulkowski*, unpublished order of the Court of Appeals, entered November 2, 1999 (Docket No. 221120). Subsequently, this Court denied defendant's motion for rehearing. *Zulkowski v Zulkowski*, unpublished order of the Court of Appeals, entered March 8, 2000 (Docket No. 221120). Defendant then filed an application for delayed appeal, which this Court denied for lack of merit in the grounds presented. *Zulkowski v Zulkowski*, unpublished order of the Court of Appeals, entered May 25, 2000 (Docket No. 225791).

[3] The order stated:

> In lieu of granting leave to appeal, the June 24, 1999 order of the Macomb Circuit Court is vacated, and the case is remanded to the Macomb Circuit Court for a hearing *by the circuit judge* on the defendant's petition for custody of her child . . . . In deciding whether to grant the petition, the circuit court is to address the interplay of the presumptions stated in MCL 722.27(1)(c) . . . and MCL 722.25(1) . . . and whether the construction supplied in *LaFleche v Ybarra*, 242 Mich App 692 (2000), *Rummelt v Anderson*, 196 Mich App 491, 496 (1992), and *Straub v Straub*, 209 Mich App 77, 79-80 (1995), gives to fit parents the degree of deference required by the U.S. Constitution. See *Troxel v Granville*, 530 US 57 (2000). [*Zulkowski, supra* at 933 (emphasis in original).]

[4] Under *Rummelt*, the burden rests with the natural parent to persuade the court by a preponderance of the evidence that a change in custody from an established custodial environment would serve the child's best interests. *Rummelt, supra* at 496. See, also, *LaFleche v Ybarra*, 242 Mich App 692, 696-698; 619 NW2d 738 (2000), and *Straub v Straub*, 209 Mich App 77, 79-80; 530 NW2d 125 (1995), where this Court also adopted the *Rummelt* standard. In *Troxel*, the United States Supreme Court emphasized the fundamental liberty interest of parents in the "care, custody, and control" of their children and the ability to make decisions regarding visitation. *Troxel, supra* at 65-66, 69-70, 72. Troxel involved a parental grandparents' petition for visitation with their grandchild.

In accordance with the Michigan Supreme Court's order, the trial court held a custody hearing. On August 31, 2001, the court issued its opinion concluding that the *Rummelt* standard did not violate a natural parent's constitutional right to raise her child. The court considered the best interest factors, applied the *Rummelt* standard and found that defendant failed to persuade the court that Dillon's established custodial environment should be altered and ordered that physical custody of Dillon vest in Robin Cook. Defendant appealed from this order. There is no indication in the record that plaintiff ever sought physical custody of Dillon, and at the hearing, he indicated that it was his desire that physical custody of Dillon vest in Robin Cook.[5]

Defendant challenges the trial court's ruling on legal grounds. She argues that the court applied the unconstitutional standard adopted in *Rummelt, supra* at 496. We agree. A legal challenge to a trial court's decision regarding a child custody dispute is reviewed for "clear legal error on a major issue." MCL 722.28; *Fletcher v Fletcher,* 447 Mich 871, 881; 526 NW2d 889 (1994); *Heltzel v Heltzel,* 248 Mich App 1; 15; 638 NW2d 123 (2001). "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher, supra* at 881. Upon a finding of clear legal error, this Court should remand to the trial court unless the error was harmless. *Fletcher, supra* at 882; *Heltzel, supra* at 23-24.

This Court recently addressed defendant's challenge in *Heltzel, supra* at 1. In light of the United States Supreme Court's decision in *Troxel, supra* at 57,[6] the Court rejected the *Rummelt* solution as "unconstitutionally infirm" because a child custody determination premised on *Rummelt* fails to accord the natural parent's fundamental interest in raising her child any special weight. *Heltzel, supra* at 21. The *Heltzel* Court concluded that due process requires that the presumption remain in favor of parental custody[7] unless otherwise shown by clear and convincing evidence. *Heltzel, supra* at 24-25. Further, placing the ultimate burden of persuading the court that a child belongs in the parent's custody on the parent is "constitutionally offensive" in violation of the parent's fundamental liberty interest in raising her child. *Heltzel, supra* at 22-23. Accordingly, the Court concluded that the trial court's application of the test set forth in *Rummelt* constituted clear legal error and adopted a new standard for custody disputes involving a natural parent seeking a change of custody from an established custodial environment with a third party. *Heltzel, supra* at 27.

The standard adopted by the *Heltzel* Court requires that "custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns . . ., taken together clearly and

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[5] Plaintiff argued that this case should not be analyzed as a case involving a parent and a third party, but rather, a dispute between two parents. However, the Court has treated cases with similar factual patterns as disputes between a parent and a third party. See *Deel v Deel,* 113 Mich App 556, 559; 317 NW2d 685 (1982).

[6] This Court recognized that in *Troxel*, "[t]he Supreme Court emphasized the fundamental constitutional right of parents to raise their children and make decisions regarding visitation, and necessarily custody." *Greer v Alexander,* 248 Mich App 259, 265; 639 NW2d 39 (2001).

[7] The parental presumption exists so long as a parent is fit. *Heltzel, supra* at 24-25.

convincingly demonstrate that the child's best interests require placement with the third person." *Heltzel, supra* at 27. "Only when such a clear and convincing showing is made should a court infringe on the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person." *Heltzel, supra* at 27-28. The existence of an established custodial environment should be considered, but should not itself eliminate the third person's burden to overcome the parental presumption by clear and convincing evidence. *Heltzel, supra* at 27, n 17. Further, it is not sufficient that the third person established by clear and convincing evidence that a "marginal, though distinct, benefit would be gained if the [child] were maintained with him." *Heltzel, supra* at 28, citing *Henrikson v Gable*, 162 Mich App 248, 252-253; 412 NW2d 702 (1987).

The trial court in this case premised its decision on its approval of the *Rummelt* standard, which *Heltzel* rejected as "unconstitutionally infirm." *Heltzel, supra* at 21.[8] After evaluating the best interest factors in accordance with MCL 722.23, the court concluded that defendant failed to persuade the court, by either a preponderance of the evidence or a clear and convincing standard, that the present established custodial environment should be altered. Requiring defendant to carry the burden of persuasion[9] pursuant to *Rummelt*, the court applied a standard that did not afford sufficient weight to defendant's fundamental constitutional right to raise her child. *Heltzel, supra* at 21. *Heltzel* requires the third-party custodian, Robin Cook, to persuade the court by clear and convincing evidence that it is in Dillon's best interest to remain in the established custodial environment. *Greer, supra* at 270; *Heltzel, supra* at 27. Because the court incorrectly applied the law, it committed clear legal error, which we are bound to correct. *Fletcher, supra* at 882.

We cannot say that this error was harmless in light of the fact that the evidence presented at the custody hearing did not weigh strongly against an award of custody to defendant. *Heltzel, supra* at 23. Testimony established that defendant is a completely capable stay-at-home mother in a stable marriage and family environment. Although significant, the fact that Robin Cook has been Dillon's custodian for the past nine years is the only factor weighing strongly against defendant. Given the *Heltzel's* Court's concern for placing too much emphasis on the established custodial environment to the detriment of the parent's fundamental constitutional right to raise her child, it cannot be said that the court's error was harmless. It is not sufficient that the third party establish by clear and convincing evidence that a "marginal though distinct benefit would be gained" if the child remained with the third party. *Heltzel, supra* at 28. In light of the pronouncement in *Heltzel* regarding the appropriate standard to be applied in custody disputes between a natural parent and a third-party custodian, we remand the case for an

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[8] In analyzing the *Rummelt* standard in light of *Troxel*, as ordered by the Michigan Supreme Court, the trial court approved of *Rummelt* and found that placing the burden of persuasion on the natural parent challenging the established custodial environment in the home of a third party "accords proper deference to a fit parent's rights under the United States Constitution."

[9] It is evident that the trial court placed the burden of persuasion on defendant both from its opinion and from review of the trial court's findings regarding the best interest factors. In every contested factor, the trial court focused heavily on the current custodial environment and ruled in favor of Robin Cook.

evidentiary hearing wherein the trial court shall apply the standard announced in *Heltzel.* [10]

Defendant next argues that on remand the trial judge should be disqualified. We disagree. Defendant failed to move for the trial court's disqualification pursuant to MCR 2.003.[11] Thus, this issue is not properly preserved for our review. *Meagher v Wayne State Univ,* 222 Mich App 700, 725; 565 NW2d 401 (1997). This Court reviews unpreserved claims for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). See also *In re Osborne,* 237 Mich App 597, 606, 610-611; 603 NW2d 824 (1999). Plain error warrants reversal where the error affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

Defendant asserts that disqualification is warranted because the trial court demonstrated prejudice and favoritism in its ruling. We disagree. Grounds exist for the disqualification of a trial judge when he cannot impartially hear a case, including situations where the judge is personally biased or prejudiced for or against a party. MCR 2.003(B)(1); *In re Forfeiture of $1,159,420,* 194 Mich App 134, 151; 486 NW2d 326 (1992). The party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections,* 451 Mich 470, 497; 548 NW2d 210 (1996), citing *In re Forfeiture of $1,159,420, supra* at 151.

Defendant asserts that judicial reassignment is necessary because the court applied and endorsed an unconstitutional standard, suggesting that on remand the court will not accept a different standard. However, at the time of the court's order, the *Rummelt* standard applied by the court was good law. There is no indication in the record or in the court's opinion that, on remand, the court would fail to apply the proper standard if ordered to do so by this Court. Defendant asserts that the best interest factors show the court's favoritism toward Robin Cook. Although the court did rule in favor of Robin Cook on all contested factors, those findings are supported by the evidence, and as such, do not show a deep-seated favoritism that would make fair judgment impossible. Defendant also asserts that because the court has ruled against defendant twice before, he is likely to rule against her again. Contrary to defendant's argument, disqualification is not established merely by repeated rulings against a litigant, even where the rulings are erroneous. *Wayne Co Prosecutor v Parole Bd,* 210 Mich App 148, 155; 532 NW2d 899 (1995).

In sum, defendant failed to demonstrate that the court displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. *Cain, supra* at 496. Furthermore, defendant failed to show any actual prejudice on the part of the trial judge. Because a showing of actual bias on the part of the judge is required for disqualification, and defendant has provided no evidence of actual bias or prejudice, she did not overcome the strong presumption of impartiality. *Cain, supra* at 495. Accordingly, defendant forfeited this claim as she failed to demonstrate plain error affecting her substantial rights. *Carines, supra* at 763-764.

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[10] Given our resolution of this issue, we need not address defendant's remaining argument concerning the trial court's findings regarding the best interest factors.

[11] MCR 2.0003(A) requires that a party must raise the issue of a judge's disqualification by motion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. On remand, the trial court should apply the standard announced in *Heltzel, supra* at 27, and *Greer, supra* at 270, and should consider up-to-date information. *Fletcher, supra* at 889.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter