STATE OF MICHIGAN

COURT OF APPEALS

ZJHILA HILL,

Plaintiff-Appellant,

v

JERVONE JOHNSON,

Defendant-Appellee.

UNPUBLISHED
February 25, 2025
9:58 AM

No. 369852
Wayne Circuit Court
Family Division
LC No. 23-164675-DP

Before: MARIANI, P.J., and RIORDAN and FEENEY, JJ.

PER CURIAM.

In this custody matter, plaintiff appeals by leave granted[1] the trial court's order denying plaintiff's ex parte motion for the return of her minor child, JH. We reverse.

I. BACKGROUND

This case arises out of the trial court's denial of an emergency ex parte motion requesting that defendant return JH to plaintiff. JH is plaintiff's minor son, and defendant is one of two putative fathers. Defendant was not listed on the birth certificate, did not sign an affidavit of parentage, and has not participated in genetic paternity testing.

In November 2023, plaintiff asked defendant to temporarily care for JH because her housing was unstable. According to plaintiff, around December 2023 or January 2024, she asked defendant to return JH because she had since obtained housing with her best friend, so housing was no longer a concern. Defendant refused, did not allow plaintiff to see or speak with JH, refused to provide his current address, and blocked plaintiff's phone number. According to defendant, he had tried repeatedly to return JH during that time, but plaintiff had refused to take JH back.

[1] See *Hill v Johnson*, unpublished order of the Court of Appeals, entered July 29, 2024 (Docket No. 369852).

In February 2024, plaintiff filed an emergency ex parte motion for the immediate return of JH, arguing that because paternity was not established, defendant had no legal rights to JH, and requesting an order for JH's immediate return. After briefly receiving testimony from the parties, the trial court denied plaintiff's motion, initially ordering that plaintiff receive parenting time in the form of a video call. After plaintiff's counsel, however, questioned the court for awarding defendant, a third party who had no legal rights to JH, custody without a best-interests evaluation, the court reversed course and simply denied the motion without parenting time. This appeal followed.

II. ANALYSIS

Plaintiff argues the trial court erred by denying her motion to return JH without a clear and convincing showing that it was in JH's best interests to remain placed with defendant, a third party. We agree.

We review questions of law, including a trial court's interpretation and application of statutes, de novo. *Barretta v Zhitkov*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 364921); slip op at 5. In a child-custody dispute, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "A clear legal error occurs when the circuit court incorrectly chooses, interprets, or applies the law." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014) (quotation marks, citation, and ellipsis omitted).

"The Child Custody Act (CCA), MCL 722.21 *et seq*., governs custody, parenting time, and child support issues for minor children in Michigan, and it is the exclusive means of pursuing child custody rights." *Barretta*, ___ Mich App at ___; slip op at 6 (quotation marks and citation omitted). This statutory scheme recognizes that "[a] natural parent possesses a fundamental interest in the companionship, custody, care, and management of his or her child" and that his or her "right to custody" necessarily "rests on a constitutional foundation." *Frowner v Smith*, 296 Mich App 374, 381; 820 NW2d 235 (2012). Under the CCA, a "parent" is defined as "the natural or adoptive parent of a child." MCL 722.22(i). "[A]n individual other than a parent" is considered a "third person." MCL 722.22(k). The term "natural parent" is not statutorily defined, but "we have previously interpreted the term to mean a blood relation." *LeFever v Matthews*, 336 Mich App 651, 663; 971 NW2d 672 (2021). "The CCA must be read in context not only with judicial decisions interpreting it but also within the broad statutory framework of family law." *Pueblo v Haas*, 511 Mich 345, 357; 999 NW2d 433 (2023). This includes the Paternity Act, MCL 722.711 *et seq*., and the Acknowledgement of Parentage Act (APA), MCL 722.1001 *et seq*., both of which provide a means of establishing paternity for a child born out of wedlock. *Id*. at 358; *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003).

Under the APA, "[i]f a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage." MCL 722.1003(1). Absent an acknowledgement of parentage, a putative father has no right to custody of the child under the APA. See MCL 722.1004 ("An acknowledgment signed under this act establishes paternity, and the acknowledgment may be the basis for court ordered child support, custody, or parenting time

without further adjudication under the paternity act[.]"). The Paternity Act provides that paternity may be established by the parties' "consent to an order naming the man as the child's father" or, if the parties do not consent, by genetic testing (court-ordered or otherwise). MCL 722.714(9) and (10). Upon making a paternity determination under the Paternity Act, the trial court "may enter an order of filiation" establishing paternity. MCL 722.714(14).

In light of the above, we conclude that defendant is not the "natural father" of JH, and instead, is a "third person" under the CCA. As plaintiff points out, defendant has not established paternity of JH under either of the above statutes. See, e.g., *Pecoraro v Rostagno-Wallat*, 291 Mich App 303, 314; 805 NW2d 226 (2011) ("Whether the putative father would be considered a natural or biological parent under the [CCA] is irrelevant unless he can first establish paternity under Michigan's Paternity Act."). Defendant testified that he did not sign an affidavit of parentage, which is required to establish paternity under the APA. See MCL 722.1004. Further, the court and the parties acknowledged at the hearing that genetic testing had not been completed, and according to plaintiff's brief on appeal,[2] no testing has been conducted since. See MCL 722.714(9) and (10). Nor did the parties consent to an order naming defendant as JH's father. See MCL 722.714(9). A review of the lower court's register of actions also reveals that no orders of filiation or judgment of paternity have been entered. See MCL 722.714(14). Indeed, it appears the case has languished since the trial court abruptly changed course and denied plaintiff's request to retrieve her young child.

In a dispute between a parent and a third party, the CCA creates a statutory presumption that custody with the parent is in the child's best interests as described in MCL 722.23. See MCL 722.25(1); *Howard v Howard*, 310 Mich App 488, 494-497; 871 NW2d 739 (2015). This remains true even if the child had been living with the third party. *Howard*, 310 Mich App at 495 ("[T]he presumption in favor of an established custodial environment set forth in MCL 722.27(1)(c) yields to the parental presumption set forth in MCL 722.25(1)."). This presumption may be overcome only if it "is established by clear and convincing evidence" that custody with the third party, rather than the parent, is in the child's best interests. MCL 722.25(1); see also *Howard*, 310 Mich App at 496-497. In other words, "once a natural parent initiates a custody dispute with a third-party custodian, the third party . . . must . . . present evidence in support of that party's claim that the child's best interests are served by the continued placement of the child with that third party instead of the natural parent." *Howard*, 310 Mich App at 496-497. "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 within MCL 722.23, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person." *Id*. at 496 (quotation marks, citation, and alterations omitted). In addition, this Court has repeatedly recognized that "Michigan has an important public policy favoring the return of children to custodial parents who have temporarily transferred custody in order to meet those children's needs," *Stoudemire v Thomas*, 344 Mich App 34, 48-49; 999 NW2d 43 (2022) (collecting cases), and "a parent who voluntarily and temporarily relinquishes custody to foster his or her child's best

[2] Defendant has not filed a brief on appeal, nor did he file a response to plaintiff's application for leave to appeal.

interests should not suffer a penalty for [such an] election," *Frowner*, 296 Mich App at 385 (citation omitted). See also *id.* (confirming that "[i]ndeed, we encourage such a practice") (quotation marks, citation, and alterations omitted).

Here, the trial court recognized that defendant had not established paternity. The court also explicitly acknowledged that it had not conducted an evaluation of the best-interests factors, but nonetheless denied plaintiff's motion to return JH.[3] When asked about defendant's lack of a legal status as JH's father, the court responded, "Well [plaintiff] felt good enough to take him over there." Furthermore, the court did not allow plaintiff any parenting time, despite initially recognizing that plaintiff "need[ed] to see the child" and stating that it "ha[d] no problem with her seeing him." The extent of the court's reasoning for denying the motion was that it seemed to find plaintiff untrustworthy, it was not satisfied it would be putting JH "in a better situation given mom's instability," and it was not satisfied it was in JH's best interests to return him to plaintiff.

The trial court could award defendant ongoing custody of JH over plaintiff only if defendant "prove[d] that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within MCL 722.23, taken together clearly and convincingly demonstrate[d] that the child's best interests require placement with" defendant rather than plaintiff. *Howard*, 310 Mich App at 496 (quotation marks, citation, and alterations omitted). And in performing that analysis, the court was required to bear in mind Michigan's "important public policy favoring the return of children to custodial parents who have temporarily transferred custody in order to meet those children's needs." *Stoudemire*, 344 Mich App at 48-49; see also, e.g., *Frowner*, 296 Mich App at 385. Not only did the trial court wholly fail to conduct such an evaluation, its determination was otherwise unsupported by the slim testimony at the hearing. In fact, defendant did not contest the return of JH to plaintiff, had no concerns about returning JH to plaintiff so long as plaintiff had "a place where [JH] can lay his head," and indicated that he could return JH to plaintiff that day if necessary. And plaintiff, for her part, testified she had a place to stay with her best friend, including a shared room for JH. Given the foregoing, we conclude the trial court committed clear legal error by failing to apply the parental presumption or otherwise make a best-interests determination as required by MCL 722.25(1) before ordering that JH remain placed with defendant.[4]

Reversed and remanded for further proceedings consistent with this opinion. To the extent JH currently remains in the custody of defendant (as appears to be the case), a best-interests hearing must be held as soon as possible, and no later than 28 days from the issuance of this opinion, to

[3] When plaintiff's counsel pointed out that the court had "essentially made either a custody or parenting time decision even if it's temporary without going through any of the factors," the trial court interrupted, stating: "Well then, okay, you're right, then the motion is denied. I won't make any decision. There won't be any parenting time then. You're right, counsel, I have not gone through the 12 best interest factors. You're right, the motion is denied, okay."

[4] Given our disposition of this issue, we need not reach plaintiff's additional claim that the trial court's legal errors violated her constitutional rights to due process.

determine whether continued custody with defendant is warranted under the proper legal standards as discussed above. We retain jurisdiction.

/s/ Philip P. Mariani
/s/ Michael J. Riordan

Court of Appeals, State of Michigan

ORDER

ZJHILA HILL V JERVONE JOHNSON

Docket No. 369852

LC No. 23-164675-DP

Philip P. Mariani
Presiding Judge

Michael J. Riordan

Kathleen A. Feeney
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence as soon as possible and shall be given priority on remand until they are concluded. As stated in the accompanying opinion, to the extent the minor child, JH, currently remains in defendant's custody, a best-interests hearing to determine whether continued custody with defendant is warranted shall be held as soon as possible, and no later than 28 days from the date of this order and accompanying opinion. The proceedings on remand, including the issuance of all rulings and orders, shall be completed and concluded as soon as possible, and no later than 35 days from the date of this order and accompanying opinion.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

Presiding Judge

Feeney, J., would order the immediate return of the child to plaintiff but concurs with the retention of jurisdiction and the timing set forth in the order to resolve the hearing and have the matter returned to the Court of Appeals.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

February 25, 2025
Date

Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

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Before: MARIANI, P.J., and RIORDAN and FEENEY, JJ.

FEENEY, J. *(concurring in part and dissenting in part)*

I agree with the majority that the trial court erred by refusing to return the child to plaintiff-mother, but I do so on the basis of the well-established presumption in favor of a fit natural parent's fundamental constitutional right to parent his or her child, pursuant to MCL 722.25(1); that this presumption controls over the presumption in favor of an established custodial environment with a third-party, pursuant to MCL 722.27(1)(c); and the policy in Michigan that a parent who voluntarily and temporarily relinquishes custody of the child should not suffer a penalty for this choice. See *Frowner v Smith*, 296 Mich App 374, 381-386; 820 NW2d 235 (2012); *Heltzel v Heltzel*, 248 Mich App 1, 26-27; 638 NW2d 123 (2001). Notably, in both *Frowner* and *Heltzel*, the biological parent stipulated to entry of an order placing the child in the custody of the child's grandparents. *Frowner*, 296 Mich App at 376; *Heltzel*, 248 Mich App at 4-5. Conversely, in this case, defendant is a legal stranger to the child, and no custody order exists. Yet these cases, as well as *Hunter v Hunter*, 484 Mich 247, 263; 771 NW2d 694 (2009),[1] make it crystal clear that the trial court's decision to leave the child with defendant in this case violated plaintiff's constitutional rights. Therefore, the trial court's order must be vacated forthwith and the child returned immediately.

[1] The plaintiffs in *Hunter* were the children's aunt and uncle who obtained full guardianship of the defendants' children when the defendants were struggling with substance abuse. *Hunter*, 484 Mich at 252.

In *Frowner*, 296 Mich App at 381-382 (emphasis added), this Court summarized the law on this topic as follows:

> A natural parent possesses a fundamental interest in the companionship, custody, care, and management of his or her child, an element of liberty protected by the due process provisions in the Fourteenth Amendment of the United States Constitution and article 1, § 17, of the Michigan Constitution. *In re Rood*, [483 Mich 73, 91–92; 763 NW2d 587] (2009) (opinion by CORRIGAN, J.). The United States Supreme Court strongly reaffirmed the constitutional rights of parents in *Troxel v Granville*, [530 US 57, 65; 120 S Ct 2054; 147 LEd2d 49] (2000), invalidating a Washington statute permitting a court to order grandparent visitation despite parental opposition. The Supreme Court explained that the Washington statute "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. *The preeminence of a parents precious right to raise his or her child is so firmly rooted in our jurisprudence that it needs no further explication.*
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> In enacting the Child Custody Act, MCL 722.21 *et seq.*, our Legislature recognized that a parent's right to custody rests on a constitutional foundation. The parental presumption in MCL 722.25(1) codifies the fundamental tenet that, in a custody disagreement between a fit parent and a third party, the fit parent has the advantage:
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> > If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, *the court shall presume that the best interests of the child are served by awarding custody to the parent or parents*, unless the contrary is established by clear and convincing evidence.
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> This Court first acknowledged the tension between MCL 722.25(1) and MCL 722.27(1)(c) in [*Heltzel*, 248 Mich App at 26-27]. In that case, a mother sought to regain custody of her child whom she had previously placed in her parents' care. In *Heltzel*, as here, the biological parent had stipulated for the entry of an order in favor of the grandparents' custody. *Id.* at 4–5 . . . . Unlike in this case, the circuit court in *Heltzel* afforded the parent an evidentiary hearing concerning the child's best interests. *Id.* at 7 . . . . In reviewing the evidence produced at the hearing, the circuit court placed on the mother the burden of proving that a change of custody would serve the child's best interests. *Id.* at 13 . . . .
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> This Court reversed, holding that when a "fit natural mother" seeks a change of custody "from an established custodial environment with third persons," the application of a presumption in favor of the custodial environment with the third

persons constitutes clear legal error. *Id.* at 23 . . . . The *Heltzel* Court specifically addressed the situation presented here:

> We do not believe, however, that the Legislature intended that in every custody dispute between a noncustodial natural parent and a third-person custodian, the third-person custodian could eliminate the fundamental constitutional presumption favoring custody with the natural parent, and thus arrive on equal footing with the parent with respect to their claim of custody to the parent's child, merely by showing that the child had an established custodial environment in the third person's custody. This interpretation . . . fails to take into proper account the parents' fundamental due process liberty interest in childrearing. [*Id.* at 26–27 . . . .]

In [*Hunter,* 484 Mich at 263], the Supreme Court reaffirmed *Heltzel*'s central holding: "In *Heltzel,* our Court of Appeals recognized *Troxel*'s mandate: In order to protect a fit natural parent's fundamental constitutional rights, the parental presumption in MCL 722.25(1) must control over the presumption in favor of an established custodial environment in MCL 722.27(1)(c)." Further, in *Hunter,* [484 Mich at 260], quoting *Heltzel,* [248 Mich App at 27], the Supreme Court adopted the manner in which *Heltzel* resolved the "interplay" of the two presumptions:

> "[C]ustody 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 within [MCL 722.23], taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person."

"Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person." *Heltzel,* [248 Mich App at 27–28]. [*Frowner,* 296 Mich App at 382-384.]

* * *

But *Heltzel* and *Hunter* instruct that a court may not interpose a presumption in favor of a child's established custodial environment as an obstacle to parental custody. Rather, due regard for Smith's parental rights requires that the circuit court presume him to be the proper caretaker of his child. Enforcing this presumption requires that any opposing presumption, shielding the child from a custodial change absent a showing of proper cause or changed circumstances, must yield. Thus, the circuit court clearly erred by applying MCL 722.27(1)(c) in this case.

> Nor does our jurisprudence countenance the notion that Smith relinquished his fundamental liberty interest in raising his child by stipulating to the order granting custody to the Frowners. *This Court has emphatically stated that a parent who voluntarily and temporarily relinquishes custody to foster his or her child's best interests should not suffer a penalty for this election. Speers v. Speers,* [108 Mich App 543, 547; 310 NW2d 455] (1981). Indeed, "[w]e encourage such a practice . . . ." *Theroux v Doerr,* [137 Mich App 147, 150; 357 NW2d 327] (1984). [*Frowner*, 296 Mich App at 384-385 (emphasis added).]
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> As stated by our Supreme Court in *Hunter,* "when these presumptions conflict, the presumption in MCL 722.27(1)(c) must yield to the presumption in MCL 722.25(1)." *Hunter,* [484 Mich at 264]. Because Smith's ability to pursue custody of his child is essential to his constitutional right to parent, the circuit court erred by conditioning Smith's right to enter the pursuit on his establishment of proper cause or a change in circumstances. [*Frowner*, 296 Mich App at 385-386.]

Notably, in *Theroux*, 137 Mich App at 148, the mother obtained physical and legal custody of the children, but when she was accepted into a nine-month master's degree program, she and the father agreed that he would, during that nine-month program, have physical custody of the children. This Court recognized that it was necessary to encourage the practice of voluntarily relinquishing custody to protect the children's best interests; "otherwise a mother would be reluctant to relinquish custody if she knew that, once it passed to the father, it could not be regained." *Id*. at 150. In reversing the trial court, this Court gave effect to the parties' stipulation "as we desire to encourage the practice [mother] utilized of voluntarily and temporarily relinquishing custody of her children to protect their best interests." *Id.* at 151.

The case at bar is factually distinct from all these cases; whereas each case involved an earlier agreed-to change of custody or guardianship regarding the minor child, there is no stipulation, agreement or order in this case. Those custody agreements gave the guardian or nonbiological parent caregiver standing to challenge the child or children's removal from their home. Here, defendant has no standing, and allowing the child to stay with defendant while the trial court asked him to complete DNA testing improperly elevated the desirability of maintaining continuity over plaintiff's constitutional right to parent. See *Speers*, 108 Mich App at 547. Accordingly, like this Court in *Theroux*, 137 Mich App at 151, I would: (1) reverse the trial court's erroneous decision to leave the child with a man who has not, in the year that this case has been pending or during the life of this child, established his legal parentage of the child; and (2) immediately "reinvest the mother with legal and physical custody" of the child.

While the majority has decided to remand this case to conduct the required hearing within 28 days, I would remind the trial court of our Supreme Court's conclusion in *Hunter*, 484 Mich at 265-266, that "(1) the parental presumption in MCL 722.15(1) prevails over the presumption in favor of an established custodial environment in MCL 722.27(1)(c) and that (2) the parental presumption can be rebutted only by clear and convincing evidence that custody with the natural

parent is not in the best interests of the child . . . .” This is the analysis that should have been done, but was not, in February 2024.

/s/ Kathleen A. Feeney