

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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THEODORE J. ZULKOWSKI III,

Plaintiff-Appellee,

and

ROBIN COOK,

Appellee,

v

JAMIE C. ZULKOWSKI,

Defendant-Appellant.

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UNPUBLISHED

July 20, 2004

No. 253056

Macomb Circuit Court

LC No. 92-3679-DM

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's denial of her motion for change of custody. Plaintiff and defendant's minor child currently lives with appellee Robin Cook, the minor's paternal grandmother. We reverse.

This case has a long history. On September 3, 1992, plaintiff filed for divorce. Plaintiff and defendant had been married since June 22, 1991. They had one minor child from the relationship, born on December 2, 1991. Both parties sought custody. On September 3, 1992, an ex-parte interim order was issued, granting plaintiff-father temporary custody of the minor. Defendant-mother subsequently withdrew her pleadings and the divorce continued as uncontested. On August 13, 1993, the trial court entered the judgment of divorce and granted joint legal and physical custody to plaintiff-father and defendant-mother, with grandmother Robin Cook providing day-to-day care of the minor. The reasons for that provision in the judgment are not apparent on the record.

On July 20, 1995, defendant-mother filed a motion to modify the judgment of divorce to allow her to provide day-to-day care of the minor because her circumstances had changed and she was now in a stable environment. On February 9, 1998, Cook filed an application for intervention with a motion for a change of permanent custody, stating that she had standing due to her care of the minor. A custody order was entered adopting the Friend of the Court's May

12, 1999, recommendation that Cook retain custody, and granting legal and physical custody of the minor to Cook.<sup>1</sup>

Defendant-mother filed a claim of appeal and, on November 2, 1999, this Court dismissed defendant-mother's appeal due to a filing defect of non-conformity with MCR 7.201(B)(3) and MCR 7.216(A)(10). *Zulkowski v Zulkowski*, unpublished order of the Court of Appeals, entered November 4, 1999 (Docket No. 221120). A second motion for rehearing was denied by this Court on March 8, 2000. *Zulkowski v Zulkowski*, unpublished order of the Court of Appeals, entered March 10, 2000 (Docket No. 221120). On May 25, 2000, this Court also denied defendant-mother's application for delayed appeal for lack of merit in the grounds presented. *Zulkowski v Zulkowski*, unpublished order of the Court of Appeals, entered May 26, 2000 (Docket No. 225791).

On December 12, 2000, the Michigan Supreme Court considered defendant-mother's delayed leave to appeal. Our Supreme Court vacated the June 24, 1999, order and remanded for a hearing, which it instructed was to be conducted by the circuit court judge, on defendant-mother's petition for custody of the minor. The Court ordered 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),<sup>2</sup> in light of the United States Supreme Court decision in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2d 49 (2000). *Zulkowski v Zulkowski*, 463 Mich 933; 622 NW2d 65 (2000).

On remand, the trial court held another custody hearing and, on August 31, 2001, ruled that physical custody should be awarded to Cook.<sup>3</sup> The trial court concluded that the *Rummelt* standard did not violate a natural parent's constitutional right to raise her child.

Defendant-mother again appealed the trial court's decision, which was reversed by this Court in *Zulkowski v Zulkowski*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 2002 (Docket No. 236633), on the basis that the "preponderance of the evidence" standard, placing the burden on the natural parent, *Rummelt, supra*, was unconstitutional. *Id.* at 3. Relying in part on *Heltzel v Heltzel*, 248 Mich App 1, 15; 638 NW2d 123 (2001), this Court

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<sup>1</sup> From the beginning, Friend of the Court investigators treated this case as a custody dispute between defendant-mother and grandmother Cook. The possibility of custody with plaintiff-father was never raised and the investigators opined early on that Cook was inherently more fit to parent than either party. The trial court routinely adopted FOC recommendations without any critical examination of Cook's role in this matter.

<sup>2</sup> Under *Rummelt*, trial courts assessed custody in third party cases under the familiar established custodial environment structure. The parent challenging the established custodial environment had the burden of showing by a preponderance of the evidence that changing the minor's environment was in the best interest of the child.

<sup>3</sup> As noted, the trial court's award of physical and legal custody to Cook was vacated by our Supreme Court. The question of legal custody was not considered on remand and is not raised on appeal. We presume that the provision of joint legal custody ordered in the parties' divorce judgment, the last valid judgment in this case, is in effect.

rejected the *Rummelt* standard as “unconstitutionally infirm” because it failed to accord appropriate weight to the natural parent’s constitutional right to raise her child. *Id.* at 3. This Court specifically found 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 [the minor child’s] custodian for the past nine years is the only factor weighing strongly against defendant. [*Id.* at 4.]

This Court reversed and remanded the instant case for consideration in light of updated information and under the *Heltzel* standard.

On second remand, evidentiary hearings were again held to gather updated information. On December 3, 2003, the trial court issued its opinion and order again granting physical custody to Cook. The trial court stated that Cook “has proven that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns, taken together clearly and convincingly demonstrate that [the minor’s] best interests require placement remain with her. The court is further satisfied that it is a clear benefit to the minor, not a marginal benefit, that his custody remain with [Cook].”

Defendant-mother argues on appeal that the trial court erred in granting sole physical custody of the minor child to Cook and that the trial court again placed too much emphasis on the established custodial environment to the detriment of the natural parent’s fundamental constitutional right to raise her child. We agree.

We stress at the onset that Cook, a third party, would not have had a right to initiate a custody action against defendant-mother, a natural parent in this case, and would not be a party here except for the provision in the parties’ divorce judgment. MCL 722.26c. Apparently Cook was never formally appointed the child’s guardian. The trial court recognized that Cook only had standing in this case because the minor child was placed in her custody pursuant to the divorce judgment. MCL 722.26b. Perhaps of necessity, defendant-mother assented to Cook’s standing at some point during this prolonged action, and, as it is not raised or briefed by the parties, we do not address that problem here, although we question whether Cook has a legally protected interest in this case. *In re Foster*, 226 Mich App 348, 358; 573 NW2d 324 (1997).

Parents have a “fundamental right,” a “liberty interest” in the care, custody and control of their children. *DeRose v DeRose*, 469 Mich 320, 328-329, 332; 666 NW2d 636 (2003), citing *Troxel, supra*, 530 US 65-66, 80. “[P]arents have a right to make decisions for children, and such decisions must be accorded ‘deference’ or ‘weight.’” *Id.* at 67, 78 n 2. In Michigan, there is also a statutory presumption in favor of parental custody. *Heltzel, supra*, 248 Mich App 24. When, as here, the statutory presumption in favor of parental custody and the presumption in favor of the established custodial environment conflict, due process demands that the presumption remain in favor of custody of the parent absent a showing of parental unfitness. *Id.* “It is presumed that the best interests of the child are served by granting custody to the natural parent.” *Id.* To rebut that presumption, a third party must show by clear and convincing evidence that child’s best interests require maintaining the established custodial environment. *Id.* at 24-25. “Only when such a clear and convincing showing is made should a court infringe on a parent’s fundamental constitutional rights by awarding custody of the parent’s child to a third person.” *Id.* at 27-28.

Further, the benefit established by the third party must be greater than a marginal, even if distinct, benefit. *Id.* at 28, citing *Henrikson v Gable*, 162 Mich App 248, 252-253; 412 NW2d 702 (1987).

There are twelve statutory factors provided in § 3 of the Child Custody Act that the court must consider in order to determine the best interests of children in custody cases. MCL 722.23; *Foskett v Foskett*, 247 Mich App 1, 9; 634 NW2d 363 (2001). The language of the factors suggests that the Legislature anticipated that the comparison would normally be between two parents rather than between a natural parent and a third-party custodian. With each statutory factor, the court is required to consider and explicitly state its findings and conclusions. *Bowers v Bowers*, 190 Mich App 51, 55; 475 NW2d 394 (1991).

The best interests of the child are determined by “the sum total of the following factors:”

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home, or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

Defendant-mother argues that the trial court failed to consider the evidence in the correct light under the current standard. The trial court's findings with regard to each of the factors are subject to review under the great weight of the evidence standard and should be affirmed unless the evidence clearly preponderates in the opposite direction. *Thompson v Thompson*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 250504, issued March 23, 2004, slip op at 7).

Factor (a), MCL 722.23(a), examines “[t]he love, affection, and other emotional ties existing between the parties involved and the child.” *Hillard v Schmidt*, 231 Mich App 316, 321-322; 586 NW2d 263 (1998). The trial court found that this factor weighed in favor of Cook because she had custody and had developed a strong bond with the child over the years. As the trial court acknowledged, however, there is every indication that both defendant-mother and Cook love the minor child and that he loves them. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court's finding that Cook was favored on this factor. *Thompson, supra*.

The second factor, MCL 722.23(b), looks at “[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.” The trial court found that Cook had provided the minor with more emotional stability than defendant-mother, had not interfered with defendant-mother's decision to raise the minor child in a religion, and that this factor favored Cook. Again, there is every indication that both defendant-mother and Cook have the capacity and disposition to give the minor child love and guidance. Although only defendant-mother regularly attends church, Cook is willing to respect defendant-mother's decision about the child's religious training. Again keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court's finding that this factor favored Cook. *Thompson, supra*.

The third factor, MCL 722.23(c), looks at “[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.” The trial court stated that defendant-mother had an arrearage on child support payments. The court noted but found irrelevant the fact that plaintiff-father, too, was in arrears. The trial court found that this factor favored Cook. The record, however, shows that Cook used defendant-mother's child support payments to finance this action to contest defendant-mother's motion for custody of the child, and that Cook herself had not yet paid the court ordered costs from the previous proceedings. Defendant-mother, a stay-at-home mom, was not employed, but her husband earned a salary of approximately \$57,000, they own a four bedroom home, and there is no evidence that the minor child ever lacked for anything while in their care. Cook and her husband receive Social Security and retirement benefits and, again, there is no evidence that the child ever lacked for anything in Cook's care. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court's finding in favor of Cook on this factor. *Thompson, supra*.

The fourth factor, MCL 722.23(d), looks at “[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.” Cook has provided daily care for the minor since he was an infant. The minor has flourished in his present environment and is now entering high school. The trial court found the factor favors Cook. Defendant-mother argues that factor (d) was wrongly weighed in favor of Cook because it solely focused on the established custodial environment. We agree. Our Supreme Court has explained that this factor contemplates an “inquiry into the extent to which a ‘home’ will serve as a permanent ‘family unit.’” *Ireland v Smith*, 451 Mich 457, 465 n 8; 547 NW2d 686 (1996). There is, in fact, every indication that both defendant-mother’s and Cook’s family units are permanent and stable. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court’s finding that Cook was favored on this factor. *Thompson, supra*.

The fifth factor, MCL 722.23(e), looks at “[t]he permanence, as a family unit, of the existing or proposed custodial home or homes.” The trial court found that the minor is living with his grandparents and plaintiff-father lives nearby with the minor’s half-siblings. Plaintiff-father is very involved with the minor. Although defendant-mother lives with the minor’s stepfather and half-siblings, she lives four hours away and has moved several times. The trial court found that this factor favors Cook because defendant-mother does not live in Michigan and because her family has been willing to move when career opportunities have arisen for her husband. The court improperly considered a subjective view of the “acceptability” rather than the permanence of the family units. *Fletcher v Fletcher*, 447 Mich 871, 884-885; 526 NW2d 889 (1994). This Court specifically found in its previous opinion that defendant-mother was in a stable family unit, and there is no evidence in the record to show that the situation changed by the time of this hearing. As noted previously, there is every indication in the record that the family units of both defendant-mother and Cook are permanent and stable. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court’s finding that this factor favors Cook. *Thompson, supra*.

The sixth factor, MCL 722.23(f), examines “[t]he moral fitness of the parties involved.” The trial court found that there was no evidence regarding the moral fitness of either party. Defendant-mother argues that the findings for this factor are against the great weight of the evidence because the court failed to consider that Cook has been using child support payments to fund this case. Factor (f) “relates to the parent-child relationship and the effect that the conduct at issue may have on that relationship.” *Hillard, supra*, 231 Mich App 323-324. We are unwilling to consider Cook’s decision to pursue this case, which she apparently believes is in the best interests of the child, an issue of moral fitness. The question under this factor “is not ‘who is the morally superior adult’; the question concerns the parties’ relative fitness to provide for their child, given the moral disposition of each party as demonstrated by individual conduct.” *Fletcher, supra*, 447 Mich App 887. There is no evidence regarding a lack of moral fitness on the part of either defendant-mother or Cook, and trial court’s finding on this factor was not against the great weight of evidence.

The seventh factor, MCL 722.23(g), examines “[t]he mental and physical health of the parties involved.” The trial court found that both defendant-mother and Cook enjoy good health and that Cook’s age alone does not render her health inferior to defendant-mother’s. Defendant-mother suggests that the court’s findings on this factor are against the great weight of the evidence because Cook’s surgeries, disability benefits and handicapped parking privileges indicate that Cook’s health is not comparable to defendant-mother’s good health. There is nothing in the record to suggest that Cook’s health has negatively affected her ability to care for the minor child and the trial court’s finding on this factor was not against the great weight of the evidence.

The eighth factor, MCL 722.23(h) involves “[t]he home, school, and community record of the child.” The trial court found that the minor is involved in several extra-curricular activities. He has won awards for his achievements while under Cook’s care, and on that basis, the trial court found that this factor favors Cook. Defendant-mother asserts that the minor could have flourished in any environment and that the court only focused on what the minor had been able to accomplish in his established custodial environment with Cook. We agree. The record shows that, when the minor child visits defendant-mother, he attends and excels at activities there. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court’s finding in Cook’s favor on this factor. *Thompson, supra*.

The ninth factor, MCL 722.23(i), is “[t]he reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.” The court examined the minor’s preference during an *in-camera* interview and, finding the minor of sufficient age and maturity, factored his stated preference into consideration. Defendant-mother argues that the court appeared to show bias throughout the case and may have done so in the *in-camera* interview. A review of the interview, however, convinces us that the court proceeded in an unbiased manner and asked questions that were not slanted toward either party. The trial court did not err in considering the minor’s reasonable preference. We note that the trial court did not state any conclusion regarding this factor. However, as the child indicated that he loved and felt loved by both of his parents and by Cook, we are not convinced that this factor clearly preponderates in favor of any party.

The tenth factor, MCL 722.23(j), looks at “[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.” The trial court stated that Cook has shown a willingness to facilitate a relationship between the minor and plaintiff-father and between the minor and defendant-mother. The trial court found that defendant-mother would facilitate a relationship between the minor and plaintiff-father, but opined that defendant-mother was not as likely to maintain a relationship with Cook. On that basis, the trial court found that this factor favored Cook. The trial court erred in basing its decision on this factor on defendant-mother’s willingness to encourage and facilitate the child’s relationship with Cook. The statutory language of this factor specifically pertains to the “willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.” MCL 722.23(j). We stress again that Cook is not the minor child’s parent and that, in the normal course of events, parents determine

how much time children will spend with their grandparents. *DeRose, supra*, 469 Mich 332. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court's finding that this factor favors Cook. *Thompson, supra*.

The eleventh factor, MCL 722.23(k), looks at “[d]omestic violence, regardless of whether the violence was directed against or witnessed by the child.” The trial court found that no testimony was presented indicating domestic violence between defendant-mother and Cook and found the factor inapplicable.

Factor (l), MCL 722.23(l), examines “[a]ny other factor considered by the court to be relevant to a particular child custody dispute.” The trial court indicated that it was appropriate to consider plaintiff-father's involvement in the minor's life. The trial court found that granting custody to defendant-mother would greatly hinder the minor's now-frequent contact with plaintiff-father and, on that basis, the trial court found that this factor favors Cook. Defendant-mother argues that the trial court placed too much emphasis on plaintiff-father's relationship with the minor when plaintiff-father never sought custody, and that too strong a focus was placed on the established custodial environment. We agree. It appears that the trial court again elevated Cook's status to that of a natural parent; while the minor child is able to see plaintiff-father frequently while he lives in Michigan with Cook, he has been unable to see defendant-mother frequently. Although both parents have a liberty interest in raising the minor child, only defendant-mother is pursuing custody.

The trial court also suggested that it was “important” to prevent a “complete upheaval” of the minor child's life by a move to Indiana, and that it was desirable for the child to attend high school in the community where he was raised and where he has friends. Defendant-mother has taken steps to ensure that the child could continue in many of the activities he enjoys while he is in Indiana, including local sports leagues. Ironically, the trial court criticized defendant-mother for allowing the child to spend time during his visitations in Indiana at sports camps, with his maternal grandparents or at the homes of new friends in that community. The trial court also implicitly suggested that the minor child's activities might be curtailed if he were moved to a custodial environment where he was not the only child. These considerations, which necessarily involve value judgments regarding the potential benefits of living in different places and of growing up in a household with siblings, are better left to the natural parents and have no place in this analysis. Keeping in mind the presumption in favor of parental custody and the presumption that the best interests of the child are served by granting custody to the natural parent, *Heltzel, supra*, 248 Mich App 24, the evidence here clearly preponderates in the opposite direction of the trial court's finding for Cook on this factor. *Thompson, supra*.

In viewing the “sum total” of the factors under MCL 722.23, we find that the trial court abused its discretion in determining that granting sole physical custody of the minor to Cook was in the best interests of the child. *Thompson, supra*. The record shows that defendant-mother is a “completely capable” parent, *Zulkowski, supra*, slip op at 4, and that the child's other natural parent, plaintiff-father, has never sought custody. Defendant-mother has made repeated attempts to regain custody of her minor child, and has been able to provide a fit home for him since before he was of school age. While we sympathize with the trial court's concerns about the possible hardship and upheaval to the minor child, who is naturally involved with friends and activities in

the community where he was raised, we cannot help but recognize that this sad situation would not have arisen if defendant-mother's constitutional right to parent her child had been given due deference in the beginning. A trial judge is not permitted to "make childrearing decisions simply because [the] state judge believes a 'better' decision could be made." *Heltzel, supra*, 248 Mich App 22, citations omitted. There is every indication that Cook has done an admirable job of caring for the child since he was an infant. However, defendant-mother, his natural parent, has been willing and able to provide a fit home for the child for over a decade, and has been prevented from doing so because Cook was permitted to establish a third-party custodial environment and because her interest was then elevated above the rights of defendant-mother. We urge the Legislature to address this question and to clarify the rights of a third-party custodian in situations such as this, where a fit parent requests custody.

Unfortunately, this case cannot yet come to a final conclusion. Our Supreme Court has determined that the trial court is in a "superior position to make accurate decisions concerning the custody arrangement that will be in the child's best interests." *Fletcher, supra*, 447 Mich 889-890. Because of the difficulty in setting aside the prior findings, we remand to a different judge. On remand, the trial court shall hold an evidentiary hearing within fourteen days and again consider all the statutory factors, taking into consideration any updated information regarding changes in circumstances since the previous hearing in this case.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder