526 P.3d 177
Supreme Court of Colorado.

IN RE the PEOPLE of the State of Colorado, Petitioner,
IN the INTEREST OF Child, A.P.,
and
Concerning S.S. and D.P., Respondents.

Supreme Court Case No. 22SA6
|
June 6, 2022

Synopsis

Background: Following mother's and father's acceptances of no-fault adjudications that child was dependent and neglected, county department of human services (DHS) filed motion to terminate parental rights to both. The District Court, Arapahoe County, entered order terminating their parental rights. Parents subsequently filed motion for relief from judgment on ground of judicial bias, following District Court judge's public censure by Supreme Court. The District Court, Kenneth M. Plotz, Senior Judge, granted motion. DHS filed petition for Supreme Court to exercise its original jurisdiction in order to vacate District Court's order granting relief from judgment terminating parental rights.

Holdings: The Supreme Court, Hood, J., held that:

Supreme Court's exercise of its original jurisdiction was appropriate;

parents failed to show actual judicial bias based on judge's actions in dependency and neglect and termination proceedings, coupled with public censure of judge due to inappropriate conduct unrelated from their case, as ground for relief from judgment; and

judgment terminating parental rights was not void based on alleged violation of due process.

Rule made absolute; remanded.

Procedural Posture(s): On Appeal; Motion for Relief from Order or Judgment; Petition to Terminate Parental Rights.

***180** *Original Proceeding Pursuant to C.A.R. 21*, Arapahoe County District Court Case No. 19JV878, Honorable Kenneth M. Plotz, Senior Judge

Attorneys and Law Firms

Attorneys for Petitioner: Ronald A. Carl, Arapahoe County Attorney, Kristi Erickson, Assistant County Attorney, Aurora, Colorado, Writer Mott, Deputy County Attorney, Rebecca M. Taylor, Assistant County Attorney, Littleton, Colorado

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Attorney for Respondent S.S.: Alan M. Lijewski, Broomfield, Colorado

Attorney for Respondent D.P.: Just Law Group, LLC, John F. Poor, Denver, Colorado

En Banc
JUSTICE HOOD delivered the Opinion of the Court, in which CHIEF JUSTICE BOATRIGHT, JUSTICE MARQUEZ, JUSTICE GABRIEL, JUSTICE HART, JUSTICE SAMOUR, and JUSTICE BERKENKOTTER joined.

Opinion

JUSTICE HOOD delivered the Opinion of the Court.

¶1 In this original proceeding, we review the district court's order setting aside the adjudication and termination orders entered against A.P.'s parents, S.S. and D.P. (collectively referred to as "Parents"), under C.R.C.P. 60(b)(5). Because Parents failed to show that former Judge Natalie Chase [1] was actually biased in their case, and because Rule 60(b)(5) is reserved only for extraordinary circumstances not present here, we make the rule absolute.

I. Facts and Procedural History

¶2 The Arapahoe County Department of Human Services ("ACDHS") filed a petition in dependency and neglect ("D&N") on November 14, 2019, claiming that Parents were using and selling heroin out of their home while caring for their three-year-old daughter, A.P. Judge Chase presided over most of this underlying D&N proceeding. Without objection from Parents, Judge Chase quickly placed A.P. in

the temporary custody of her paternal grandparents, with whom she has remained.

¶3 Parents initially requested a jury trial. Judge Chase obliged and set a case management conference, a pretrial readiness conference, and a trial date. She also informed counsel that if Parents failed to appear at either conference, the jury trial would automatically convert into a bench trial. Parents failed to appear at both conferences. At the pretrial readiness conference, a different judge presided and determined that Parents had waived their right to a jury trial based on their failure to appear. At a second pretrial readiness conference, Judge Chase scheduled the bench trial on top of a different case that was unlikely to resolve.

¶4 At the bench trial, S.S. immediately accepted a no-fault adjudication upon her voluntary admission that A.P. was not domiciled with her, as A.P. was in the temporary custody of her grandparents, and that she could not provide A.P. with proper care. S.S. also agreed to a treatment plan addressing her substance abuse. Judge Chase encouraged S.S. "to work with this team so we can help you in this treatment plan."

¶5 About two months later, D.P. also accepted a no-fault adjudication upon his voluntary admission that he was unable to provide A.P. with a safe and stable environment. And ***181** he agreed to a treatment plan. In explaining to D.P. the potential consequences of his admission, Judge Chase warned him that he could lose his parental rights but also said that she didn't want to see that happen.

¶6 During subsequent monthly review hearings, ACDHS and the guardian ad litem ("GAL") voiced concerns that Parents were failing to comply with their treatment plans; were continuing to abuse drugs; were participating inconsistently in virtual visits with A.P.; and, at times, appeared to be under the influence during those visits. Additionally, A.P.'s grandparents reported that A.P. was struggling with the virtual parental visits, during which she would sometimes protest, run, and hide.

¶7 At the August 2020 review hearing, in response to the description of the parental visits, Judge Chase said "if we're chasing [A.P.], [and] we're forcing [visits] when she's running and hiding[,] [t]hen she's always going to think that this is a bad experience and that this is awful. And I don't want her to think that about her parents." At the same hearing, ACDHS informed Parents' counsel that unless circumstances markedly changed, it would likely seek termination of parental rights.

¶8 On September 22, 2020, citing the above concerns, ACDHS moved to terminate both S.S.'s and D.P.'s parental rights.

¶9 At the pretrial readiness conference for the termination hearing, S.S. and her counsel indicated to Judge Chase that they wanted to end their attorney-client relationship. Rather than grant their request, Judge Chase urged them to work together because she believed that S.S. wouldn't be entitled to another attorney.

¶10 On the morning of the termination hearing, S.S.'s counsel moved to withdraw. Judge Chase immediately referred the withdrawal issue to another judge. At an impromptu hearing minutes later, which included ACDHS and the GAL, the other judge allowed S.S.'s counsel to withdraw and sent the case back to Judge Chase to determine whether S.S. qualified for court-appointed counsel. Based on S.S.'s paystubs, Judge Chase found S.S. eligible.

¶11 Before the termination hearing concluded, ACDHS claimed that S.S.'s request for new counsel may have been a delay tactic based on information it received regarding text messages between Parents. Judge Chase agreed with ACDHS's characterization and warned Parents that she wouldn't continue the next date or entertain further attorney-client issues. Judge Chase then appointed new counsel for S.S. and advised the court-appointed counsel about S.S.'s alleged delay tactic and failure to communicate with prior counsel. She also rescheduled the termination hearing to allow the court-appointed counsel time to prepare.

¶12 Following the rescheduled termination hearing, Judge Chase terminated S.S.'s and D.P.'s parental rights by written order on January 25, 2021. Parents appealed. While their appeal was pending, this court publicly censured Judge Chase and accepted her resignation. *See Matter of Chase,* 2021 CO 23, ¶ 7, 485 P.3d 65, 67.

¶13 As relevant here, we noted in the censure order that Judge Chase acknowledged:

- her "use of the N-word" in the presence of court staff didn't "promote public confidence in the judiciary and create[d] the appearance of impropriety" in violation of Canon Rule 1.2;

- she "undermined confidence in the impartiality of the judiciary by expressing [her] views about criminal

justice, police brutality, race and racial bias, specifically while wearing [her] robe in court staff work areas and from the bench" in violation of Canon Rule 2.3, "which prohibits a judge from manifesting bias or prejudice based on race or ethnicity by word or action"; and

- she "failed to act in a dignified and courteous manner" by "disparag[ing] one or more judicial colleagues."

Matter of Chase, ¶ 3, 485 P.3d at 66.

¶14 In light of Judge Chase's censure, Parents sought a limited remand from the court of appeals for further factfinding regarding potential bias in their case. The division granted the request, *People in Int. of A.P.,* (Colo. App. No. 21CA222, May 21, 2021) ***182** (unpublished order), and on remand, Parents filed a Rule 60(b) motion, asserting that Judge Chase exhibited bias in their case, or, at a minimum, her involvement created an appearance of impropriety. They asked the district court to vacate the termination and adjudication orders.

¶15 The district court granted Parents' Rule 60(b) motion. While the court found that Judge Chase's actions during the proceedings were insufficient to justify vacating the prior orders, it concluded that some of those actions, combined with her behavior documented in the censure order, were sufficient to warrant relief under Rule 60(b)(5). And even though Parents and A.P. are white, the court reasoned that "any bias or prejudice to one person is bias and prejudice to all" and that "there was an appearance of an impropriety because Judge Chase was biased." The court, therefore, vacated both the adjudication and termination orders.

¶16 ACDHS now petitions this court under C.A.R. 21 to vacate the district court's order and to hold that Parents are not entitled to relief under Rule 60(b).

II. Analysis

A. Original Jurisdiction and Standard of Review

¶17 Relief under Rule 21 is extraordinary in nature and wholly within the discretion of this court. C.A.R. 21(a)(1). It is appropriate "when an appellate remedy would be inadequate, when a party may otherwise suffer irreparable harm, or when a petition raises 'issues of significant public importance that we have not yet considered.' " *People v. Rowell,* 2019 CO 104, ¶ 9, 453 P.3d 1156, 1159 (citations omitted) (quoting *Wesp v. Everson,* 33 P.3d 191, 194 (Colo. 2001)).

¶18 We exercise our original jurisdiction here because of the potential harm to A.P. posed by the district court's decision to set aside both the adjudication and termination orders. Restarting the D&N process three years into this case would almost certainly traumatize A.P., who is now six years old.

¶19 To initially vacate a judgment under Rule 60(b), "the movant bears the burden of establishing by clear and convincing evidence that the motion should be granted." *Goodman Assocs. v. WP Mountain Props.,* 222 P.3d 310, 315 (Colo. 2010). Furthermore, "a trial court's ruling [under Rule 60(b)(5)] must be reviewed in light of the purposes of the rule and the importance to be accorded the principle of finality." *Davidson v. McClellan,* 16 P.3d 233, 239 (Colo. 2001).

¶20 We review an order granting relief under Rule 60(b)(5) for an abuse of discretion. *See Davidson,* 16 P.3d at 238. A court abuses its discretion when it makes a manifestly arbitrary, unreasonable, or unfair decision or when it misunderstands or misapplies the law. *Rains v. Barber,* 2018 CO 61, ¶ 8, 420 P.3d 969, 972. We now turn to the nature of the relief granted by the district court.

B. Rule 60(b)(5): Reserved for Extraordinary Circumstances

¶21 Rule 60(b) "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Canton Oil Corp. v. Dist. Ct.,* 731 P.2d 687, 694 (Colo. 1987) (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2851 (1973)). It specifies several situations under which post-judgment relief may be warranted and provides a residuary provision, (b)(5), which allows courts to set aside a judgment for "any other reason justifying relief from the operation of the judgment." *Id.* (quoting C.R.C.P. 60(b)(5)).

¶22 In the interest of preserving the proper balance, we've narrowly construed that residuary provision to avoid undercutting the finality of judgments. *Id.* In doing so, we've maintained that Rule 60(b)(5) is reserved for "extraordinary circumstances," *Canton Oil Corp.,* 731 P.2d at 694 (quoting *Cavanaugh v. State Dep't. of Soc. Servs.,* 644 P.2d 1, 5 (Colo. 1982)), and "extreme situations," *id.* (quoting *Atlas Constr. Co. v. Dist. Ct.,* 197 Colo. 66, 589 P.2d 953, 956 (1979)). *See*

also Cox v. Horn, 757 F.3d 113, 122 (3d Cir. 2014) (discussing the movant's burden of ***183** establishing the existence of extraordinary circumstances warranting relief under Fed. R. Civ. P. 60(b)(6), the federal analogue to C.R.C.P. 60(b)(5)); 11 Wright & Miller, *supra,* at § 2864 (3d ed. 2022) (observing that under Fed. R. Civ. P. 60(b)(6) "relief often has been denied on the ground that an insufficient showing of extraordinary circumstances has been made").

¶23 Even when we've encountered unusual facts indicative of an extraordinary circumstance warranting relief under Rule 60(b)(5), we've cautioned that "trial courts [must] continue to give scrupulous consideration to our strong policies favoring the finality of judgments." *State Farm Mut. Auto. Ins. Co. v. McMillan,* 925 P.2d 785, 791 (Colo. 1996). As we've emphasized time and again, Rule 60(b)(5) "is not a substitute for appeal, but rather is meant to provide relief in the interest of justice where extraordinary circumstances exist." *State Farm,* 925 P.2d at 791.

¶24 Having identified Parents' burden to establish clear and convincing evidence of their entitlement to extraordinary relief, we now pivot to the source of law on which they rely in seeking a fresh set of proceedings.

C. Judicial Impartiality

¶25 A basic principle of our system of justice is that judges "must be free of all taint of bias and partiality." *People v. Julien,* 47 P.3d 1194, 1197 (Colo. 2002). A judge must not preside over a case if she is unable to be impartial. *Id.* But, "[u]nless a reasonable person could infer that the judge would in all probability be prejudiced against [a party], the judge's duty is to sit on the case." *Smith v. Dist. Ct.,* 629 P.2d 1055, 1056 (Colo. 1981).

¶26 Whether a judge should recuse herself from a case depends entirely on the impropriety or potential appearance of impropriety caused by her involvement. *People in Int. of A.G.,* 262 P.3d 646, 650 (Colo. 2011). While recusal may result from allegations of actual bias or a mere appearance of impropriety, the recusal in each instance serves a distinct purpose. *Id.*

¶27 Rule 2.11(A) of Colorado's Code of Judicial Conduct requires a judge to recuse herself "in any proceeding in which the judge's impartiality might reasonably be questioned," *A.G.,* 262 P.3d at 650 (quoting C.J.C. 2.11(A)); that is, whenever her involvement in a case might create the appearance of impropriety, *id.* The main purpose of this broad standard is to protect public confidence in the judiciary. *Id.*

¶28 Actual bias, on the other hand, exists when, in all probability, a judge will be unable to deal fairly with a party; it focuses on the judge's subjective motivations. *Id.* at 650–51. The Code of Judicial Conduct requires judicial disqualification when a judge "has a personal bias or prejudice concerning a party or a party's lawyer." C.J.C. 2.11(A)(1). Laws requiring disqualification of a biased judge are intended to secure a fair, impartial trial for litigants. *A.G.,* 262 P.3d at 651.

¶29 Although a judge's involvement in a case might create an appearance of impropriety warranting recusal, that alone doesn't imply that the judge was biased. *See id.* at 652. Only when a judge was actually biased will we question the reliability of the proceeding's result. *See id.* In other words, while both an appearance of impropriety and actual bias are grounds for *recusal* from a case, only when the judge was actually biased will we question the *result*. [2]

¶30 The party asserting that a trial judge was biased "must establish that the judge had a substantial bent of mind against ***184** him or her." *People v. Drake,* 748 P.2d 1237, 1249 (Colo. 1988). The record must clearly demonstrate the alleged bias. *Id.* Bare assertions and speculative statements are insufficient to satisfy the burden of proof. *Id.*

¶31 While not binding, we also find instructive the Supreme Court's handling of similar issues under federal law. For a bias claim to be viable, the Supreme Court has suggested that a judge must show "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* "[E]xpressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect [people], even after having been confirmed as ... judges, sometimes display" don't establish bias or partiality. *Id.* at 555–56, 114 S.Ct. 1147.

¶32 Additionally, adverse legal rulings by a judge are unlikely to provide grounds for a bias claim, as they are proper grounds for appeal, not for recusal. *Id.* at 555, 114 S.Ct. 1147; *see also Schupper v. People,* 157 P.3d 516, 521 n.5 (Colo. 2007)

("[R]ulings of a judge, although erroneous, numerous and continuous, are not sufficient in themselves to show bias or prejudice." (alteration in original) (quoting *Saucerman v. Saucerman,* 170 Colo. 318, 461 P.2d 18, 22 (1969))).

¶33 Against this legal backdrop, we now return to the facts present here.

D. Application

¶34 Parents relied in part on Judge Chase's censure as the basis for their motion. They also pointed to examples of alleged misconduct and missteps during the proceedings to suggest that Judge Chase was biased or, at a minimum, that her involvement in the case created an appearance of impropriety.

¶35 In granting Parents' motion under Rule 60(b)(5), the district court explicitly stated that Judge Chase's actions here—including double-setting this case on top of another case that was unlikely to settle, discouraging Parents from taking their case to an adjudicatory hearing, expressing frustration with S.S. regarding the conflict with her counsel, and allowing opposing counsel to become aware of that conflict—were insufficient to justify vacating the termination and adjudication orders. Instead, the court concluded that those actions *combined with* her behavior documented in the censure order were sufficient to warrant relief under Rule 60(b)(5).

¶36 The district court's extensive reliance on the censure order was misplaced. Although Judge Chase stipulated to several instances of misconduct and resigned her position, the censure order doesn't support Parents' claim of bias or an appearance of impropriety in their case. For that to be true, there would need to be some connection between the facts giving rise to the censure and what's at issue in Parents' case. We disagree with the district court's broad observation that "any bias or prejudice to one person is bias and prejudice to all." To be sure, bias inflicted on one person can pollute space shared by others. But that's not the issue here. Bias also often involves flawed preconceptions about groups of people. So, perhaps the court simply meant to suggest that someone who is willing to rely on such preconceptions in evaluating one group might be willing to jump to unreasonable conclusions about members of another group. If that's what the court was trying to convey, that observation still misses the mark here. After all, it is members of the *same* group, the group against whom the judicial officer has exhibited bias (or significant insensitivity), who are most at risk of being subjected to the *same* flawed thinking. And while, as Parents point out, Judge Chase's misconduct extended beyond racial insensitivity and included the disparagement of one or more colleagues as well as other episodes where she abused her judicial office, none of those situations shares a nexus with these facts. *See Matter of Chase*, ¶ 2, 485 P.3d at 65–66. Even if any meaningful nexus could be conjured, it would fall well short of satisfying the heavy burden Parents shoulder here.

***185** ¶37 Rather than showing a "substantial bent of mind," *Drake,* 748 P.2d at 1249, indicative of bias against Parents, several of Judge Chase's comments demonstrated compassion for them. She encouraged S.S. "to work with this team so we can help you in this treatment plan." She told D.P. she didn't want to see him lose his parental rights. And in reviewing the parental visits, Judge Chase said she didn't want A.P. "to think that this is a bad experience and that this is awful ... [and didn't] want her to think that about her parents."

¶38 Furthermore, we agree that Judge Chase's actions in this case, standing alone, don't warrant Rule 60(b)(5) relief. For example, Judge Chase's expressions of frustration with S.S. and her counsel fall within the Supreme Court's description of judicial remarks that fail to support a bias challenge. *See Liteky,* 510 U.S. at 555–56, 114 S.Ct. 1147. And although Judge Chase may have made several mistakes during the proceedings (e.g., stating that Parents' requested jury trial would automatically convert into a bench trial if they failed to appear at pretrial conferences, claiming that S.S. wouldn't be entitled to court-appointed counsel, and allowing opposing counsel to become aware of S.S.'s conflict with her counsel), such alleged legal missteps alone don't provide grounds for a bias claim. Instead, they might have constituted grounds for appeal. *See id.* at 555, 114 S.Ct. 1147; *see also Schupper,* 157 P.3d at 521 n.5.

¶39 In sum, this record doesn't demonstrate actual bias. *See Drake*, 748 P.2d at 1249. And without a showing of actual bias, the trial court lacked any legal basis for questioning the proceeding's result. *See A.G.,* 262 P.3d at 652. Because the district court misconstrued the law concerning impropriety and bias in this case, and it misapplied the Rule 60(b)(5) standard in granting Parents' relief, we conclude that the court abused its discretion. [3]

III. Conclusion

¶40 The district court abused its discretion in setting aside the adjudication and termination orders. Thus, we make the rule absolute and remand for further proceedings consistent with this opinion.

All Citations

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Footnotes

1 As explained later in this opinion, this court publicly censured Judge Chase and accepted her resignation on April 16, 2021. *Matter of Chase,* 2021 CO 23, ¶ 1, 485 P.3d 65, 65. So, although throughout this opinion we refer to her as "Judge Chase" because of her involvement in this case, she is no longer a judicial officer.

2 Relatedly, but not directly at issue here, C.R.C.P. 97 allows for a judge's disqualification on her own or any party's motion "in an action in which [the judge] is interested or prejudiced." Crucially, such a motion "must be timely filed so that a judge has the opportunity to ensure that a trial proceeds without any appearance of impropriety." *A.G.*, 262 P.3d at 653. After a ruling has issued, the judge has missed the opportunity to disqualify herself, and the motion is essentially a challenge to the judgment. *Id.* At that time, a C.R.C.P. 97 motion shouldn't be granted unless the judge was actually biased. *A.G.,* 262 P.3d at 653. Here, Parents never made a motion under Rule 97. Only after Judge Chase's censure did they raise the issue of bias or potential appearance of impropriety under Rule 60(b).

3 Parents' Rule 60(b) motion included an argument under (b)(3), which provides that a trial court may relieve a party from a final judgment that is void. They suggested that Judge Chase's involvement in their case violated their due process rights because she wasn't impartial, and they maintained that a judgment entered in violation of due process is void. The district court didn't address this argument and instead ruled under Rule 60(b)(5), which is a residuary provision of last resort, *see Davidson,* 16 P.3d at 237 ("To prevent [Rule 60(b)(5)] from swallowing the enumerated reasons and subverting the principle of finality, it has been construed to apply only to situations not covered by the enumerated provisions and only in extreme situations or extraordinary circumstances."). Based on our analysis under Rule 60(b)(5), we perceive no violation rendering the proceedings fundamentally unfair. Thus, Parents aren't entitled to relief under Rule 60(b)(3) or (5).