Circuit Court for Anne Arundel County
Case No. 02-C-13-183451

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 674

September Term, 2018

ROBERT KOUNTZ, *et al.*

v.

JAMES FREND, II

Wright,
Graeff,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: April 17, 2019

Rebecca Kountz ("Mother") and James Frend, II ("Father") are the parents of J.F., a five-year-old boy. Mother and Father have never married and both have a history of substance abuse, but they lived together up until Mother became pregnant and moved in with her parents, Robert and Kathleen Kountz ("the Grandparents").

J was born substance-exposed and spent the first two-and-a-half months of his life in the hospital. After he left the hospital, J lived with Mother at the Grandparents' house. Custody litigation ensued, and the parties agreed to a series of consent orders. Under the last of these, they agreed to share legal custody; Mother had primary physical custody, and Father had increasing (and less supervised) visitation.

In early 2017, Mother was hospitalized for mental health issues, then after returning home, overdosed while J was with her. Mother moved out to receive long-term medical treatment. Father filed a motion to modify custody and sought sole custody of J; the Grandparents later filed a motion to intervene and their own complaint for custody. After a two-day trial in April 2018, the Circuit Court for Anne Arundel County issued an order, on May 15, 2018, awarding sole legal and physical custody of J to Father and granting visitation to the Grandparents.

Father filed a notice of appeal and the Grandparents cross-appealed. We granted the Grandparents' unopposed motion to dismiss Father's appeal on November 5, 2018 after Father failed to file briefs and the transcripts.[1] This leaves the Grandparents' contention

[1] *See* Md. Rules 8-602(c)(4) (authorizing the Court to dismiss an appeal for failure to file a record on appeal in compliance with Maryland Rule 8-413(a)) and 8-602(c)(5)

that the trial court erred or abused its discretion when it granted Father legal and physical custody of J. After reviewing the hearing transcripts, the evidence at trial, the court's written orders, and the previous custody agreements, we affirm.

I. BACKGROUND

The custody battle began shortly after J was born, when Father filed a complaint seeking joint custody of J in November 2013. Father alleged he was denied access to his son, who had recently been released from the hospital into the care of Mother and the Grandparents. After a scheduling conference, Mother and Father reached an agreement regarding J's custody, and the court entered a temporary consent order permitting Father supervised visitation in a public place once a week for two hours.

Father amended his complaint on April 16, 2014, and asserted that supervised visitation prevented him from bonding with J. He asked the court for sole legal and sole physical custody. Mother responded by filing a counter-complaint and an answer. After (unsuccessful) mediation, the court convened a second pre-trial conference and the parties agreed to another temporary consent order on August 4, 2014. The new order kept Father's visitation supervised, but increased visits to every Wednesday from 10:00 a.m. to 4:00 p.m. and every Saturday from 10:00 a.m. to 6:00 p.m. The order also allowed the visits to take place at Father's home with supervision by one of his parents.

At a third pre-trial conference, the court scheduled a hearing on the merits for

(authorizing the Court to dismiss an appeal for a failure to file a brief or record extract by the deadline specified in Rule 8-502(a)(1)).

February 3, 2015. Mother and Father both appeared that day and reached another agreement regarding custody and visitation. This time, the parties agreed to share legal and physical custody of J, although he lived primarily with Mother and the Grandparents. Among its provisions, the order broke Father's visitation schedule into three phases. During the first two phases, his visits had to be supervised by one of his parents; during the third phase, he was allowed unsupervised visits. To graduate from one phase to the next, the order required Father to complete three months of negative substance abuse testing. The order required both Father and Mother to continue drug treatment and required both to pass drug screenings; if Mother failed one, her time with J had to be supervised by one of her parents for three months.

This arrangement seemed to work until March 6, 2017, when Father filed a motion to modify custody. He also filed a motion for Emergency and *Ex Parte* Relief on March 8, alleging that "[Mother was] currently in Sheppard Pratt hospital . . . . threatening to leave the facility and take [J] and leave the area." Then in April, after returning to the Grandparents' house, Mother overdosed while J was in her custody. Mother was admitted to the hospital for inpatient care, and she has not lived in the Grandparents' home since May 2017. The Grandparents continued to share custody with Father until August 2017, when Father stopped allowing them access.

Mother and Father attended two court-ordered mediations that resulted in a signed parenting agreement. Then, on June 22, 2017, the Grandparents filed a complaint for custody, or in the alternative, visitation, and they sought sole legal and primary physical

custody of J.

In September 2017, Father completed a substance abuse assessment and tested positive for cocaine. As ordered by the court, both Father and Mother were assessed by a custody evaluator who recommended that J be placed in the custody of the Grandparents with supervised visitation for Father under the terms of the February 2015 consent order. At a pre-trial conference in October 2017, the parties agreed to allow J to stay in Father's primary custody with visitation for the Grandparents. Another custody evaluation followed in November 2017, and led to the same recommendation. And after a pre-trial conference on December 12, 2017, the court scheduled a merits hearing for April 2018.

On the first day of trial all parties were present, including Father, Mother, and the Grandparents. Mother testified in her opening statement that she would not be seeking custody and instead wanted the Grandparents to have full custody of J. She did not attend the second day of trial.

Father testified that he had been working for a traffic control company since October 2017. He stated that his hours fluctuate day-to-day, but living with J in his parents' three-bedroom home allowed him the flexibility to meet the demands of his job. Father's parents, Mr. and Mrs. Frend, both testified that they help care for J while Father is at work. And as a condition of his employment, Father said that he is required to submit random drug testing. In addition to those drug screenings, Father testified that he has been enrolled in a drug treatment program that meets several times a week and he attends Narcotics Anonymous meetings every day.

One of Father's witnesses, J's teacher, testified about behavioral issues that she observed with J since he enrolled in her class. She noted that J had improved significantly by November 2017, but that he continued to demonstrate "erratic and impulsive" behavior on certain days of the week. She also testified that Father was active and engaged in J's development and that he often communicated with her about J's behavioral progress and attended school events.

All of the other witnesses who observed Father with J painted him in a positive light—as a caring, attentive, and nurturing father—with one minor exception: Mr. Kountz testified that he observed Father strap J improperly into his car seat. Father's mother, Mrs. Frend, testified that he regularly gets J up in the morning and ready for school, prepares his after-school snack, plays with him, and gets him ready for bed in the evenings. Father's aunt also testified that she had seen Father engage with and care for J in the same ways. And Father testified that when J is in his custody, they go swimming, watch movies, and play outside together.

The evidence presented at trial painted a similarly positive picture of J's relationship with the Grandparents. Mr. Kountz testified that whenever J was in their custody, they would stay active by watching educational programs, playing games, going shopping, and visiting parks and museums. The Grandparents both testified that due to Mother's substance abuse and worsening health conditions, they were his primary caretakers whenever he was in her custody.

The custody evaluator assigned to J's case, Katherine Nutile, opined at trial that she

had recommended that the Grandparents have custody of J because of concerns with Father's history of substance abuse, the inaccuracy of his reporting of his substance abuse,[2] and his potential inability to support J financially. She recommended that Father not have custody of J until he could demonstrate a consistent six-month period of sobriety.[3]

At the conclusion of trial, the court found a material change in circumstances since the February 2, 2015 consent order and found Mother unfit, but Father to be fit based on his ability to care for J for the preceding six months.[4] The court applied the test for *de facto* parenthood established in *Conover v. Conover*, 450 Md. 51, 85 (2016),[5] and found that the Grandparents satisfied that standard because (1) Father had implicitly consented to J forming and establishing a parent-like relationship with the Grandparents, (2) J lived with the Grandparents for most of his life, (3) the Grandparents had assumed responsibility of J's care, education, and development without an expectation of financial compensation, and (4) the Grandparents had assumed a parent-like role for J since his birth.

[2] At trial, Father testified falsely that his last positive drug screening had been in May 2017—in fact, he tested positive for cocaine in September 2017.

[3] Ms. Nutile's recommendations were based on information she obtained up until November 2017, approximately five months before she testified on April 18, 2018.

[4] Neither Mother's nor Father's fitness status has been challenged on appeal.

[5] The *Conover* factors are: (1) the legal parent must have consented and fostered the relationship between the third party and the child; (2) the third party must have lived with the child; (3) the third party must have performed parental functions for the child to a significant degree; (4) a parent-child bond must have been forged. *See Conover*, 450 Md. at 85.

Then, the court weighed the factors in *Montgomery County Department of Social Services v. Sanders*[6] and *Taylor v. Taylor*[7] and found that J's best interests lay in living primarily with Father while having regular time and contact with the Grandparents:

> So going back to the top of the list of a dozen or so factors, the first one is fitness of the parents. And I've already talked about that. That the Court would have to find that [Mother] is not fit at this time, but . . . as we sit in the court room today, that [Father] is a fit parent.
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> The character and reputation of the parties. The Court has to agree that there are some question marks on the character of [Father] in that he seems not to either [be] quite accurate, or quite forthcoming I think was the term that [the custody evaluator] used in her testimony, about the drug use. But as in the Burak case, that lack of complete accuracy or forthcomingness is not decisive by itself. The Court does think that there's been a lot of evidence to indicate that his character is one in terms of caring for the child, where he has done a good job caring for [J], especially in the past six months. And even if we go back to 2015, I've not really heard any horror stories

[6] In *Sanders*, this Court applied the following "best interest" factors to determine custody: "1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) potentiality of maintaining natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender." *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 420 (1977) (internal citations omitted).

[7] In the context of considering whether joint custody was in a child's best interest, the Court of Appeals in *Taylor* evaluated: (1) the capacity of the parents to communicate and to reach shared decisions affecting the child's welfare; (2) the willingness of parents to share custody; (3) fitness of parents; (4) relationship established between the child and each parent; (5) preference of the child; (6) potential disruption of child's social and school life; (7) geographic proximity of parental homes; (8) demands of parental employment; (9) age and number of children; (10) sincerity of parents' request; (11) financial status of the parents; (12) impact on state or federal assistance; (13) benefit to parents; and (14) other related circumstances. *Taylor v. Taylor*, 306 Md. 290, 304–11 (1986).

or bad episodes about his care for [J] with the possible exception that Mr. Kountz said there was an occasion where [Father] had messed up [J's] car seat installation . . . . I don't find that to be dispositive.

Reputation. The Court really hasn't heard too much about reputation of [Father]. However, we have heard that he has been able to move along from one job to another. It's not like he has such a bad reputation that he's unemployed. The Court, in terms of his record, has not heard that other than traffic tickets, that he has any significant legal entanglement in the past three years or so. On the [Grandparents'] side . . . the Court thinks that they both have excellent characters and reputation.

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The third factor is the desire of the natural parents and the agreements between them . . . . I think that it's a sincere desire on [Father's] part that he wants to be involved and parent his son. . . . . [T]here are times that the parties have been able to reach agreements, although the level of communication between them has not been tremendous.

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The fourth factor; potential of maintaining natural family relations, is a factor which the Court commonly [interprets] to mean if the Court awarded custody on this or that side, would it mean that the child would be separated from the other side of the family[?] I don't quite find that in this case. Again, there was the time right as the change was occurring in August that [Father], on advice of his attorney said, no, don't come and pick him up. But that apparently was with the desire to get a court order in place before the contact with the grandparents resumed. [] [T]he Court doesn't think that that, with the order subsequently having been followed, is a sign of trouble if the Court would award custody on one side or the other.

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The fifth factor, the preference of the child. . . . . Where a child is very young in this case, four-years-old, approaching five . . . . The court [] recognize[s] that . . . he loves his dad, he loves his grandparents. So he is attached, I think, to both sides of the family.

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Factor six, material opportunities affecting the future life of the child. It's been pointed out that maybe Severna Park is a higher property value or income area than where [Father] lives. But it's also been pointed out in the case law that if that were the only factor, or the most decisive factor in every case where one parent earned more money than the other, then we should just give the children to the parents who have more money. Or if we always had cases with grandparents on one side and parents on the other side, the parents would almost always lose. Because grandparents are going to be better off in terms of financially, maybe their mortgages are paid, they have more money in the bank from a lifetime of savings, we hope. They have more experience parenting. They have a lot of things going for them. And yet what the cases say and has been construed under the U.S. Constitution is, that the parents have a right to raise their own children. So even though we're permitting the grandparents to intervene . . . the grandparents still have to overcome the presumption that a parent has the right to raise his or her own child. In this case, that said, I do recognize that the material opportunities affecting the future life of the child are probably better on [the Grandparents'] side. It's probably a nicer house and they're not likely to have to move unless they decide to do so, and so forth. But as far as the Court knows at this moment, [Father] is working full-time, he seems, we hope, to have turned the corner in terms of substance abuse, and seems to have done all of the right things. At least since the school year started, that the court can see, in terms of taking care of this child. So hopefully there are good material opportunities to improve for the child as [Father] ages and moves further in his career.

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The next factor is number seven; age, health, and sex of the child. Again, [J] is a little boy about to turn five-years-old, who seems to be doing really well right now. The Court has heard that he had health issues in the past, but I can't recall that he has any real active issues at this moment.

[Factor eight,] [t]he residences of the parents are, and I'll say parties, and the opportunity for visitation. The Court has heard that it's only perhaps a 15 minute drive, probably worse sometimes with traffic or weather. But there's a good opportunity for the child to go back and forth and have access

to both sides of the family.

The ninth factor, length of separation from the natural parents [and] voluntary abandonment, number ten, which I kind of will lump together. And say that in this instance, the Court doesn't think either of the parents either abandoned, ever abandoned [J]. They have agreed to take a step back at one point where each of them had substance issues, but they did not abandon him. They instead set up this arrangement where grandparents were able to supervise and assist on both sides and most on the [Grandparents'] side.

The last couple of factors are parental employment. And the Court recognize[s] on [the Grandparents'] side that both of them are retired. Mr. Kountz sometimes consults and goes on trips for that, but basically they're pretty much always there, available. On [Father's] sides, as in the case of most young parents, he is working and has to deal with his work. But he is fortunate to be still residing with his parents and they're able to back him up in terms of getting [J] to a bus stop and picking him up at the end of the day. And his schedule is such that [Father] is there almost every day, involved in breakfast, dinner, and regular daily activities with his son. Which is about as much as the Court can hope for.

The last major factor is called stability. And that is a factor where the Court looks at whether there is the potential for more tumult on this or that side and how it is going for the child. . . . . [T]he status quo before August 2017 was one which had worked out reasonably well for [J], except that his mother and he were having a progressively troubled relationship as her mental health and her substance abuse progressed in a negative way. And according to some testimony, he saw her overdose and hauled away by the paramedics[.]

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[I]f I look at what's been going on for the past several months now, it seems to be working out well for [J], having the greater access and care from his dad and having the regular time to continue his relationship with [the Grandparents].

The court also discussed Father's substance abuse in the context of *Burak v. Burak*,

455 Md. 564 (2017), and recognized that there and here there was "a little bit of uncertainty about what [was] going on in [the biological parent's] private life."[8] But the court found that "[Father] has maintained his own stability and taken good care of [J]" and that by a preponderance of the evidence it was persuaded Father had "been drug-free, substance abuse-free . . . for approximately six months. Which [was] approximately what was recommended as a standard to be fit for unsupervised care and custody by the Court's custody evaluator[.]"

For those reasons, the court granted Father's motion for primary care and custody subject to several conditions, including regular visitation for the Grandparents, a requirement that Mother and the Grandparents are "informed of important decisions that need to be made for J," that Father "not use any kind of illegal drugs," and "not use or be under the influence of alcohol when caring for [J]." Father appealed, but failed to file a brief or transcripts. The Grandparents cross-appealed.

II. DISCUSSION

None of the circuit court's options in this case were risk-free. Both parents have challenging histories of substance abuse. Father has stabilized his life and financial circumstances in the time since the original consent order, but his margin of error is thin. J

[8] In *Burak*, the Court of Appeals held that the trial court abused its discretion in granting custody of a child to his grandparents, in part because the court had erred in making factual findings about the mother's drug use and overall fitness as a parent. *Burak*, 455 Md. at 651–52. More specifically, the court held that there was no evidence to support a finding that the mother used anything but marijuana after her separation from the child's father, nor was there evidence indicating that her drug use "detrimentally impacted the [c]hild." *Id.* at 652.

is blessed to have two sets of engaged and generous grandparents, but the law (appropriately) errs on the side of giving custody to fit parents over grandparents, even if the grandparents might well be better able to perform the day-to-day functions of parenting.

The dismissal of Father's appeal leaves us to consider the Grandparents' challenge to the trial court's application of the best interest of the child standard.[9] They argue that the court properly found exceptional circumstances, but it "failed to elevate [them] to the same constitutional level as [Father]" when it considered J's best interests. This is another way of saying, perhaps, that they feel as though they could do a better job of parenting J than their son-in-law can. Whether that statement is true is not for us to decide. Instead, we look at whether the circuit court abused its discretion in awarding custody to Father on the record before it. Under the circumstances, we find that the court made an appropriate choice from among the difficult options.

In child custody disputes, Maryland appellate courts employ three different but interrelated methods of review. *First*, when "the appellate court scrutinizes factual findings, the clearly erroneous standard applies." *In re Adoption of Cadence B.*, 417 Md. 146, 155 (2010) (*quoting In re Yves S.*, 373 Md. 551 (2003)). *Second*, if the trial court "erred as to matters of law, further proceedings in the trial court will ordinarily be required

[9] The Grandparents state the Question Presented as follows:

> 1. Having found exceptional circumstances existed in this case, did the trial court misapply the law and abuse its discretion when finding that it was in the best interest of the child for custody to be granted to [Father]?

unless the error is determined to be harmless." *Id. Third*, when the ultimate conclusion of the trial court is "founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.* An abuse of discretion occurs when "no reasonable person would take the view adopted by the trial court" or when the court acts "without reference to any guiding rules or principles." *Yve S.*, 373 Md. at 583 (cleaned up).

A. The Circuit Court Did Not Abuse Its Discretion In Awarding Custody To Father.

Before modifying custody, the trial court is required to find a material change in circumstances. *Wagner v. Wagner*, 109 Md. App. 1, 28 (1996) ("[U]nless a material change of circumstances is found to exist, the court's inquiry ceases.") The trial court found a change in circumstances, and nobody disputes that finding:

> I do find there's been a material change of circumstances, both because at the time that the consent order was entered into in 2015, [Mother] was in the home, able to be actively involved in the care of [J], and the testimony the Court has heard has indicated that her health, physically and mentally, has gradually become worse. And she's had an episode, in particular of recurrent substance abuse involving a number of overdoses, she's had these bipolar psychotic episodes, breaks from reality.
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> And that since she's no longer even in the home, the circumstances are different than they were in 2015. But the circumstances also are different in the defacto, [Father], has taken primary care and custody of [J] since, I guess, August. Which is now coming up on six months. And that the report of how [J] has done in his care is basically a good report. So for all of those reasons, the Court finds a change of circumstances and goes on to consider the motions to modify today.

People other than biological parents who seek custody of a child can proceed down either of two analytical paths. On the one hand, they can attempt to establish that the biological parents are unfit or there are exceptional circumstances that would make a continuation of the parental relationship "detrimental to the best interest of the child." Md. Code (1984, 2012 Repl. Vol.) § 5-323(b) of the Family Law Article; *see also Ross v. Hoffman*, 280 Md. 172, 179 (1977); *In re Adoption of K'amora K.*, 218 Md. App. 287, 304–08 (2014). On the other, they can establish that they qualify as the child's *de facto* parent. *Conover v. Conover*, 450 Md. 51, 61 (2016). "[*D*]*e facto* parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis." *Id.* at 85. If they succeed down either of these paths, they then must prove that the custody or visitation they seek serves the best interests of the child. *See Kpetigo v. Kpetigo*, 238 Md. App. 561, 581 (2018); *K'amora K.*, 218 Md. App. at 304–05. Courts measure the child's best interests using the factors identified in *Taylor v. Taylor* and *Montgomery County Department of Social Services v. Sanders*. *See Kpetigo* 238 Md. App. at 581 (*citing Taylor*, 306 Md. at 304–11; *Sanders*, 38 Md. App. at 420.).

The Grandparents don't challenge the trial court's finding that Father was fit and Mother unfit, and they agree with the court's finding that they satisfied the *Conover* standard and qualify as J's *de facto* parents. They take issue with the court's application of the best interest standard, and specifically the finding that J's best interests would be served by custody with Father. They contend that the trial court abused its discretion when it found

Father had been "substance abuse-free for approximately six months" and that the court "erroneously gave deference to [Father]" despite their *de facto* parenthood status.

We disagree. A best interests analysis represents a court's best judgment in light of the record before it, a record that in this case offered no easy solutions. It is to the Grandparents' credit, and to J's broader benefit, that the Grandparents qualify as his *de facto* parents. But that relationship doesn't, and shouldn't, guarantee custody—Father is still J's father, and the court was well within its discretion to find that the combination of custody with Father and visitation with the Grandparents served J the best. The record supports the court's finding that Father has been "drug-free, substance abuse-free. . . for approximately six months" as of trial,[10] and supports as well the decisions to allow visitation to the Grandparents and to impose conditions that keep Mother and her family informed of J's circumstances and require Father to maintain his sobriety. The custody and visitation balance the court struck here represents a leap of faith in Father's direction, but a leap consistent with the appropriately difficult burden for awarding custody to non-parents and the record before the court at trial.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[10] Father's then-most recent positive drug test was from September 2017—more than six months before the April 2018 trial.