Circuit Court for Baltimore County
Case No. 03-C-18-008774

CHILD ACCESS

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 850

September Term, 2022

TRACY HYLTON

v.

STEPHEN M. SWEDO, JR., *ET AL.*

Nazarian,
Leahy,
Friedman,

JJ.

Opinion by Nazarian, J.

Filed: January 24, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Tracy Hylton appeals the Circuit Court for Baltimore County's order denying her second motion to intervene in a custody case involving two minor children, whom Ms. Hylton identifies as her cousins. In 2019, after the unexpected death of the children's mother, Dora Margaret Cropper and Lawrence R. Cropper, their maternal grandparents, obtained third-party legal and physical custody of the children. The children's father, Stephen M. Swedo, Jr. ("Father"), didn't participate in the proceedings, and an order of default was entered against him.

Mrs. Cropper passed away and Ms. Hylton—who alleged generally that she became a *de facto* parent to the minor children—sought to intervene in the case and to obtain full legal and physical custody of the children. The trial court, however, ruled that her motion was "not timely" because "the action [was] not pending[.]" She did not appeal that ruling.

Instead, shortly thereafter, Father filed a petition to modify custody, seemingly to reopen the case so that Ms. Hylton could make another attempt at intervening. She then filed a new motion to intervene, along with a petition to modify custody asserting that the 2019 custody order wasn't being followed and that she was the children's *de facto* parent. Father's petition was never served, though, and Mr. Cropper argued that his petition was insufficient to reopen the case and that Mr. Cropper should not "be forced to expend time and resources on Ms. Hylton's unjustified attempts to achieve an award of relief for which

she is not entitled." The motions court granted Mr. Cropper's opposition and denied Ms. Hylton's motion to intervene without a hearing.

On appeal, Ms. Hylton argues that her motion and petition were legally sufficient and that she was denied due process. Although we disagree with Mr. Cropper's position that Father's petition was necessary to "reopen" the case, we are constrained to affirm the circuit court's denial of Ms. Hylton's motion to intervene and we offer some observations on where this leaves everyone.

I. FACTUAL BACKGROUND[1]

This case concerns the custody of two children, M and S, who were born in 2016 and 2017 respectively. The children's mother passed away unexpectedly on January 12, 2018, and Father was unable to care for the children after her death. The underlying case was first initiated in September 2018, when the Croppers, the children's maternal grandparents, filed a Complaint for Third-Party Custody. A hearing was held on September

[1] The following facts are derived from an "Appeal Index" filed in the circuit court. Ms. Hylton's counsel's failure to file a record extract in accordance with Maryland Rule 8-501, after being served a brief deficiency notice by the Clerk of Court, is grounds for dismissing the appeal. *See* Md. Rule 8-501(m). This Court has no duty to "search the record for pertinent information omitted from the record extract." *Mitchell v. AARP Life Ins. Program N.Y. Life Ins. Co.*, 140 Md. App. 102, 107 n.3 (2001) (citations omitted). The record extract in this case surfaced only after an order from this Court and contained none of the relevant documents—we had to piece everything together ourselves. We have decided this time, not least because this appeal involves the custody of young children, to exercise our discretion in favor of addressing the merits and not dismissing the appeal. That said, we caution counsel to familiarize themselves with the Maryland Rules governing appellate procedure, especially Title 8, to avoid sanctions in the future.

11, 2018. Father failed to appear, the Croppers were granted temporary sole legal and physical custody of the children, and the court scheduled a final custody hearing set for January 16, 2019. At the final custody hearing, the circuit court ruled from the bench.[2] Ultimately, the trial court entered an order granting sole physical and legal custody of the minor children to the Croppers and supervised visitation to Father, on terms he and the Croppers would negotiate. As custody was uncontested, there was no express ruling in the court's written order that Father was unfit or that exceptional circumstances existed, nor that the Croppers qualified as *de facto* parents (a status their complaint did not seek). And as in all custody actions, the order was subject expressly to the continuing jurisdiction of the court.

Three years passed with no activity in the case. Then, unfortunately, Mrs. Cropper passed away on December 20, 2021. On February 16, 2022, Ms. Hylton filed a *pro se* motion (which the court treated as a motion to intervene) requesting a hearing, identifying herself as the children's cousin, and stating that S had lived with her "his entire life" and that M had lived with her for the "4 months prior to [Mrs. Cropper's] death." She asserted that the Croppers "would watch [S] while I worked to support him," and that a week after

[2] Mr. Cropper relies on factual findings made on the record at this hearing, but no transcript of the proceeding was provided in this appeal, nor does the transcript itself appear to have been ordered in the circuit court at all. Therefore, we won't consider Mr. Cropper's arguments that cite the court's oral ruling at the 2019 hearing. *See Davis v. Davis*, 97 Md. App. 1, 23–24 (1993) (failure to include trial transcript in appendix to brief constitutes waiver of issue for consideration); *see also* Md. Rule 8-501(e) (directing appellee to file appendix for any "part of the record that the appellee believes is material").

Mrs. Cropper's death, Mr. Cropper took S to live with Mr. Cropper's niece, adding that "[Mr. Cropper] is not residing with the children." Along with her motion she filed a Petition to Modify Custody, which alleged that Mrs. Cropper's passing was a material change in circumstances and that S "has never []physically resided at [the Cropper residence]. He has lived at [my address] sin[c]e his mother's passing on January 12, 2018, until February 11, 2022." Ms. Hylton stated that Mr. Cropper told her he was taking S for a weekend, which was not unusual, but then on February 11, 2022, she received a text from Mr. Cropper stating that he took the children "to their cousin's house in Bel-Air" and that he would not be returning S. She also referenced S's medical conditions as a reason that she should have custody.

At first, on February 25, 2022, the trial court granted Ms. Hylton's motion to intervene as an interested party. The court ordered Ms. Hylton to "file an Amended Complaint adding Stephen M. Swedo, Jr. as a Defendant" and to "file a death certificate or other evidence of Ms. Cropper's death, such as an obituary," as an exhibit to her amended complaint. On February 28, Ms. Hylton filed an Amended Petition to Modify Custody adding Father as a party. In that filing, she stated again that the change in circumstances was that Mrs. Cropper passed away and that S "has never lived at the Cropper's, always lived with me. [S] has 2 major medical conditions that only I've dealt with." She requested full custody of both minor children. Her supporting exhibit was Mrs. Cropper's memorial card.

But on March 22, 2022, Mr. Cropper filed a motion asking the court to vacate the order permitting Ms. Hylton to intervene. He argued that the motion to intervene was not timely because Ms. Hylton is a third party vis-à-vis the children and lacked the right to intervene in a custody action. He argued that "[a] third party's ability to seek permissive intervention in a custody case i[s] premised upon there being an existent child custody action pending before the Court. *Burak v. Burak*, 455 Md. 564 (2017)," and that because the custody case had been closed in 2019, Ms. Hylton lacked the ability to intervene and reopen the case to seek a modification of custody. Mr. Cropper alleged further that Ms. Hylton had not alleged unfitness or exceptional circumstances that could justify her intervention by way of reopening the proceeding. Along with his motion, Mr. Cropper filed an affidavit stating that S had resided with him since his birth and that Ms. Hylton was paid "to provide childcare" for S, "the frequency of which varied, but never exceeded one to two times per week." However, he conceded that around June 2021, as Mrs. Cropper's health deteriorated, "we requested more assistance with childcare from Ms. Hylton," which included overnight care for both minor children, but ending in early 2022.

Ms. Hylton obtained counsel who entered his appearance on March 24, 2022 and filed a response on April 11, 2022. In that motion, she asserted for the first time that she was a *de facto* parent of the two minor children and that she had standing to intervene as

of right under Rule 2-214(a).[3] Her opposition attached an affidavit where she stated that the children were living with Mr. Cropper's nieces, whom the minor children did not know prior to being moved there in December 2021 and February 2022. She stated that the week

[3] Maryland Rule 2-214, titled "Intervention," provides for intervention as "of right" and "permissive" intervention in civil cases:

> (a) **Of Right. —** Upon timely motion, a person shall be permitted to intervene in an action:
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> > (1) when the person has an unconditional right to intervene as a matter of law; or
> >
> > (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately represented by existing parties.
>
> (b) **Permissive. —**
>
> > (1) **Generally. —** Upon timely motion a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action.
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> > * * *
> >
> > (3) **Considerations. —** In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> (c) **Procedure. —** A person desiring to intervene shall file and serve a motion to intervene. The motion shall state the grounds therefor and shall be accompanied by a copy of the proposed pleading, motion, or response setting forth the claim or defense for which intervention is sought. An order granting intervention shall designate the intervenor as a plaintiff or a defendant. Thereupon, the intervenor shall promptly file the pleading, motion, or response and serve it upon all parties.

after the children's mother died, in January 2018, Father brought S to her and asked her to raise him. She stated that she "understood that he wanted me to raise and take care of [S] indefinitely as would a parent." She stated that S lived with her from January 2018, that she "took care of all of [S's] daily needs, including doctor's appointments," and that she fully supported S financially. She attested that "[w]hen the Croppers filed their Complaint for Custody in September, 2018 I had a conversation about that with Dora Margaret Cropper who told me that 'nothing would change' as a result of the custody filing." She stated that when Mrs. Cropper had surgery, Ms. Hylton also cared for M, who resided with her from August 2021 "until a week or so after [Mrs. Cropper's] death until Lawrence Cropper took her from me on 17 January 2022 and placed [M] with his niece . . . ."

In response to Mr. Cropper's affidavit, Ms. Hylton stated that the Croppers provided childcare for S when Ms. Hylton worked to support him financially. The Croppers occasionally gave her money that she never asked for and that she never considered compensation or reimbursement. She also filed, as an exhibit, a letter from Father stating that he wanted S to reside with Ms. Hylton, and screenshots of text messages between her and Mrs. Cropper relating to her care of the children.

On April 14, 2022, the court entered an order granting Mr. Cropper's motion to vacate. The court found that Ms. Hylton's motion to intervene was "not timely and the action is not pending," adding that "th[e] case has been closed for three (3) years with a final Order of custody[.]" Ms. Hylton did not appeal from this order.

Instead, new counsel for Ms. Hylton entered an appearance on May 2, 2022. Shortly after, on May 11, 2022, Father filed a complaint to modify custody—his first activity in the case—citing Mrs. Cropper's death as a change in circumstances and seeking custody of the children.[4]

On June 2, 2022, Ms. Hylton filed a second motion to intervene, which is now before us on appeal. She asserted that the motion was timely because Father had reopened the case "and the Court is adjudicating whether there has been a material change since the January 19, 2019 Order and the best interests of the Minor Children." In her accompanying three-page verified petition to modify custody, Ms. Hylton asserted that she is a *de facto* parent, alleged a material change in circumstances, and argued that it is in the best interest of the children that she have custody:

> 6. During the last 4 years, the Minor Child [S] resided . . . with Intervenor. [M] lived at this address for six months while grandmother was ill.
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> 7. The Court awarded legal and physical custody to [the Croppers] on January 16, 2019.
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> 8. Post January 16, 2019, the [Croppers] were uninvolved with the Minor Child [S's] medical matters.
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> 9. There has been a material change in circumstance because the prevailing order has not been followed, Mother died, the [Croppers] did not function as legal custodians, [S] developed medical conditions, a *de facto* parent relationship manifested between the Minor Children and Intervenor who has been their primary caretaker.

[4] There is no evidence that Father ever served Mr. Cropper, the only remaining party, with this pleading, but Mr. Cropper has never asked the court to dismiss Father's complaint for lack of service.

> 10. Intervenor is a fit and proper person to be awarded custody of the Minor Children, unlike [Mr. Cropper].
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> * * *
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> 11. [Mr. Cropper's] actions and omissions have disrupted natural family relationships and the Minor Children.
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> 12. Defendant/Father's position is that the best interest of the Minor Children [is] to be cared for by Intervenor.
>
> 13. The Minor Children deserve the benefit of a Court Order that is followed.

Ms. Hylton also requested a hearing.

Mr. Cropper's opposition disputed Ms. Hylton's factual allegations and asked the court to deny the motion to intervene. He argued that Father's petition to modify custody was not "being actively litigated or pursued, as there has been no activity with respect to this pleading since the filing and issuance of the Writs of Summons" and that the contents of Ms. Hylton's petition "are false, misleading, and neither this Honorable Court nor [Mr. Cropper] should be forced to expend time and resources on Ms. Hylton's unjustified attempts to achieve an award of relief for which she is not entitled."

On July 7, 2022, without a hearing and without further explanation, the court entered an order granting Mr. Cropper's opposition and denying Ms. Hylton's motion to intervene. Ms. Hylton appealed.

II. DISCUSSION

Ms. Hylton presents one issue for review, which we reword:[5] whether the trial court erred when it denied Ms. Hylton's second motion to intervene in the custody case (her first motion to intervene is not before us). Ms. Hylton argues that because "[c]ustody decisions are never final," they are "modifiable when the moving party establishes a change in circumstances . . . ." She contends that at the time her motion was made (she filed it twenty-three days after Father's petition to modify on May 11, 2022), there was ongoing, active litigation in the case that made her motion timely filed under Rule 2-214, and that she was "denied due process and the opportunity to present important claims regarding the[] best interests of the minor children."

Mr. Cropper offers three responses: *first*, that the trial court is presumed to know the law and apply it properly and that Ms. Hylton has not rebutted that presumption; *second*, that Mr. Cropper is a *de facto* parent and the trial court denied Ms. Hylton's motion to intervene properly because Ms. Hylton failed to meet the pleading standards in *Burak v. Burak*, 455 Md. 564 (2017); and *third*, that Ms. Hylton's motion to intervene was untimely

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[5] Ms. Hylton framed the Question Presented as: "Did the trial court err when it granted the Appellee's *Response in Opposition to the Motion to Intervene*, effectively barring the Appellant's cause of action?"

Mr. Cropper phrased the Question Presented as: "Did the trial court err in denying the Second Motion for Permissive Intervention filed by Appellant, Tracy Hylton?"

because her allegations include circumstances "in existence at the time of the January 31, 2019, Custody Order."

A. *De Facto* Parent Rights Versus Third Parties And The Children's Best Interests.

Before addressing Ms. Hylton's motion to intervene, the context warrants some general background on the law of custody and parenthood. *De facto* parenthood was first recognized by the Supreme Court of Maryland[6] in *Conover v. Conover*, 450 Md. 51 (2016). *De facto* parenthood is not an accidental status—it happens only if and when the child's other parent(s) create and allow a parent-caliber relationship to develop between their child and another adult. Although legal parents have a fundamental constitutional right "to direct and govern the care, custody, and control of their children," they "do[] not have a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it." *Id.* at 75. *De facto* parenthood is relatively new to Maryland and the case law is filling gaps in its application speedily. This case presents a new twist: a third party, in this instance a relative, has asserted her *de facto* parenthood status as a basis to intervene in a custody case to which she is not yet a party in order to ask the court to modify an existing custody order and award custody to her.

[6] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Md. Rule 1-101.1(a) ("From and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland . . . .").

Both Mr. Cropper and Ms. Hylton assert at this juncture that they are *de facto* parents of the children in this case. And we can understand why they might want that status—"a *de facto* parent is accorded the same constitutional rights as a biological or adoptive parent, and with that, the presumption that the child's best interests are to be with that parent." *Basciano v. Foster*, 256 Md. App. 107, 144 (2022). Whereas "[i]n *third-party* custody cases, the third party does not have equal standing with a fit parent; that party must rebut the presumption and the court must undertake the delicate constitutional balancing that is avoided when 'each fit parent's constitutional right neutralizes the other parent's constitutional right,' rendering the parents as 'presumptive equals'" *Id.* (emphasis added) (*quoting McDermott v. Dougherty*, 385 Md. 320, 353 (2005)). "In other words, once a party is a *de facto* parent, his or her status in a dispute over custody or visitation is equal to that of a biological parent, adoptive parent, or other *de facto* parent because, as among those individuals, a court rendering a custody decision must consider only the best interest of the child, not any differences in the status of the parents." *David A. v. Karen S.*, 242 Md. App. 1, 27 (2019).

As it turns out, though, neither Mr. Cropper nor Ms. Hylton qualifies currently as a *de facto* parent to either of these children. We know Ms. Hylton doesn't because the court

never adjudicated the merits of her contention that she is a *de facto* parent, which is the whole point of this appeal. Mr. Cropper's status requires a closer look.

1. *Mr. Cropper never sought* de facto *parenthood status and was not recognized as a* de facto *parent in the operative custody order.*

Mr. Cropper contends now that he "is and has been a *de facto* parent to the minor children since [the circuit court's] ruling on January 16, 2019, and the corresponding Custody Order entered January 31, 2019." We recognize that the parties didn't have the benefit of our extremely recent opinion in *Caldwell v. Sutton*, __ Md. App. __, No. 424, Sept. Term, 2022 (filed Nov. 30, 2022), as they prepared their briefs for this appeal. But *Caldwell* resolves one important aspect of this case against Mr. Cropper definitively—to the extent there was any confusion before, we know now that the legal and physical custody awarded to Mr. Cropper in the 2019 custody order did not make him the children's *de facto* parent.

In *Caldwell*, the minor child's grandmother was awarded sole legal and physical custody of the child by court order, with the mother's consent, while the mother was incarcerated for killing the child's father. *Id.* at 3–4. When the mother was released, she filed a motion seeking to modify custody, and after a full merits hearing, was awarded full custody. *Id.* at 1. The grandmother appealed, arguing that the initial "custody order put her 'on equal footing' with Mother in the custody dispute." *Id.* at 35. We disagreed, holding that "[t]he court's order did not, by itself . . . give Grandmother status as a legal parent." *Id.* at 36.

Mr. Cropper stands in exactly the same position as the grandmother in *Caldwell*, not least because he never actually sought *de facto* parent status or proved that he qualified. His petition for custody was titled "Third-Party Complaint for Custody" and sought custody, nothing more. Neither the words "*de facto* parent" nor allegations that could support a finding of *de facto* parenthood appear in his original petition, and there otherwise is no evidence in the record that the issue of the Croppers' *de facto* parenthood was ever raised in or decided by the trial court.

The burden of proof for putative *de facto* parents is steep. To qualify as a *de facto* parent, the proponent must demonstrate that (1) "the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child"; (2) proponent and child "lived together in the same household"; (3) proponent "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) proponent "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." *Conover*, 450 Md. at 74 (cleaned up). And their burden of persuasion is higher too. In *E.N. v. T.R.*, the Supreme Court of Maryland specified that a party must file "a verified complaint attesting to the consent" of biological parents, and must prove their case by clear and convincing evidence:

> [A]n action for *de facto* parenthood may be initiated only by an existing parent or a would-be *de facto* parent by the filing of a verified complaint attesting to the consent of the establishment of *de facto* parent status. The trial court should

> find by clear and convincing evidence that the parent has established: [] that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child . . . .

474 Md. 346, 381–82 (2021) (*quoting Conover*, 450 Md. at 93 (Watts, J., concurring)).

Mr. Cropper never undertook or satisfied these burdens. He did prove that Father was unfit, the prerequisite to third-party legal and physical custody, and that the children's best interests in January 2019 would best be served by awarding custody to the Croppers. But these are altogether different analytical paths, and the 2019 custody award in this case correctly did not recognize the Croppers as *de facto* parents.

2. *Father's petition to modify custody was not a prerequisite to Ms. Hylton's motion to intervene.*

Again, "a *de facto* parent is accorded the same constitutional rights as a biological or adoptive parent," *Basciano*, 256 Md. App. at 144, and has standing to contest custody or visitation, even in a case with an otherwise final custody order. *See Caldwell*, slip. op at 35–37; *Basciano*, 256 Md. App. at 114 ("*de facto* parenthood [is] a viable means to establish standing to contest custody or visitation" (cleaned up)). For that reason, Ms. Hylton, by asserting that she was a *de facto* parent, had standing to invoke the court's continuing jurisdiction in the underlying custody case, and Father's petition was not a prerequisite to hers.

That gets her the right to file. "Nevertheless," we noted in *Caldwell*, "'custody and visitation orders entered by the court are intended to carry some amount of finality,'" slip op. at 36 (*quoting Barrett v. Ayres*, 186 Md. App. 1, 18 (2009)), and a parent seeking to regain custody must prove a material change in circumstances. *Id.* (*citing Burak*, 455 Md.

at 649–50). And again, the pleading burden is a steep one: a third party seeking to invoke the court's continuing jurisdiction as a "would-be *de facto* parent" must: (1) allege their *de facto* parent status in "a verified complaint" at the very least "attesting to the consent of the establishment of the *de facto* status," *E.N.*, 474 Md. at 381, (2) allege a material change in circumstances, *Caldwell*, slip op. at 36; *see also McMahon v. Piazze*, 162 Md. App. 588, 597 (2005) (petition for modification of custody order didn't state a claim when "[t]he allegations of fact [we]re extremely general" and "entirely conclusory"), *and* (3) "demonstrate[] that the best interests of the child would be served in the custody of the third-party" asserting *de facto* status. *Burak*, 455 Md. at 624. The question, then, is whether her pleadings met these standards.

B. Ms. Hylton Requested Intervention As Of Right, But Failed In Her Petition To Plead Sufficient Facts To Support A Finding That She Is A *De Facto* Parent And That The Best Interests Of The Children Would Be Served In Her Custody.

This brings us, finally, to Ms. Hylton's pleadings, and specifically to whether she alleged enough to intervene in this case and to assert her claims on the merits. Because she was not a party to the original custody action that resulted in the January 31, 2019 custody order, she needed to intervene in the case via Maryland Rule 2-214:

> (a) **Of Right. —** Upon timely motion, a person shall be permitted to intervene in an action:
>
> > (1) when the person has an unconditional right to intervene as a matter of law; or
> >
> > (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest unless it is adequately

represented by existing parties.

(b) **Permissive. —**

(1) **Generally. —** Upon timely motion a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action.

* * *

(3) **Considerations. —** In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure. —** A person desiring to intervene shall file and serve a motion to intervene. The motion shall state the grounds therefor and shall be accompanied by a copy of the proposed pleading, motion, or response setting forth the claim or defense for which intervention is sought. An order granting intervention shall designate the intervenor as a plaintiff or a defendant. Thereupon, the intervenor shall promptly file the pleading, motion, or response and serve it upon all parties.

Ms. Hylton didn't specify in her motion whether she sought intervention as of right or permissively. She did assert that she was a *de facto* parent, and "*de facto* parents have standing to contest custody." *Conover*, 450 Md. at 85. But asserting generally is not enough. To have the right to intervene, she has to satisfy the pleading standards required for the status she seeks—in this instance, because her ability to intervene depends on her potential status as a *de facto* parent, her intervention motion must satisfy the heightened pleading standard required of those seeking recognition as *de facto* parents.

We review the denial of a motion to intervene as of right *de novo*. *Doe v. Alternative Med. Md., LLC*, 455 Md. 377, 414 (2017) ("an appellate court reviews without deference a trial court's conclusion that a party may not intervene as of right" (citation omitted));

Maryland-Nat. Cap. Park & Plan. Comm'n v. Town of Washington Grove, 408 Md. 37, 65 (2009) (if a trial court's denial of a motion to intervene is for untimeliness, the appellate court reviews it for "abuse of discretion, provided the trial court articulates reasons why the motion was untimely").

1. Ms. Hylton's motion to intervene was timely.

Even when a person has an "unconditional right to intervene as a matter of law," their motion to intervene still must be "timely." Md. Rule 2-214(a). Timeliness "depends on the purpose for which intervention is sought, the probability of prejudice to the parties already in the case, the extent to which the proceedings have progressed when the movant moves to intervene, and the reason or reasons for the delay in seeking intervention." *Doe*, 455 Md. at 415 (cleaned up). There is "longstanding judicial recognition in Maryland (and elsewhere) that children need good relationships with parental figures and they need them to be stable." *Conover*, 450 Md. at 77. Timeliness in the custody context, therefore, necessarily intertwines with whether and when there has been a material change in the children's circumstances. *See McMahon*, 162 Md. App. at 594.

After establishing a basis to seek custody, Ms. Hylton needed to allege that there had been a material change in circumstances since the operative custody order was entered. *See id.* Mr. Cropper is correct that the events predating the January 2019 custody order do not, and as a matter of law cannot, constitute a material change in circumstances. But there were relevant and much more recent changes in the circumstances of these grandparents and children: Mrs. Cropper died, of course, and Ms. Hylton alleged that M had resided with

her during Mrs. Cropper's illness and that the January 2019 order has not been followed by Mr. Cropper. Moreover, Ms. Hylton alleged that Mr. Cropper "did not function as legal custodian[]" after the January 2019 order and Mrs. Cropper's death. Such a change in circumstances is also "material." *See id.* These things could, if alleged and proven, support a finding that there had been a material change in circumstances. The fact that these events came three years after the January 2019 custody order doesn't make an intervention motion untimely—what matters is the motion's proximity to the events comprising the change in circumstances. And because Ms. Hylton's attempts to intervene came after Mrs. Cropper died and in proximity to other alleged changes in the lives of the children, she satisfied the "[u]pon timely motion" requirement in Rule 2-214(a), and her motions should not have been denied as untimely.

2. *Ms. Hylton failed to sufficiently "state the grounds" upon which she sought to intervene.*

Since she had standing and her motions were timely, Ms. Hylton's motions to intervene rise or fall on the sufficiency of the allegations themselves. Under Rule 2-214(c), Ms. Hylton was required to "state the grounds" upon which she sought to intervene within her proposed pleading. *Burak v. Burak* is the only case interpreting Rule 2-214 in the custody context, and although it dealt with permissive intervention rather than intervention as of right, it's instructive here. In *Burak*, two parents were involved in a divorce and custody proceeding. 455 Md. at 575. The mother filed her complaint for absolute divorce on July 11, 2013. *Id.* On January 14, 2014, a *pendente lite* consent agreement gave the mother temporary custody of the child, with father retaining visitation rights supervised by

the grandparents. *Id.* On April 24, 2014, the grandparents filed a motion to intervene seeking custody of the child, which was granted, and the grandparents ultimately were awarded custody of the child. *Id.* at 576–77.

On appeal, the mother argued that the grandparents should not have been permitted to intervene "without a prior finding of parental unfitness or extraordinary circumstances" as it violated her "fundamental liberty interest . . . in raising [her] child[] without the interference of the State." *Id.* at 618. The Court held that third parties can seek to intervene in custody cases, but they must satisfy a heightened pleading standard:

> [T]here is no procedural bar preventing a third-party from seeking to permissively intervene in an existent custody action as long as he or she can make a *prima facie* showing that the parents are either unfit or that exceptional circumstances exist and that the child's best interests would be served in the custody of the third party. Specifically, a third-party seeking to intervene in a custody dispute must include detailed factual allegations in his or her pleading that, if true, would support a finding that both biological parents are either unfit or that exceptional circumstances exist and that the best interests of the child would be served in the custody of the third-party. *See* Maryland Rule 2-214(c) (requiring a party seeking to intervene in a cause of action to "state the grounds" upon which they are seeking to intervene).

Id. at 623–24 (footnotes omitted). The Court noted that third parties can prevail only by overcoming the presumption that the child's best interest is served by remaining with the legal parent, which requires the third party to prove either that the parents are unfit or that exceptional circumstances are present. *Id.* at 624 (citations omitted).

This case differs from *Burak* in a few ways. Ms. Hylton's petition did not allege that Mr. Cropper is unfit or that exceptional circumstances are present; it did allege that she is

a *de facto* parent. Mr. Cropper, for his part, is not a parent—he was never recognized as a *de facto* parent and is himself a third party who has custody pursuant to the January 2019 order. *See Caldwell*, slip op. at 35. Ms. Hylton's standing to seek custody depends on her ability, as a would-be *de facto* parent, to allege a *prima facie* case that she meets the elements of *de facto* parenthood. And that required her to meet the heightened pleading standard articulated in *Burak* because, as the Supreme Court explained in *E.N.*, "[a] court should be very cautious and avoid having a child or family to be overburdened or fractured by multiple persons seeking access." 474 Md. at 382 (*citing Conover*, 450 Md. at 75 n.18). As an additional safeguard, the Court offered the "guidance" that "would-be *de facto* parents" must file a "verified complaint attesting to the consent of the establishment of *de facto* parent status" and bear the burden of proving by clear and convincing evidence that the biological parent formed the parent-like relationship with the child. *See also id.* at 381, 394–95 ("a prospective *de facto* parent must demonstrate that both legal parents consented to and fostered such a relationship or that a non-consenting legal parent is unfit or exceptional circumstances exist").

On this posture, the only pleading we can consider for this purpose is the petition that Ms. Hylton attached to her second motion to intervene,[7] and it falls far short of meeting the heightened pleading standard that *Burak* and *E.N.* require. Rather than alleging facts that, if true, could support a conclusion that she is the children's *de facto* parent (the affidavit and exhibits she attached to her answer to the motion to vacate the first

[7] She never appealed the denial of her first motion to intervene.

intervention order come a lot closer), the petition asserts baldly that "a *de facto* parent relationship manifested between the Minor Children and Intervenor who has been their primary caretaker." The petition states only that "Father's position is that the best interest of the Minor Children [is] to be cared for by Intervenor," but doesn't allege that Father consented to a parent-like relationship with the children, nor any specific facts that could support a finding of Father's implied or express consent to any sort of relationship between the children and her. Nor does the petition plead any facts that could support a finding that Ms. Hylton "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation," or that she has "has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." *Conover*, 450 Md. at 74.

In order for Ms. Hylton to "state the grounds" on which she sought to intervene under Rule 2-214(c) sufficiently, she needed to allege facts that could support a finding that she is the children's *de facto* parent, that there was a material change in circumstances since the entry of the 2019 order, and that the best interests of the children would be served by an order placing them in her custody. *See E.N.*, 474 Md. at 381; *Burak*, 455 Md. at 619; *McMahon*, 162 Md. App. at 593. And because the motion and petition before us failed to allege even a *prima facie* version of these elements, we must affirm the circuit court's denial of her second motion to intervene.

That said, the court never articulated a basis for denying this motion to intervene—although the court denied the first one on timeliness grounds, the second time the court granted Mr. Cropper's opposition and denied Ms. Hylton's motion without stating any grounds. To the extent that the court was reprising its timeliness ruling, that decision erred for the reasons explained above. To the extent that the court denied the motion for failure to satisfy the heightened pleading standards that apply in this context, Ms. Hylton normally would be entitled to leave to amend her pleading to attempt to meet them, and nothing in our ruling should be read to preclude her from seeking to amend her petition if she can.

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