Circuit Court for Queen Anne's County
Case No.: C-17-FM-21-000188

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 971

September Term, 2022

RACHEL BETHEA
v.

VENUS McDONALD

Beachley,
Ripken,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: May 22, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal involves a custody dispute between appellant, Rachel Bethea ("Mother"), and appellee, Venus McDonald, Mother's sister ("Aunt"), regarding Mother's daughter, S.C. ("Child"), who is currently nine years old. In July 2021, Aunt filed a complaint in the Circuit Court for Queen Anne's County seeking primary physical and sole legal custody of Child. Aunt filed the complaint shortly before Mother took Child from Aunt's care and moved with her to Georgia. Following a hearing held on June 30, 2022, the court found Aunt to be a *de facto* parent and then determined that it was in Child's best interests for Aunt to have primary physical custody and sole legal custody of Child. The court granted visitation rights to Mother and to Cornell Chichester ("Father"). Neither Mother nor Father attended the trial, and the appearance of Mother's counsel was stricken at the start of trial.

Mother appeals the judgment and, representing herself, raises several issues which we understand to be, and we recast, as follows:[1]

1. Whether the circuit court erred in proceeding with the merits trial in the absence of Mother and Father.

2. Whether the circuit court erred in its custody award when there was no evidence of abuse or neglect by Mother or Father.

[1] In her "assignment of error" in her informal brief, Mother states:

> The trial court erred in judgment because I was never notified of the trial that took place due to the fact that I moved out-of-state. In addition, [Father] was never served with any notice of this trial. Therefore we did not have an opportunity to present the facts of our case. There was never any evidence of abuse or neglect of my child presented to a finder of fact to render any informed decision. The decision made by Queen Anne County to remove a child from her natural parents with no evidence of maleficence was erroneous and not in the best interest of the child. In addition, [Aunt's] claim that gave standing that she is a de fact [sic] parent is completely false.

3. Whether the circuit court's custody decision was contrary to the best interests of Child.

4. Whether Aunt presented false evidence in support of her position that she is a *de facto* parent to Child.

For the reasons to be discussed, we shall affirm the judgment.

BACKGROUND

Pre-Trial Proceedings

In July 2021, Aunt filed a complaint (which she subsequently amended) against Mother and Father for third-party custody of Child and other relief. Aunt alleged, among other things, that she had been actively involved in Child's care since her infancy and that she had been responsible for "all aspects of [Child's] care and support" for the past two years; that Aunt "functions as the parent" and is viewed as the *de facto* parent by others; and that Mother and Father are unfit to care for Child because, among other things, they both engage in substance abuse. Aunt requested *pendente lite* and permanent custody of Child and requested an emergency hearing.

A hearing was held on July 16, 2021. Because we have not been provided with a transcript of that hearing, the following facts are taken from the Magistrate's November 1, 2021 Report. Both Aunt and Mother appeared with counsel. Father, who had not yet been served with the complaint, did not appear. After hearing testimony and receiving evidence, the Magistrate found that Child was born in April 2015; Mother had recently relocated from Prince George's County to Georgia; Aunt resides in Queen Anne's County; beginning shortly after Child's birth, Aunt assisted Mother in caring for Child on weekends; Aunt's care for Child gradually increased to weeks at a time until about 2018 when Aunt assumed

nearly full-time care and financial responsibility of Child, which included arranging for her daycare, taking her to doctor appointments, and enrolling her in pre-school and then kindergarten. In late May 2021, Mother advised Aunt that she intended to move to Georgia and, on or about July 4th of that year, Mother picked up Child from Aunt and relocated to Georgia.

Aunt testified that she has concerns about Child's welfare when Child spends time with Mother or Father. On one occasion, Aunt observed marks on Child's body after a visit with Father. Aunt also related an incident when Child, then in Father's care for about three months, kept Aunt's husband on the phone for five hours. When Aunt related that incident to Mother, Mother retrieved Child from Father and returned Child to Aunt's care.

The Magistrate found that Mother agreed that Aunt had been involved in Child's care and that she, Mother, had relied on her family's help in raising Child and Child's two older siblings. Mother also agreed that, prior to her move to Georgia, Child had been residing with Aunt and attending school in Queen Anne's County. Mother testified that she is employed by LabCorp and that she moved to Georgia when the opportunity arose to transfer to a position there, which she took to provide "better living" for her children. Mother related that Father (who is the father of all three of Mother's children) speaks to the children by telephone, but he does not see them often and she believes his living situation is not particularly good.

Loretta Bethea, mother of Mother and Aunt, testified that Aunt has taken excellent care of Child. Candice Bethea, a younger sister to Mother and Aunt, testified that Mother

had not left Child with Aunt for "weeks or months at a time." Both of these witnesses agreed that Father's involvement with Child has been sporadic.

In its Report, Recommendations, and Findings of Fact filed on November 1, 2021, the Magistrate correctly noted that, "[i]n disputed custody cases involving a third party (i.e. non *de facto* parent), there is a presumption that it is in the best interests of the minor child to be in the care and custody of the [natural] parents." The Magistrate also set forth the factors a court must find before declaring a non-parent a *de facto* parent, including that both natural parents must consent to the Child's relationship with the non-parent, either explicitly or implicitly. The Magistrate found that Father did not participate in the *pendente lite* hearing and that there was no evidence he was aware of the issues in this case and no evidence that he had consented to Aunt assuming a *de facto* parent relationship with Child. Moreover, the Magistrate concluded that, "for *pendente lite* purposes, [Aunt] did not overcome the presumption that it is in the best interests of the minor child be in the care and custody of her parents." Although the Magistrate found Mother's "testimony lacked credibility," the Magistrate concluded that "there was no evidence presented that she was unfit or that exceptional circumstances exist" to warrant granting Aunt custody *pendente lite*. Rather, the Magistrate recommended that "this case remain open and proceed in the normal course as doing so is in the best interests of the minor child." By order entered on November 1, 2021, the court ratified the findings of the Magistrate, denied Aunt's request for expedited custody, and ordered that the matter "proceed in the normal course."

On December 29, 2021, the court issued a scheduling order and, among others, an order directing that Child attend and complete the Queen Anne's County Circuit Court

Children's Program on February 5 and 12, 2022.[2] Child did not attend the program. On February 22, 2022, the court issued an order directing Aunt, Mother, and Father to show cause why they should not be barred from offering evidence at trial or otherwise be sanctioned for their failure to ensure Child's attendance at the Children's Program as ordered. Aunt responded that she was unable to comply given that Child was then in Mother's care and custody. At a hearing held on March 22, 2022 before the Magistrate, Mother's counsel explained that Mother and Child currently live in Georgia and would seek a similar program there. Counsel for both Mother and Aunt advised that they had not heard from Father and his "whereabouts [are] unknown[.]"

The Magistrate issued a Report, which indicates that both Mother and Mother's counsel attended, remotely, the March 22nd hearing. The Magistrate recommended that Mother could discharge the Show Cause Order "by ensuring that the minor child is enrolled in and attends the May 2022 dates for children's program." And if "an equivalent program is located in the State of Georgia, [Mother] to timely submit documentation of the program and request permission to attend program in GA instead of this Court's program." The Magistrate's Report also included this notation: "***Parties are required to appear for all scheduled hearings.***" The Magistrate's recommendations were approved and so ordered by the court on April 6, 2022. On May 6, 2022, the court issued an order directing that Child attend the Children's Program scheduled for June 4 and 11, 2022.

[2] The order described the Children's Program as "a nontherapeutic program designed solely for children" and intended "to provide children with an understanding of *if* and *why* their family dynamics may be changing and *how* they fit into this change."

On February 23, 2022, the court issued an order granting Aunt's motion to reschedule the settlement conference from April 22nd to March 25th. Following the March 25th settlement conference, the Magistrate filed a Report noting that all parties, including Mother and Mother's counsel, had appeared remotely. The Report indicated that the case had not settled and that the parties were to return on May 13th, with Mother and Mother's counsel permitted to appear remotely. Among other things, the Magistrate recommended that the discovery deadline be extended to May 12, 2022 per the agreement of counsel. The court approved the recommendations and on March 29, 2022, the court issued a notice scheduling a settlement conference for May 13, 2022 at 8:45AM.

On May 3, 2022, the circuit court issued a Show Cause Order directing Mother to show cause why she should not be barred from offering evidence at trial or otherwise be sanctioned for failing to attend a scheduled mediation session. The order set a show cause hearing for May 13, 2022 (the same date as the settlement conference) and directed that Mother attend unless the Show Cause Order was discharged prior thereto by "arranging and participating in mediation and having a report filed by the mediator" no later than May 11th.

Both Mother and Mother's counsel failed to appear for the May 13th hearing. The Magistrate's Report, dated May 13th and entered on May 20th, noted their failure to appear, noted that the case had not settled, and set a trial date on "custody, access, and counsel fees" for June 30, 2022 at 8:45AM. The report included the notation: "***PLEASE NOTE NEW TRIAL DATE.****" The Magistrate recommended, among other things, that the court issue a Show Cause Order directed to Mother's counsel related to his failure to appear

for the May 13th hearing; issue an order directing Mother to obtain a hair follicle substance use assessment; and remind Mother that Child is expected to attend the June Children's Program. On June 3, 2022, the court approved and adopted the Magistrate's recommendations in an order.

On May 13th, prior to the entry of the Magistrate's latest Report just referenced, the court issued a notice scheduling trial for July 8, 2022. A week later, however, by notice dated May 20, 2022, the court issued a "Notice Of Change Of Assignment – Courthouse" that, in relevant part, stated:

> **INSTEAD OF THE TIME FORMERLY SCHEDULED,** a **Hearing – Show Cause Trial – Court** will be held in this action on **06/30/2022** at **8:45AM**, replacing previously scheduled event on 07/08/2022 at the Courthouse for the Circuit Court for Queen Anne's County in Centreville, Maryland.

On May 23, 2022, the court entered an order directing Mother to submit to a hair follicle substance use assessment and directing her to schedule the assessment on or before May 27th. The record before us indicates that the senior case manager in Mother's counsel's office emailed this order to Mother on May 25th and in the email advised Mother to "call to make arrangements by May 27th."[3]

On June 3, 2022, the court entered an order regarding discovery and directing Mother to complete answers to interrogatories and responses to request for production of documents no later than June 10th. The order further provided that Mother's failure to do

[3] This particular email is in the record before us because it was subsequently attached to Mother's counsel's motion to strike his appearance in this case.

so would result in sanctions, including "a time limitation on Defendant Bethea's ability to testify and otherwise present evidence and witnesses at the Trial on June 30, 2022."

On June 7th, Mother's counsel responded to the Show Cause Order related to his failure to appear for the May 13th hearing. Counsel explained that he missed "the scheduled Settlement Conference due to an inadvertent entry in his online digital calendar" and was in the District Court of Maryland for Montgomery County in another case at the time. Counsel asserted that his failure to appear was neither intentional nor deliberate. At the show cause hearing held on June 14, 2022 on this issue, Mother's counsel reiterated his explanation and, in its subsequently issued Report, the Magistrate recommended that the Show Cause Order against Mother's counsel be discharged. The court subsequently approved the recommendation and so ordered.

On June 11th, Mother replied to the email of May 25th sent to her by her attorney's office in relation to the hair follicle test. In her reply email, which she addressed to her attorney, Mother thanked counsel for all that he had done and stated that his services were no longer needed. Counsel then sent a letter, dated June 13, 2022, to Mother by email and via the United States Postal Service informing her that, given her email to him of June 11th, he intended to withdraw his appearance as attorney of record in this case by filing a motion to strike his appearance. The letter further advised that the motion would be filed five days hence and that he would continue to represent Mother until the court granted the motion to strike his appearance. Counsel also advised Mother to have another attorney enter an appearance on her behalf or notify the circuit court in writing that she intended to represent herself.

On June 27th, Aunt's counsel filed a motion to permit a witness for Aunt to testify remotely at "Trial on June 30, 2022 at 8:45a.m." On June 29th, Mother's counsel filed a motion "for continuance of the trial scheduled before this court on June 30, 2022 at 8:45am" or, in the alternative, permission for counsel to appear remotely due to a family emergency necessitating his presence out-of-state. The motion also renewed counsel's request to strike his appearance.[4] The court granted the request for Mother's counsel to appear remotely at the June 30th trial.

Trial

When the case was called on June 30th, Mother's counsel announced his presence as counsel for Mother. The court noted that Mother was not present. In response, Mother's counsel stated: "I have no representations about her whereabouts, Your Honor." The court then turned to counsel's motion to strike his appearance and inquired as to whether counsel had "hear[d] anything back from" Mother regarding his motion to strike his appearance. Counsel replied that he had not. The court then granted the motion striking counsel's appearance and counsel, who had appeared remotely, left the proceedings.

After hearing from Aunt's counsel that Aunt wished to proceed, the court went forward with the trial. Neither Mother nor Father were present.

Aunt testified that she is employed as "a federal worker, program manager" and resides with her husband in a single-family home in Church Hill. Mother is Aunt's younger

[4] Counsel's motion to strike his appearance was initially denied because counsel had failed to attach a copy of the June 13, 2022 letter he had sent to Mother advising her of his intention to move to withdraw his appearance. He included the letter with his June 29th motion.

sister and, as of that date, Mother had three children: Child (then seven) and two sons (then fifteen and seventeen). Although Mother's sons never lived with Aunt, after Child was born the boys "normally spent a few months at [her] house per year."

Aunt related that, after Child was born, she often picked her up from Mother and cared for her on weekends. When asked why she did so, Aunt replied that Mother "wanted to party, wanted to go out, and did not want to care for [Child]." Then when Child was about eight months old, Mother's arrangements for daycare during the week fell through and when Mother advised that she could not take care of Child, Aunt offered to take care of her. Thus, Child began residing with Aunt and Aunt paid for a babysitter while Aunt worked. During these "early days" when Child resided with Aunt, Mother would see Child about two weekends a month and eventually "off and on." When Mother did request a weekend with Child, on most occasions, Aunt took Child to Mother and then retrieved her from Mother. Father was not involved in Child's life at this time. However, when Child was "almost three[,]" Aunt related that Mother became angry with her and also wanted to "implant herself into [Father's] life," and she took Child from Aunt and dropped her at Father's house. After about three months, Mother returned Child to Aunt's care. Then when Child was about five years old, Aunt said Mother "got mad" again and took Child for about three weeks before again returning her to Aunt.

Aunt claimed that Child viewed her "as her mom" and called her "Mom" until Mother told Child, when Child was about three years old, not to call Aunt mom. Child then started calling Aunt "Aunty."

Aunt related that she cared for Child as if she were her daughter, taking her to doctor appointments, staying home from work when Child was sick, enrolling her in pre-school and then kindergarten, paying for daycare, and taking her on vacation. Aunt also enrolled Child in gymnastics and recreational soccer and paid for those activities herself. Aunt attended all of Child's soccer games; Mother attended one. Aunt also threw birthday parties for Child (every year except year one) and, although she invited Mother and Father, Father never came and Mother attended two of the five parties Aunt hosted. Aunt claimed Child as a dependent for tax purposes "[f]our out of the six years."

Aunt invited Mother and Mother's sons, and other family members, on a vacation Aunt paid for to Orlando, Florida in December of 2020. Aunt rented two adjoining suites. Child stayed with Aunt in her suite, not with Mother in the adjoining suite. While there, Aunt and Mother got into a dispute when Mother's boyfriend showed up after Aunt said he could not join them because the "boyfriend is a known drug dealer." Mother then took her sons, but not Child, and went to Miami. Shortly after they returned from this vacation, Mother took Child from Aunt until about mid-February 2021. She returned Child to Aunt so Child could continue her schooling at Church Hill Elementary School. Sometime thereafter, Mother informed Aunt that she intended to move to Georgia, which prompted Aunt to file for custody of Child.

Aunt had not seen or spoken with Child since July 2021. Aunt expressed concerns about Mother's care for Child, believing that Mother "will just abrogate her [caretaking] role to someone else." Aunt expressed that she would like custody of Child to provide Child with structure, especially during the school year.

As for Father, Aunt testified that following his approximate three months of caring for Child when Child was three years old, Father would occasionally ("maybe once every four months") text Aunt to arrange a visit with Child. Aunt would take Child to Father and then pick her up from him. Aunt never told Father he could not see Child. When asked whether she had heard from Father during this litigation, Aunt replied:

> I heard from him one time, he called. He said that we should be able to work this out on our own, without the courts, and I told him that I would love to work it out without the courts and if he [came] up with a proposal for him to call me back and he did not call me back.

Cari Moats, Aunt's husband's sister, testified that she considers Child to be her niece. Although she resides in West Virginia, she would visit with her brother and Aunt "at least six or seven times" every year. The majority of the time, Child would be with Aunt. She described Aunt as "very much the mother figure for [Child] and has been ever since [Child] has been with them." Ms. Moats recalled a beach vacation with Aunt where Mother made "an appearance for about 20 minutes" but Child remained with Aunt. Moreover, she testified that Child regularly was with Aunt (and Aunt's husband) when the two families gathered for holidays at Ms. Moats's home, including Thanksgiving, Christmas, and the 4th of July.

Rachel Lloyd, Aunt's neighbor and friend, testified that she babysat Child "throughout the years on and off." She has a son the same age as Child and "consistently" saw Child when Child resided with Aunt. She met Mother a couple of times, once when Mother came to Ms. Lloyd's house to pick up Child from her house when Child was about three or four years old. Ms. Lloyd recounted that Child did not want to leave with Mother

and "went behind [Ms. Lloyd's] leg and wanted [her] to shut the door." Because Mother did not have a car seat, Ms. Lloyd gave Mother her daughter's car seat for Child's use. Aunt, not Mother, paid Ms. Lloyd for babysitting Child and Mother never inquired about her credentials or engaged in any conversations with her regarding her daycare of Child. Ms. Lloyd never met Father.

Ms. Lloyd observed Aunt interact with Child on many occasions, including on outings to the park, pool, library, parties, and playdates. She related how Aunt helped Child "overcome a fear of swimming" and how impressed she was by Child's reading ability at age five, which she attributed to Aunt.

Dana McDonald, Aunt's adult stepdaughter, testified that she has "never known [Child] not living with" Aunt and her father (Aunt's husband). Child was always with them when Ms. McDonald visited. When asked about Child's relationship with Aunt's husband, Ms. McDonald related that Child "loves him" and "adores him like a father[.]" Ms. McDonald never met Father.

Aunt submitted verification that Child was enrolled in school in Georgia. Aunt's counsel noted that the records reflect that Child's "attendance, although not perfect, is not glaringly terrible." Aunt also submitted some of Mother's bank records and flight records into evidence. Aunt's counsel proffered that the records reflect that, since the *pendente lite* hearing in July 2021, Mother had traveled several times to Maryland and Florida, as well as to Cancun, Mexico. Counsel proffered that the records reflect a "pattern of [Mother] traveling[,]" but the passenger log for Southwest Airlines reflects that Child did not travel with her on trips where she flew Southwest.

In closing, Aunt's counsel maintained that Aunt is a *de facto* parent to Child. Counsel further asserted that it would be in Child's best interest to award Aunt custody.

At the conclusion of trial, the court noted that "both parents were properly served in this case and included."

Circuit Court Ruling

By Order entered on July 1, 2022, the court awarded sole legal custody and primary physical custody of Child to Aunt and gave access to Mother and Father one full weekend each per month and one full week during summer break "as well as other times" to be agreed upon with Aunt. In its Memorandum Opinion and Order Regarding Custody on the same date, the court summarized the evidence presented at trial and noted that neither Mother nor Father attended trial and both failed to "correspond in any way regarding their absence or lack of participation in the proceedings."

Among other things, the court found that it was "uncontroverted that [Aunt] provided for all of [Child's] needs during the first five years of her life[,]" including "select[ing] her pediatrician, her babysitters, her pre-school, her elementary school, and her extra-curricular activities." The court also found that Aunt "acted as [Child's] parent, providing for her financially, emotionally, medically, and socially." The court concluded that Child "was fully a part of" Aunt's family.

The court found that, although Mother was represented by counsel in these proceedings "up until the day of trial," Mother "failed to complete discovery, failed to participate in mediation, failed to attend the online parenting program, failed to have the child attend the children's program, and failed to submit to a hair follicle test."

The court discussed the four-factor test set forth in *Conover v. Conover*, 450 Md. 51 (2016) for establishing *de facto* parenthood and concluded that Aunt met the test.[5] Specifically, the court found:

> (1) [Aunt] and [Child] resided together in the same household for the majority of five of the last six years; (2) the natural parents "consented to and fostered the formation and establishment of a parent-like relationship" between [Aunt] and [Child] by acquiescing and even arranging for [Child] to live and be cared for by [Aunt]; (3) [Aunt] assumed obligations of parenthood by taking all responsibility for the child's care, education, development, and financial support; and (4) [Aunt] has been in the parental role for a length of time sufficient to have established a bonded dependent relationship.

After concluding that Aunt qualified as a *de facto* parent to Child, the court then turned to custody, correctly noting that a custody award is based on the best interests of the child. The court examined the factors set forth in *Montgomery County Department of Social Services v. Sanders*, 38 Md. App. 406 (1978). In discussing the "abuse" factor, the

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[5] In *Conover*, the Supreme Court of Maryland held that a third party claiming *de facto* parent status bears the burden of proving the following when seeking access to a minor child:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
> (2) that the petitioner and the child lived together in the same household;
> (3) that the petitioner 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) that the petitioner 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.

450 Md. at 74.

court found that, although there were allegations in the pleadings that Mother and Father abused drugs, there was no evidence at trial to support the allegation. Nor did the court find that "any party was unfit." But the court did conclude that there were "regular and consistent periods of time where the child did not see either natural parent during the first five years of life" and that "Mother and Father's behavior borders on voluntary abandonment and surrender, by permitting [Aunt] to raise [Child] during their extended absences from her life." The court concluded that, when residing with Aunt, Child "want[ed] for nothing" and Aunt provided her "with enrichment and development activities[.]"

After considering the *Sanders* factors, the court concluded that it was in Child's best interest for Aunt to have legal custody of Child. The court found that the "parties cannot make decisions together" regarding important issues related to Child and Mother and Father's "lack of involvement in this litigation has provided the Court with no information to make any other decision."

Turning to physical custody, the court reviewed the factors set forth in *Taylor v. Taylor*, 306 Md. 290, 303 (1986). The court found that, although the parties communicated with each other prior to this litigation, "Mother often used the child as a pawn when she was angry at [Aunt]." The court found no evidence that any party is unfit to parent Child; that the evidence demonstrated a positive relationship between Aunt and Child and no evidence was presented as to Mother's or Father's relationship with Child; that Child had lived for most of her life with Aunt; and that Aunt "demonstrated sincerity and full commitment to [Child] in pursuing this litigation" while both Mother and Father

"demonstrated no sincerity to the child and a complete lack of respect to this Court." The court found that Aunt is gainfully employed, while the "natural parents' employment is unknown." The court also found that the natural parents failed to complete court-ordered tasks. The court concluded that it is in the best interest of Child that Aunt be awarded sole legal and primary physical custody of Child. As previously noted, the court did grant Mother and Father visitation rights.

Mother's Post-Trial Motions

On July 5, 2022, four days after the court entered its ruling, new counsel entered an appearance on behalf of Mother. On July 11th, Mother's new counsel filed a motion for a new trial, as well as a motion to vacate, or in the alternative, to stay the custody award. In those motions, among other things, Mother asserted that service of the complaint on Father was not "properly perfected[,]" and that she reasonably believed that the custody merits trial was scheduled for July 8, 2022. The court denied the motions. Mother then noted this appeal.[6]

STANDARD OF REVIEW

In an action tried to the court, we "review the case on both the law and the evidence" and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, [as we give] due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). "When a trial court decides legal questions or makes legal conclusions based on its factual findings, we review these

[6] Father did not participate at any stage in the circuit court proceedings and he has not sought to enter an appearance on appeal.

determinations without deference to the trial court." *E.N. v. T.R.*, 474 Md. 346, 370 (2021) (cleaned up). We review a trial court's custody decision for abuse of discretion. *Basciano v. Foster*, 256 Md. App. 107, 128 (2022).

DISCUSSION

De Facto Parenthood

There is no doubt that "the rights of parents to direct and govern the care, custody, and control of their children is a fundamental right protected by the Fourteenth Amendment of the United States Constitution." *Conover*, 450 Md. at 60 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Accordingly, "the rights of parents to custody of their children are generally superior to those of anyone else[.]" *Id*. Where parents are in a child custody dispute, the paramount concern is the best interest of the child. *Id*. Where a third party seeks custody or visitation, the third party generally "must first show unfitness of the natural parents or that extraordinary circumstances exist before a trial court could apply the best interests of the child standard." *Id*. at 61.

In *Conover*, however, the Supreme Court of Maryland recognized that a third party may have such a special relationship with a minor child as to be deemed a *de facto* parent, placing that person in a position equivalent to a natural parent. *Id.* at 85 ("[*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.").

When a third party seeks access to a child by claiming *de facto* parenthood, the petitioner bears the burden of proving:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner 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) that the petitioner 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.

Id. at 74.

"The *de facto* parent doctrine does not contravene the principle that legal parents have a fundamental right to direct and govern the care, custody, and control of their children" because "a legal parent does not have the right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it." *Id*. at 75.

Where there are two natural parents, both must consent to the relationship to satisfy the first prong of the test. *E.N.*, 474 Md. at 401. But the "consent" of the natural parent to the establishment of a *de facto* parent-child relationship may be explicit or implicit and "implied consent may be inferred from a legal parent's conduct[,]" including his or her "action or inaction[.]" *Id*. at 401-02.

<u>Mother's Contentions</u>

We turn now to Mother's contentions on appeal. First, she asserts that she and Father did not have the opportunity to present their side of this case because (1) she was

not notified of the trial date and (2) Father was never served "with any notice of this trial." She does not elaborate or proffer any facts or evidence in support of her assertions.

Mother was represented by counsel and the record before us indicates that Mother's counsel certainly understood that trial was set for June 30th, for on June 29th, he filed a motion with the court seeking a continuance or permission to remotely attend "the trial scheduled before this court on June 30, 2022 at 8:45am" due to a personal emergency necessitating his presence out-of-state. Although Mother's counsel had a pending motion to strike his appearance, he had also advised Mother that he would continue to represent her until the motion was ruled on. Mother does not allege that her attorney did not inform her of the June 30th trial date, as was his duty. *See* Md. Rule 19-301.4(a)(2) ("An attorney shall . . . keep the client reasonably informed about the status of the matter[.]"). Moreover, the Maryland Rules provide that, "[w]hen any notice is to be given by or to a party, the notice may be given by or to the attorney for that party." Md. Rule 1-331. And "under longstanding precedent[,] once an attorney files an appearance on behalf of a client, notice to the attorney is notice to the client." *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 303 (4th Cir. 2017) (citing *Rogers v. Palmer*, 102 U.S 263, 267-68 (1880) for the proposition "that the law presumes that an attorney communicates notice of any matter within the scope of representation to the client"). *See also Thomas v. Hopkins*, 209 Md. 321, 327 (1956) ("The lawyer's knowledge of the hearings and the judgment rendered must be imputed to the appellants. His failure to tell them of the hearings or of the judgment . . . would not constitute irregularity justifying the striking of the judgment."

(internal citations omitted)). In short, based on the record before us we are not persuaded that Mother was unaware of the June 30th trial date.

Assuming Mother has standing to assert that Father was not served with notice of the trial, that too is a bald allegation unsupported by any facts or evidence. In fact, the trial court announced on the record of the June 30th hearing that "both parents were properly served in this case[.]" The record further reflects that the court had granted Aunt's motion for alternative service on Father due to his alleged evasion of service. The affidavit of the process servicer filed in support of the motion reflects that the process server personally observed Father enter a home reasonably known to be his residence, but he refused to answer her knock on the door. The process server attested that she left a writ of summons and Aunt's complaint for custody taped to the door of the residence. After the motion for alternative service was granted, notices were mailed to Father's last known address (the home where the summons and complaint were left) and were also posted on the courthouse door. Finally, the record reflects that Aunt testified that she had a conversation with Father about this litigation, reflecting that he was aware of the proceedings.

Mother next maintains that, given the lack of "any evidence of abuse or neglect" by the natural parents, the court erred in awarding custody of Child to Aunt. Such a finding, however, is not required upon a determination that a non-natural parent seeking custody is a *de facto* parent. *Conover, supra*, 450 Md. at 85 ("We hold that *de 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.").

Mother also argues that awarding custody to Aunt is not in Child's best interest. The court, after it concluded that Aunt is a *de facto* parent, engaged in a best interest of the child analysis. Based on the evidence before it, the court made findings to support its conclusion that Aunt having sole legal custody and primary physical custody was in Child's best interest. The court, among other things, found that Child had resided with and been cared for by Aunt (at Aunt's expense) for most of her life; that Aunt had the means to support Child and could continue to provide her with enrichment and development activities; that Mother and Father's behavior bordered on voluntary abandonment of Child; that Child had a "positive" relationship with Aunt; and there was no evidence before the court regarding the employment status of either natural parent.

Although Mother attempts in her brief to tell her side of the story as to how Child came to reside with Aunt, and proffers reasons why it is in Child's best interest to be in Mother's custody, those facts are not in the record before us and, therefore, we shall not consider them. *Cochran v. Griffith Energy Serv., Inc.*, 191 Md. App. 625, 663 (2010) ("[A]n appellate court must confine its review to the evidence actually before the trial court when it reached its decision."); *Casson v. Joyce*, 28 Md. App. 634, 638 (1975) ("On appeal[,] we are confined to the record made in the court below" and "we may not go beyond it for additional facts."). Based on the evidence before the circuit court, we cannot conclude that the court erred in its best interest of the child analysis. Thus, we find no abuse of the court's discretion in its custody award.

Finally, Mother asserts that Aunt's "claim that gave standing that she is a de fact[o] parent is completely false." As noted, Mother attempts to refute Aunt's evidence with

factual allegations not presented to the circuit court and thus, not in the record before us. In short, Mother forfeited her right to tell her side of the story and enter evidence in support of her position when she failed to appear for trial.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.