

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1084

September Term, 2017

MICHELLE G.

vs.

DARYL L. F., ET AL.

Graeff,
Fader,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 28, 2018

*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.

In this private custody proceeding, appellant, Michelle G., appeals from the order of the Circuit Court for Prince George's County denying her petition for sole legal and physical custody of her nephew, the minor child, D.E. The circuit court granted custody to appellees, Daryl F. and Crystal E., D.E.'s biological parents.

On appeal, Michelle G. presents the following questions for this Court's review:

1. Did the trial court err by failing to make any findings of fact before issuing its custody determination?
2. Did the trial court err in awarding child custody to appellees, when appellant was a *de facto* parent, appellant had overcome the parental presumption, and it was in the minor child's best interest to remain in the appellant's custody?
3. Did the trial court err when it misapplied child in need of assistance ("CINA") standards to a private custody case and failed to make a custody determination in a reasonable time?¹

For the reasons set forth below, we shall vacate the judgment of the circuit court and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

D.E. was born in April 2013, in Washington, D.C. ("D.C."), and he is the child of Daryl F. and Crystal E. Michelle G. is the paternal aunt of D.E.

At birth, D.E. had a positive toxology for heroin and cocaine, and Crystal E. tested positive for cocaine at delivery. Consequently, D.C.'s Child and Family Services Agency opened an investigation.²

¹ Daryl F. and Crystal E. have not filed a brief in response to Michelle G.'s appeal.

² The record does not reflect the status of this investigation.

For approximately the first six months of D.E.'s life, D.E. lived with Michelle G. "[o]n and off." Michelle G. would "provid[e] for him, . . . tak[e] him to WIC appointments," and "bring things to him like pampers, hygiene [products], [and] food."³ By December 2013, when D.E. was eight months old, he began to reside continuously with Michelle G.

June 2014 Incident

In June 2014, after Michelle G. took D.E. to visit with his parents, they called Michelle G. to pick up D.E. When Michelle G. arrived, D.E. was wet, "didn't have clean clothes or the things he needed," and "the house wasn't clean." Michelle G. also observed that Crystal E. had "[s]ome white powdery stuff around her nose." When Michelle G. asked Crystal E. about it, Crystal E. said she "was high," and she could not "deal with [D.E.] at that time." Michelle G. advised that she was taking D.E.

In the months that followed, neither Daryl F. nor Crystal E. visited D.E. They did not call the police or come to Michelle G.'s house to collect D.E. Michelle G. testified that she called Daryl F. and Crystal E. several times to pick up D.E., but they refused.

Complaint for Custody

On September 2, 2014, Michelle G. filed a Complaint for Custody and a Motion and Affidavit for Emergency Hearing in the Circuit Court for Prince George's County.

³ Women, Infants and Children (WIC) is a federal grant program authorized by Congress to assist low income women, infants and children. Women, Infants and Children (WIC), <https://perma.cc/NZC5-XL8W> (last visited Feb. 27, 2018).

Michelle G. requested sole physical custody of D.E. and a court order requesting Daryl F. and Crystal E. to attend a drug treatment program.

In the Motion and Affidavit for Emergency Hearing, Michelle G. asserted that Daryl F. and Crystal E. abandoned D.E. and had a “history of child neglect and drug abuse.” She alleged that she attempted to notify Daryl F. and Crystal E. of her complaint and motion for custody, but she was unable to contact either parent.

On September 25, 2014, following an emergency hearing, the court issued a temporary order granting sole legal and physical custody of D.E. to Michelle G. It ordered that the parents show cause why Michelle G. should not retain sole custody of D.E., and it set a hearing date of December 8, 2014.

On October 23, 2014, Daryl F. and Crystal E. filed an answer to Michelle G.’s complaint for custody. They asserted that they were “the primary caretakers” of D.E., and despite Michelle G.’s involvement in D.E.’s upbringing, D.E.’s current residency with Michelle G. was “only attribut[able] to [Michelle G.’s] abduction of” the child.

Daryl F. and Crystal E. also filed an omnibus motion to reverse the temporary custody order, asserting, *inter alia*, that they afforded Michelle G. visitation with D.E., and prior to September 2, 2014, they requested that she return D.E., but she refused. Daryl F. and Crystal E. asserted that they did not call the police because Michelle G. is Daryl F.’s sister and D.E.’s aunt. They also argued that they were unaware of Michelle G.’s motion and complaint for custody, asserting that the telephone number identified in Michelle G.’s complaint was not a number either parent had used.

On November 20, 2014, the court granted Michelle G.'s motion for a drug screening, and on April 17, 2015, the court ordered a home study.⁴ A paternity test, taken on December 1, 2014, established a 99.99% probability that Daryl F. is D.E.'s father.

Show Cause Hearing

On December 8, 2014, the court held a show cause hearing on the custody dispute. At that time, Daryl F. and Crystal E. underwent a drug screening, facilitated by the Family Division of the circuit court, and tested positive for opiates. The matter was continued to December 16, 2014.

The record reflects that, on December 16, 2014, the parents did not appear for the hearing, and the parents' counsel appeared briefly, but left "to attend another Court matter and was not present when the case was called." The court awarded Michelle G. sole legal and physical custody of D.E., and set the disposition hearing for December 29, 2014.⁵

Counsel for Daryl F. and Michelle G. filed that same day a motion to vacate the award of the default judgment entered. Counsel stated that he intended to be at the show cause hearing, following his request for a postponement in a criminal case scheduled for the same day, but the criminal case was ordered to proceed, which prevented him from returning. He asserted that Daryl F. and Crystal E. appeared for the show cause hearing, but they left after he advised them that the matter would not proceed given that counsel's

⁴ It is unclear if the home study was ever performed. A custody investigation was conducted, however, which recommended visitation between D.E. and his parents.

⁵ Counsel for Michelle G. stated at the February 25, 2016, hearing that this was a temporary order based on the show cause order.

criminal trial was not postponed, and “the Court would not go forward with any proceeding [where] the Defendants’ were not present with their counsel.”

On January 9, 2015, the court scheduled a hearing on the motion for March 13, 2015, which was reset for April 17, 2015. On that date, the court denied the motion to vacate.

Scheduling Conference

On November 17, 2015, a scheduling conference was held. Neither Daryl F. or Crystal E., nor their counsel, appeared.

During the scheduling conference, Family Support Services referred the case to undergo a full custody investigation and substance abuse screening. The parties were ordered to attend the Parent Education Program, sponsored by the National Family Resiliency Center, Inc. A trial on the merits was scheduled for February 25, 2016. Neither Daryl F. nor Crystal E. attended the Parent Education Program as ordered.

On January 13, 2016, the court ordered a custody investigation. This investigation was to be performed and completed no later than February 18, 2016.⁶

⁶ A memorandum in the record indicates that this report was filed with the court, but the report does not appear in the record. The report was discussed briefly during the merits hearing, held on February 25, 2016. The court noted that the report recommended “gradual visitation” for Daryl F. and Crystal E., but it did not make any recommendation with respect to custody, which the court found “deficient.”

February 25, 2016, Hearing on the Merits

On February 25, 2016, all parties were present, with counsel, for a hearing on the merits.⁷ Michelle G. testified first in support of her complaint for custody. She explained that Daryl F. was her brother, Crystal E. was her brother's girlfriend, and D.E. was their child, who she has known since birth.

Michelle G. completed the 12th grade and had two years of college education in the field of business management. As of the hearing date, Michelle G. was not employed, but she received disability benefits and had a monthly income of \$1,300. She had custody of, and received benefits for, all of her "brothers and sister's children."

Michelle G. testified that she has "always [been] involved in [D.E.'s] life," providing for him, bringing him diapers and food, and taking him to doctor appointments and WIC appointments. Michelle G. "grew a bond instantly [with D.E.], . . . a loving, caring bond for him."

Michelle G. cared for D.E. because Daryl F. and Crystal E. would call and ask her to, but also because she wanted to "check on him." Michelle G. was aware that Crystal E. used drugs, and because D.E. "was born with heroin and cocaine in his system," there were concerns "with regard to his health."

D.E. began residing with Michelle G. "[o]n and off" when he was six months old. Around the time D.E. turned eight months, in November or December 2013, he began to

⁷ A circuit court judge, different from the one who made the initial grant of temporary custody to Michelle G., presided over the merits hearing.

reside with Michelle G. continuously. Michelle G. stated that D.E. began living with her permanently because his parents “never had much time to spend with him.”

In June 2014, Michelle G. took D.E. to his parents’ house. They called for her to pick him up, and when she arrived, D.E. was wet and did not have clean clothes or the things he needed. The house was not clean, and Daryl F. and Crystal E. did not have food for D.E. As previously indicated, Michelle G. observed “[s]ome white powdery stuff around [Crystal E.’s] nose,” and Crystal E. told Michelle G. “that she was high and that she couldn’t deal with [D.E.] at that time.” Michelle G. told the parents that she was taking D.E. with her.

Between that date and September 2014, neither Daryl F. nor Crystal E. visited D.E. or attempted to retrieve him from Michelle G.’s care.⁸ In September 2014, Michelle G. filed for custody of D.E. The court took judicial notice that it awarded Michelle G. temporary legal and physical custody of D.E. on September 25, 2014.

After the circuit court awarded temporary custody of D.E. to Michelle G., neither Daryl F. nor Crystal E. were involved in the “day-to-day care” of D.E., and they did not attend any of his doctor’s appointments. Michelle G. stated that D.E. had medical insurance, was current on his immunizations, and was meeting the appropriate developmental milestones for his age.

⁸ During this period, Daryl F. did call Michelle G. to ask about D.E. Daryl F. advised that a CPS worker was looking for D.E. so Michelle G. called and talked to the CPS worker. Michelle G. testified that, during this call, she informed Daryl F. that she was filing for custody. He said “no, the CPS worker wanted [D.E.]”

Daryl F. and Crystal E. were welcome to visit D.E., though they rarely took advantage of this opportunity. Daryl F. called “probably every two months or so” to ask her to bring D.E. over. Such visits would last “about an hour or so.”

The weekend before the February 25, 2015, merits hearing was the most recent time Daryl F. visited with D.E. Crystal E., on the other hand, only saw D.E. twice between September 2014, when Michelle G. filed for custody, and the date of the merits hearing. During this time period, neither parent had an overnight visit with D.E. or an unsupervised visit.

Michelle G. was concerned about D.E. spending time with his parents unsupervised, citing their substance abuse issues and her perception that Daryl F. and Crystal E. were unable to adequately provide for D.E.’s well-being. She testified that Crystal E. called her in January to advise that she “was just completing a drug program.” One and one-half weeks before the merits hearing, however, Daryl F. called Michelle G. and stated that the ambulance came to the house because “him and [Crystal E.] were under the influence of drugs” and “the paramedics had to check them out.” Michelle G. did not contact Child Protective Services after this call because she had D.E. with her.

Michelle G. testified that she wanted full sole and legal custody of D.E. She believed it was in D.E.’s best interest because D.E. did not know Daryl F. and Crystal E. as his parents because he had “always lived with [her].” Michelle G. wanted D.E.’s parents to be in his life, with supervised visits at that point and “work on other visitation later.”

Daryl F.'s other sister, Natosha F., testified in support of Michelle G.'s complaint for custody. She had known D.E. since birth, and because she lived "down the street" from Michelle G., she spent time with D.E. every day. She observed Michelle G. interact with D.E. on a daily basis and described Michelle G.'s interaction with D.E. as "good." "They hug, they play, they kiss, he has this thing he rubs her hair, so they are always together and affectionate with one another." Michelle G. "feeds [D.E.], clothes him, bathes him, normal things that you would do with your child." Natosha F. had heard D.E. call Michelle G. "mommy."

Two days prior to the merits hearing, Natosha F. observed Daryl F. interacting with D.E. Daryl F. talked to D.E., but there was "really no interaction." D.E. called Daryl F. "Daryl," even though Michelle G. had told D.E. to call Daryl F. "daddy." D.E. and Daryl F. had a "distant relationship," "not a relationship of a father and a child." Daryl F. had a close relationship with D.E.'s brother, but not D.E.⁹

Natosha F. also had concerns about Daryl F. and Crystal E. being able to provide a stable home for D.E. She stated:

[Crystal E.] is very combative. She is angry all of the time. I recently had to call the police because she was beating [Daryl F.] with a bat. And my other nephew was [] crying around them and they all were screaming. I had to call the police to their home. She is always very angry and abusive. So I don't think [D.E.] needs to be in that type of environment period, [the other child] either, in that matter but --

⁹ D.E.'s brother lived with Daryl F. and Crystal E.

On cross-examination, Natosha F. admitted that an altercation between her and Crystal E. occurred, although she denied being physical during the argument. Natosha F. asserted that Crystal E. had altercations “with everyone,” and Crystal E. was the person who initiated the altercations.

Daryl F. and Crystal E. then called Inga H., Crystal E.’s cousin, as their first witness. Inga H. described the relationship between Crystal E. and D.E. as loving, and she testified that D.E. was comfortable with both Daryl F. and Crystal E.

Although Inga H. was aware that Crystal E. had used drugs, she had not observed it. She had not observed Daryl F. using drugs.

Inga H. had not observed Crystal E.’s children being underfed, underdressed, or in danger while in Crystal E.’s custody. She had no reservations about Daryl F. and Crystal E. having legal or physical custody of the minor children.

Crystal E. testified next. She graduated from high school and took some courses for early childhood education, but she then began working without completing a degree. She was unemployed at the time of the merits hearing, but she was “looking for employment.” She also planned to enroll in school to receive an associate’s degree, which was her priority over work. During that time, Crystal E. received public assistance to help take care of her son and her daughter. Only two of Crystal E.’s five children resided with her at the time.¹⁰ She admitted that CINA investigations were opened with respect to several of her children.

¹⁰ Crystal E. subsequently gave birth to a sixth child. Daryl F. is the father of three of those children, including D.E.

Crystal E. admitted to having a problem with drugs, and to testing positive for opiates on December 8, 2014, but she explained that, since then, her “ambition is totally different.” She testified that she participated in a detox program and then entered a 28-day treatment program with the Community Action Group in D.C. She did not, however, have proof of “successful completion of that drug program,” stating that she would “have to get that document.” Crystal E. also testified that it had been approximately one year since she last used illegal drugs, and contrary to previous testimony, she had not recently called an ambulance regarding drug use.

Crystal E. testified that, prior to the court’s temporary grant of custody of D.E. to Michelle G., Crystal E.’s relationship with D.E. was special, and she described Daryl F.’s relationship with D.E. as “very tight.” She stated that she and Daryl F. cooked and cared for D.E.’s medical needs. She admitted that Michelle G. took D.E. to a WIC appointment, but claimed that this was to sign a paper so that, if anything happened to her or Daryl F., Michelle G. could use the WIC vouchers in the store.

Crystal E. admitted that she previously consented to Michelle G.’s visitation with D.E. She testified that Michelle G. would take care of D.E. when they were working or had conflicting schedules.

Crystal E. stated that the custody dispute developed from one instance when Michelle G. cared for D.E. while the parents worked. She recounted the following:

[W]e thought we could trust [Michelle G.] to keep [D.E.] so that we didn’t have to cut [or] call off from work and she allowed us to do that and we agreed that she would keep [D.E.] just for a day or two or even overnight so that we could finish our shift and come home. Well, after [Michelle G.]

got upset about the money at some point she retaliated.¹¹ And then recently she decided to keep [D.E.] because –

* * *

We allowed [D.E.] to go with [Michelle G.] while we worked and these were for very short amounts of time. . . . At some point [Michelle G.] decided to keep [D.E.] because she realized she was not getting her money back. We were not paying her. She kept [D.E.], she decided to go to the courts, file for emergency custody. She told them that we were not – that we gave her [D.E.], we left [D.E.] with her, that’s what she said.

Crystal E. testified that, if she had known Michelle G. was filing for custody, she “would have done whatever it took to make sure [Michelle G.] understood they were completely against it.” She “miss[ed] the opportunity to raise [her] son.” And she was willing to do whatever was necessary to regain custody, but since the time that Michelle G. acquired custody of D.E., Crystal E. had only interacted with D.E. “maybe about three or four times.” She admitted that when Michelle G. spoke with Daryl F. to invite him over to see D.E., Michelle G. would tell him to bring Crystal E. to visit as well.

During the hearing, the court was concerned with reuniting the family “[b]ecause when [] we do cases in family, it’s about reunification of the family.” At the end of Crystal E.’s testimony, the court terminated the hearing, and made the following statement:

[M]y problem right now is that when this custody order was issued back on December 16th of 2014, it [did not] provide for any visitation whatsoever. That’s totally inappropriate. So that’s been over a year. . . . But you can’t [] say I’m giving custody to one person and not let or allow the biological parents visitation. It doesn’t even say reasonable. It doesn’t say anything in here about setting it up at the visitation center. It says absolutely nothing. So when you testify that [the parents] have no[] relationship with

¹¹ Crystal E. testified that she and Daryl F. owed Michelle G. money for the heroin and cocaine she gave them.

this child and haven't had one and [] the child is not comfortable with them, how is the child supposed to be comfortable when the child hasn't seen them in a year. The child is only two. I don't understand that concept. So you built it into this order to be at this point that you are at right now, saying one of the factors that this Court should look at is the child is not comfortable.

I'm not going to allow that. I'm completely different and I'm going to keep this case. It's not going back to another judge. Since I'm not ruling right now, I'm going to rectify the problem right here in this order about they don't get to see their child.

Now, it can be through the visitation center. . . .

I see that was one of the recommendations [resulting from the custody investigation]. And one thing I do agree with the report in terms of the department's report to the Court is that it has to be gradual because it has been to[o] long. And never ever should the child be calling you [Michelle G.], mommy. That should have been corrected from the very beginning. . . .

The court then entered a written order granting Daryl F. and Crystal E. supervised access with D.E. "every other Saturday[,] beginning March 5, 2016," at a visitation center. The order also required all parties to "submit to the Court proof of completion of the parenting seminar sponsored by the National Family Resiliency Center," and it required Crystal E. to "submit to the Court proof of participating in a substance abuse aftercare program." Another hearing was set for May 11, 2016.

Daryl F. and Crystal E.'s Supervised Access

On April 20, 2016, the Family Support Services Division of the circuit court submitted a memorandum regarding the status of the parents' supervised access with D.E. The memorandum reiterated the requirements for participating in supervised visits at the visitation center, starting March 5, 2016, i.e., Michelle G., Daryl F., and Crystal E. were required to submit certain paperwork and attend an orientation by close of business on

March 2, 2016. Michelle G. completed the orientation process on February 26, 2016. Crystal E. completed orientation on March 11, 2016, but as of April 20, 2016, Daryl F. had “not participated in the required orientation process and [was] therefore ineligible to participate in supervised visits.” Although the court order included both Daryl F. and Crystal E., it was confirmed that Crystal E. “could participate in visits without [Daryl F.],” but a caseworker was unable to contact Crystal E. to inform her of this because “the number on file was not in service.”

On April 19, 2016, Crystal E. called to “check on the status of her visitation, stating she wanted to have a visit this weekend at any center because the child’s birthday was approaching.” The first supervised visit was scheduled to take place on Saturday, April 30, 2016.

Proof of Parenting Seminar

On May 9, 2016, Michelle G. submitted to the court her certificate of completion of the court-ordered parenting seminar. She completed the seminar on December 9, 2015. Daryl F. and Crystal E. did not submit proof that they completed this seminar.

May 11, 2016, Hearing on the Merits

On May 11, 2016, the parties appeared for the continuation of the merits hearing on custody of D.E. Daryl F. was not present. Crystal E. testified that she needed “to fix some things,” and she did not object to an order giving Michelle G. temporary custody of D.E. and her visitation, but she did not want to “finalize anything.” Michelle G.’s counsel stated that the proceeding was a “merits hearing,” and Michelle G. would “like to have a

permanent order entered today.” The court stated “that is almost terminating [Crystal E.’s] parental rights,” which the court stated it was “not really wanting to do that.”

The circuit court stated that Crystal E. “has a lot of issues,” which was “why the child [was] best in [Michelle G.’s] home,” but it noted that D.E. was only three years old, and the court stated that it was going to revisit the issue in a year. The court stated:

I have really a hard time thinking that it would be in the child’s best interest to not have any relationship with his mother and just say that your mother has conceded and not – doesn’t want you and has decided that your aunt can have custody, and be the one who raises you solely without her. I have a problem with that.

Crystal E.’s mother, Tonya N., then testified that D.E. and his siblings have “an incredible bond,” and that Crystal E. was “a very caring and loving mother. . . . [I]t is obvious she loves her children, all of her children, and they realize it, the ones she has close bonds with, they love their mother.” Tonya N. never saw the children harmed in Crystal E.’s presence, had no concerns regarding D.E.’s safety in the custody of Crystal E., and did not believe supervised visits were necessary.

Tonya N. affirmed that she would be actively involved if any visitation was awarded. She testified that, prior to this custody matter, she saw D.E. “a few times a week . . . [a]t [Crystal E.’s] house.”

Michelle G. then resumed the stand to testify about the status of the supervised visitation. She explained that, “the very next day,” after the previous merits hearing, she completed the required orientation so that the supervised visits could occur in accordance with the court’s order. Afterward, however, Michelle G. was not required to do anything

until Daryl F. and Crystal E. completed their orientation, which was not timely done, as discussed *supra*.

Michelle G. also testified that she invited Crystal E. to D.E.'s birthday party, something she would continue to do because Crystal E. is D.E.'s mother. Crystal E. arrived to the party late and spent about two hours at the party. Crystal E.'s interaction with D.E. "seemed to be okay," but D.E. "[did not] know her well." Other than that party, Crystal E. did not have contact with D.E.

In light of this testimony, the court questioned Michelle G. about D.E.'s relationship with Crystal E., as follows:

THE COURT: He doesn't know her. Is that what you keep telling me?

[MICHELLE G.]: He knows of her. . . .

THE COURT: That's a pretty damning statement – he doesn't know her. He doesn't know her. You didn't mean to say that, right?

[MICHELLE G.]: Yeah, I did mean to say that. He doesn't know her well.

At the conclusion of all the testimony, the court then made the following statement:

Let me say this. I am going to be very clear about this. This case has always troubled me from the very beginning. This child was only now three years old. I keep hearing he doesn't know his mother. That's very disturbing to me. There is nothing about her in terms of being a mother that he shouldn't have that relationship or that family bond with her. Now, she may have some issues with respect to her personal issues in terms of drugs, et cetera. That doesn't necessarily mean that there should not be a bond between a mother and a son.

So I am having a hard time right now with what I hear all the time that this request for custody to me is excluding this side of the family. Now, I

even heard a little hint that [Daryl F.] is now believing his sister might be the proper person. That is very troubling to me, because part of the reasons that these visitations didn't occur because of [Daryl F.] and his behavior. So, I am very concerned about what is going on in terms of this case. I am not ready to rule. I am not going to rule today.

The court revised visitation to permit D.E. the opportunity to “form the relationship he doesn't have with his mother and his siblings.” It ordered that Crystal E. have liberal supervised visitation at the home of Tonya N., D.E.'s grandmother. The court also reiterated the terms of its prior order, and requested that Crystal E. submit proof that she enrolled in a substance abuse aftercare program.

As to Daryl F., the court clarified that the modified visitation applied to Crystal E. only. It stated that, “[i]f [Daryl F.] wanted to pursue his rights in this case he need[ed] to come today. He didn't come. . . . If he wants his visitation with his son, he can see [Michelle G.]”¹²

September 1, 2016, Hearing on the Merits

On September 1, 2016, approximately four months later, the parties reconvened for the merits hearing. Michelle G.'s counsel provided an oral report regarding the visitation ordered by the court. “The first visit took place on May 17th . . . at [Tonya N.'s] home” and “lasted for a few hours,” but “[a]fter the visit, [D.E.] got very sick. He had a fever and

¹² After this hearing, until the final merits hearing, held on June 5, 2017, the court focused on Crystal E.'s relationship with D.E., but Daryl F. was not dismissed from the suit. As discussed, he was present at the final merits hearing and included in the final order.

viral infection, so he was in urgent care a few times. He was in the emergency room, and that sort of put a delay on things for a bit.”

Due to this illness, D.E. had medical appointments on May 19th, May 21st, and May 22nd, and because D.E. had a fever, the doctor advised Michelle G. to “keep him away from other children until the fever broke.” Accordingly, because “there were other children present at Tonya N.’s house,” Michelle G. “thought it better to keep him away and quiet until the fever got better.” The court disagreed, noting that the doctor did not order Michelle G. “to keep [D.E.] away from his mother.”

On June 17, 2016, Crystal E. requested a visit that day, “but [Michelle G.] was attending a graduation ceremony with her family, so that wasn’t able to take place.” A visit was then planned for June 29, 2016, which Michelle G.’s counsel described as follows:

On June 29th, [Michelle G.] brought [D.E.] into D.C. to a playground near [Crystal E.’s] home. [Michelle G.] arrived at 11:30 and [Crystal E.] arrived at 12:00.

[Tonya N.] called [Michelle G.] and said she was on her way to supervise, but she never arrived. In order to allow the visit to go forward, my client stayed. There were sort of two playgrounds next to each other, so she sat on one playground and let [Crystal E.] play with [D.E.] on the other playground. The visit began at 12:00. [Crystal E.] left around 1:20. [Michelle G.] advised her to stay longer, but she said no, she had to go.

Before the visit terminated, Michelle G. and Crystal E. planned the next visit “to take place on July 5th.” Michelle G. “also invited [Crystal E.] to their family reunion.”

The July 5th visit did not occur because Crystal E. asked Michelle G. to drop off D.E. at her home, to visit with her and Daryl F., without Tonya N. present. Michelle G. refused because the court order provided that visits were to be supervised by Tonya N.

The next visit was scheduled for July 11th from 10:00 a.m. to 4:00 p.m. That morning, Tonya N. called Michelle G. to say that Crystal E. was not coming, so the visit was canceled and rescheduled for July 13th.

Regarding the July 13, 2016, visit, Michelle G. called Tonya N. shortly before the visit was scheduled, but there was no response. Michelle G. went to Tonya N.'s house to drop off D.E., but no one was there. Michelle G. subsequently received a text from Tonya N. "saying that she wasn't home, that she had gone out early to meet [D.E.'s] other siblings.

Another visit was scheduled to take place on July 20, 2016, from 10:00 a.m. to 4:00 p.m. When Michelle G. telephoned Crystal E. "at 9:30 that morning to confirm the visit," Crystal E. indicated that she "had forgotten that a visit was scheduled, but said that she would call [Tonya N. to confirm] and call back." This visit had to be rescheduled. When Michelle G. offered to schedule a visit during the week of July 25, 2016, Crystal E. informed her that Tonya N. "wouldn't be able to supervise the visits that week."

Counsel explained that, in August,

[Michelle G.] continued sort of this pattern of calling [Crystal E.] every week, offering visits, and [Crystal E.] saying that her mother wasn't available.

At some point . . . [Crystal E.] told [Michelle G.] that she didn't need to keep calling, and that she . . . would contact [Michelle G.] to schedule a visit when her mother was available.

On August 16th, [Crystal E.] texted [Michelle G.] and asked for a visit that day, like the same day, but [Michelle G.] had an appointment scheduled already that she wasn't able to cancel And then she offered a visit for a day later that week. And that has sort of continued to be the pattern throughout.

Over the course of the summer, Crystal E. spent approximately four hours of visitation with D.E.

The court stated that it was “just shocked” that there were only four hours since May, stating:

I feel like you did not follow the spirit of what I asked for you to do in terms of cooperation and what I asked her to do in allowing [Crystal E.] to have visits. It’s her child. It’s not [Michelle G.’s] child. . . .

It’s not any termination of her parental rights either.

Tonya N. testified that she requested that they see D.E., but Michelle G. would say no. She testified to multiple occasions where she texted Michelle G. to request visitation, but Michelle G. either said that the dates did not work or limited the time they could see D.E.¹³ Tonya N. also testified that there was one visit Crystal E. attempted to set up, but Tonya N. was out of town and unable to supervise. With respect to the playground visit, discussed *supra*, Tonya N. stated that she was there, but Michelle G. did not see her. She stated that she and Crystal E. were not comfortable during the visit because Michelle G. “had several other of her relatives there,” which Tonya N. did not think “was appropriate.” Tonya N. testified that, with respect to scheduling the supervised visits, she had “become discouraged, because [they] couldn’t see [D.E.]”

¹³ The court asked Tonya N. if she had a copy of the text messages. Tonya N. said yes, but it does not appear that any text messages were entered as an exhibit. The record suggests that the texts were on Tonya N.’s phone, which was examined by the counsel and the court while Tonya N. testified.

When asked if she was available during the month of August, Tonya N. stated that she had “just arrived back in town. I wasn’t available – well, she never – I would have been available, yes, during the month of August. I’m never gone for an entire month.”¹⁴ With respect to overnight visits, she could adjust her schedule to accommodate such visits every other weekend.

After Tonya N. testified, parents’ counsel informed the court that Crystal E. was attending a substance abuse program, but she had not yet completed it. Counsel also explained that Crystal E. was unable to complete the parenting classes because the times conflicted with the substance abuse program.

Counsel next requested that the court permit unsupervised visitation, or, alternatively, overnight visitation every other weekend at Tonya N.’s house. Michelle G. consented to overnight visitations, supervised by Tonya N., occurring every other weekend. Considering this, the court made the following statement:

Let me just say this. I’m very disappointed that [the liberal summer visitation] didn’t happen. When I ordered this back in May, I was hoping that the parties were together. I was very clear about that. As far as I’m concerned, in the spirit of cooperation it did not occur. I do not feel that your client cooperated at all.¹⁵ I will be honest with you. There’s no way if I were to add up the number of hours in the day from May 1st to September 1st, we have June, July, August – three months. Thirty days in the month. Really? It’s just unacceptable.

¹⁴ Tonya N. receives medical treatments periodically, which are about 10 hours away from her home.

¹⁵ It is not entirely clear, but given that counsel for Michelle G. spoke immediately prior to this statement from the court, it appears that the court was referring to Michelle G. when it stated “your client.”

The court granted Crystal E., under Tonya N.'s supervision, overnight visitation with D.E. on the "1st, 2nd, and 4th weekend of every month until [the] next review hearing." The next review hearing was scheduled for December 1, 2016.

December 1, 2016, Hearing on the Merits

On December 1, 2016, counsel for Daryl F. and Crystal E. requested a postponement because Crystal E. was between "eight and nine months pregnant . . . on bed rest." Counsel for Michelle G., noting that there was no advance request for a postponement, requested that the case go forward and the court issue a ruling on Michelle G.'s complaint for custody. The court responded: "You know I'm not about to do custody without [Crystal E.] here though, don't you? Absolutely not. This is her child. . . . [Michelle G.] is just the aunt. . . . No. Not going to happen." The hearing was postponed until February.

February 23, 2017, Hearing on the Merits

The merits hearing continued on February 23, 2017. Crystal E. was not present because, on February 21, 2017, she entered an inpatient program for substance abuse treatment. Prior to entering that program, Crystal E. participated in Project Connect, which is a program that works with parents "who are substance affected and have children who are somehow involved in the CFSA System [Child and Family Services Agency in

D.C.]”¹⁶ Crystal E. began working with a social worker with Project Connect on January 23, 2017, prior to her admission in the substance abuse treatment program.

At the time of this review hearing, Daryl F. and Crystal E.’s two younger children had been “temporarily placed with [Michelle G.]” The court determined that this was “not really an issue” because the D.C. courts had made that decision.

Counsel for Daryl F. and Crystal E. asked for a 90-day continuance. Counsel for Michelle G. again objected and requested a ruling on custody. The court responded that “the bottom line is the best interest of the children.” It continued:

And it is the best interest of this child at one point if his mother ever gets her act together to be reunited. If this was a CINA case that would be reunification, it would be a whole different case. So again, remember, we have a biological mother and father who have issues that I understand that she is a relative, so I’m not giving her custody until I know or I am confident that both parents are not at some point ever going to be at a point where they can resume the custodial relationship with their son. Okay?

Counsel for Michelle G. informed the court that Michelle G. had been caring for D.E. since he was “six months old and he’s about to turn four.” The court responded: “That doesn’t make her the biological parent.” It stated that it was not going to give Michelle G. the child as long as Crystal E. was “trying to make efforts to better herself to assume the responsibility of being a mother to her son.”

¹⁶ Daryl F. had also entered an inpatient program and requested to participate in Project Connect.

June 5, 2017, Hearing on the Merits

At the hearing on June 5, 2017, counsel for Daryl F. and Crystal E. presented certificates of completion of a substance abuse inpatient program. Both parents were participating in an outpatient program and parenting classes. Counsel further represented that Crystal E. had secured full-time employment with Diamond Back Transportation Services. Daryl F. was employed as a seasonal worker, but was seeking full-time employment. Counsel stated that the parents were seeking unsupervised access to D.E., with the goal to ultimately gaining custody.

Michelle G.'s counsel asked the court to rule on Michelle G.'s complaint for custody and grant Michelle G. permanent sole legal and physical custody of D.E. The court responded that it would "never give [Michelle G.] sole [custody] – I've kind of made that clear from the very beginning. Because they are the biological parents, not her."

Counsel for Michelle G. opposed the parents' request for unsupervised access because Crystal E. had not been consistent with visitation. Instead, Michelle G. requested that supervised visits continue, and that her sister, Natosha F., supervise the visits because she frequently cared for two of Crystal E.'s other children, and Tonya N. had advised that she no longer was able to supervise.

Michelle G. testified regarding the parents' supervised visits with D.E. since the September 1, 2016, merits hearing, when the court first ordered supervised overnight visits to take place on the first, second and fourth weekend of every month. In the fall of 2016,

Tonya N., who was ordered to supervise the visits, called Michelle G. after the second visit, stating that could not supervise the visits because “it was too much for her.”

Michelle G. further testified that when visits did occur, she had concerns about them. For example, during an overnight, supervised visit for the weekend of September 30, 2016, which was supposed to occur at Tonya N.’s house, Michelle G. testified that she was giving Daryl F. a ride home and she observed D.E. and his sibling “outside playing around 10 o’clock at night. . . . [Tonya N.] dropped them off there to [Crystal E.’s] house and she left them unsupervised.”

In response to the court’s questions, counsel stated that only three supervised overnight visits took place in the fall of 2016, and no overnight weekend visits occurred between Crystal E. and D.E. in the year of 2017.¹⁷ Michelle G. had, however, brought D.E. to visit with Crystal E. at her home, and Crystal E. came to D.E.’s birthday party in April.

In April, Crystal E. requested that the overnight visits with D.E. resume. The overnight weekend visits did not resume, however, because Michelle G. “asked for clarification” to confirm that Tonya N. would be “supervising the visits,” but she “never heard anything back.” Michelle G. still brought D.E. over to Crystal E. for daytime visits.

¹⁷ Daryl F. and Crystal E. participated in an inpatient substance abuse treatment program in the early part of 2017.

Michelle G. attempted to contact Tonya N. and Crystal E., by telephone or text message, to schedule visits between D.E. and Crystal E., but she often did not receive any response.¹⁸

Michelle G. requested that the court grant her custody of D.E., with continued supervised visits with Daryl F. and Crystal E. Michelle G. believed this was in D.E.'s best interests because he had been with her and her family since he was three months old, and he was four years old at that time.

The court began questioning Michelle G., asking if she saw Daryl F. and Crystal E. ever "having [D.E.] in their custody." When counsel for Michelle G. injected, the court stated that the case was about custody, and "the reason [the court] granted them access was so [it] could rebuild and grant them custody." The court stated that its "question now is at what point will I grant [Daryl F. and Crystal E.] custody when it is in [D.E.'s] best interest, not [Michelle G.'s], but his best interest."

Counsel for Michelle G. proffered that Michelle G.'s sister was prepared to testify to the parents' lack of visitation. The court cut off counsel and asked how Daryl F. and Crystal E. could be considered unfit parents for D.E. if they still had custody of D.E.'s two siblings. Counsel for Michelle G. proffered that child services had been involved, but she did not know the status of the case. She did acknowledge, however, that Daryl F. and

¹⁸ The record also contains texts showing that Michelle G. took care of D.E.'s two siblings while Daryl F. and Crystal E. received treatment, and Michelle G. sent multiple texts to Crystal E. regarding when she could return them to Crystal E. After a week of daily texts, Crystal E. responded: I got ur text. My phne is dyn." A week later, Michelle G. still had not received any message from Crystal E. about her two other children.

Crystal E. did have custody of their two children.¹⁹ The court stated that, if the parents were “such a danger,” they would not have the younger two children. The court stated: “I don’t understand [] how I separate [D.E.] from [his siblings]. That’s a problem for me.”

It further stated:

[Michelle G.] stepped in when they needed her to step in and she loves him. But she also said on the stand that [the parents] love him and unfortunately under the law in the State of Maryland they are the biological parents and I have to find them not fit to be parents to [D.E.] in order to give her custody.

Counsel for Michelle G. argued that the court could award custody if it found either exceptional circumstances or that Michelle G. was the de facto parent. The court initially stated that “this is not de facto parent, okay, she’s not a de facto parent,” but when it pressed counsel regarding whether the analysis was de facto parent or exceptional circumstances, counsel stated exceptional circumstances.

Counsel argued that Michelle G. had met the standard for exceptional circumstances. She noted that D.E. was six months old when Michelle G. assumed responsibility for his care, and he had “been there for three and a half years of his four year life.” Regarding the possible emotional effect of a change of custody, counsel stated that “[i]t would be detrimental to him to remove [D.E.] from the only home that he ever knows.” Addressing “[t]he nature and strength of the ties between [D.E.] and [Michelle G.],” counsel referred to testimony describing the strength of the relationship between D.E. and

¹⁹ Counsel also stated that D.E.’s siblings temporarily were placed with Michelle G. during this investigation initiated in Washington, D.C.

M.G. With respect to “[t]he intensity and genuineness of the parent[s’] desire to have the child,” counsel stated that Daryl F. and Crystal E. were only just “appearing in court now for the first time in months saying that they want him back.” Counsel then addressed the stability and certainty of D.E.’s future, comparing Michelle G.’s “stable household,” where she has lived “and raised her children . . . for 17 [years],” with the parents, where Crystal E. had a protective order against Daryl F. during the pendency of the custody dispute, which Daryl F. then violated, resulting in criminal proceedings.

Immediately following counsel’s statements, the court stated that it could order a home study if counsel wanted. The court continued: “[B]ut I’m telling you right now they’re going to get custody. I’m sorry. They need to be back home. He needs to be back home with his parents and his other two siblings, period.” The court stated: “Just because [Michelle G.] had him and raised him up until he was four doesn’t give [her] the right to keep him for the next 14 years. It doesn’t work that way.”

The court explained that there were going to be gradually increased unsupervised visits until September 1, at which point, “custody is granted to the parents.” Michelle G.’s counsel moved to stay this ruling, which request the court denied.

On July 5, 2017, the court issued a written order, providing a schedule for access during the summer and “that on September 1, 2017, custody of the minor child shall be transferred from the Plaintiff [Michelle G.] to [Daryl F. and Crystal E.]”

Post-Hearing Events

On August 11, 2017, Michelle G. filed an emergency motion in this Court to stay the court's order, arguing that the court's order "puts the safety of the child at great risk." She explained that D.E. is four years old and has been in her custody since he was six months old. She asserted that Daryl F. and Crystal E. have had a "long-documented history of drug abuse" and have "exercised minimal contact with [D.E.] since his birth."

No opposition was filed to Michelle G.'s motion. On August 28, 2017, this Court granted the motion and stayed the court's order pending further order of this Court.

DISCUSSION

Michelle G. contends that the circuit court erred in its ruling for several reasons. First, she argues that the circuit court "erred by failing to make any findings of fact before issuing its custody determination." Second, she asserts that "the trial court erred in awarding child custody to appellees when appellant was a *de facto* parent, appellant had overcome the parental presumption, and it was in [D.E.'s] best interest to remain in the appellant's custody." Third, Michelle G. argues that the trial court erred "when it misapplied child in need of assistance ("CINA") standards to a private custody case and failed to make a custody determination in a reasonable time." As indicated, appellees did not file a brief in response.

In reviewing child custody determinations, we employ three interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012). The Court of Appeals has explained these three levels of review, as follows:

“When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] 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. (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)). The determination whether to award custody is “within the sound discretion of the [trial court],” and “a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion.”

Id. at 171 (quoting *In re Yve S.*, 373 Md. at 585-86). Accordingly, our standard of review of custody determinations “is quite deferential,” and we “may not set aside the trial court’s judgment merely because we would have decided the case differently.” *Gordon v. Gordon*, 174 Md. App. 583, 638 (2007).

Before addressing Michelle G.’s specific contentions, we will address general principals relating to child custody determinations. The Court of Appeals has explained that there is a presumption in favor of parental custody, and therefore,

in third-party custody disputes, a third-party can only prevail in obtaining custody of a child if he or she overcomes the presumption that the child’s best interest is served by being placed in the custody of the parent, by showing that the parents are either unfit or there are exceptional circumstances that would make custody with the parent detrimental to the best interests of the child.

Burak v. Burak, 455 Md. 564, 624 (2017).²⁰

²⁰ One exception to this rule involves a de facto parent, where, among other things, “the biological or adoptive parent consented to, and fostered, the petitioner’s formation and

The Court of Appeals, noting that “unfitness” in a custody dispute is distinct from such a finding in the termination of parental rights context, has set forth several factors that are relevant to the issue whether a parent is unfit. *Id.* at 648. A court “may consider whether”:

(1) the parent has neglected the child by manifesting such indifference to the child’s welfare that it reflects a lack of intent or an inability to discharge his or her parental duties; (2) the parent has abandoned the child; (3) there is evidence that the parent inflicted or allowed another person to inflict physical or mental injury on the child, including, but not limited to physical, sexual, or emotional abuse; (4) the parent suffers from an emotional or mental illness that has a detrimental impact on the parent’s ability to care and provide for the child; (5) the parent otherwise demonstrates a renunciation of his or her duties to care and provide for the child; and (6) the parent has engaged in behavior or conduct that is detrimental to the child’s welfare. Addressing the second factor, we conclude that “neglect” for the purposes of finding unfitness means that the parent is either unable or unwilling to provide for the child’s ordinary comfort or for the child’s intellectual and moral development.

Id.

With respect to determining whether exceptional circumstances exist, the Court has set forth the following factors, “which may be of probative value”:

(1) the length of time the child has been away from the biological parent; (2) the age of the child when care was assumed by the third-party; (3) the possible emotional effect on the child of a change of custody; (4) the period of time which elapsed before the parent sought to reclaim the child; (5) the nature and strength of the ties between the child and the third-party custodian; (6) the intensity and genuineness of the parent's desire to have the

establishment of a parent-like relationship with the child.” *Conover v. Conover*, 450 Md. 51, 61, 74 (2016). A de facto parent does not need to make a showing of “parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis.” *Id.* at 61.

child; and (7) the stability and certainty as to the child's future in the custody of the parent.

Burak, 455 Md. at 659. *Accord Ross v. Hoffman*, 280 Md. 172, 191 (1977). In assessing exception circumstances, a court must determine that the child “has spent a long period of time away from his or her biological parent before considering the other [] factors.” *Burak*, 455 Md. at 662-63. The length of time must be such that the court can “conclude that the constructive physical custody of the child has shifted from the biological parent to a third-party.” *Id.* at 663.

With this background in mind, we address Michelle G.’s specific contentions. The first contention is that the circuit court erred by failing to make findings of fact. We agree.

Maryland Rule 2-522(a) provides that, “[i]n a contested court trial, the judge, before or at the time judgment is entered, shall prepare and file or dictate into the record a brief statement of the reasons for the decision and the basis of determining any damages.” In custody proceedings, “[a]t minimum, this rule mandates that the court state an objective to be served . . . and then detail the facts furthering the objective.” *Boswell v. Boswell*, 352 Md. 204, 223 (1998).

In applying the best interest of the child standard to a custody award, the court is to “make findings of fact in the record stating the particular reasons for its decision.” *Id.* If a court “does not make the appropriate factual findings based on the evidence presented or relies on one factor to the exclusion of all others,” then the court’s custody order is subject to reversal. *Id.* at 224.

Here, the circuit court was focused, to the exclusion of all else, on the fact that Michelle G. was not D.E.'s biological parent. Indeed, the court stated that it would "never give [Michelle G.] sole [custody] – I've kind of made that clear from the very beginning. Because they are the biological parents, not her."

The circuit court's concern, that granting Michelle G. custody would effectively terminate the parents' rights, is without basis in the law. As the Court of Appeals has previously explained:

We do not regard an order granting custody of a child to a third party, subject to modification and with appropriate visitation privileges reserved to the parent, as the equivalent of terminating parental rights or as having the incidents or effects found important in *Santosky v. Kramer*, *supra*, 455 U.S. 745. It does not deny the parent the right to visit, communicate with, or ever regain custody; it does not terminate the parent's liberty interest in raising his or her child; it is not a "unique kind of deprivation"; it does not "pit[] the State directly against the parents" and does not bear any of the "indicia of a criminal trial."

Shurupoff v. Vockroth, 372 Md. 639, 656–57 (2003). Where the issue is a "modifiable custody order [rather] than a permanent TPR [termination of parental rights] order, the private interest of the parent becomes far less 'commanding' than that which exists in TPR cases." *Id.* at 658.

The circuit court here did not make any findings of fact on Michelle G.'s claim that she should be awarded custody of D.E. based on exceptional circumstances.²¹ Rather,

²¹ Although Michelle G.'s counsel on appeal argues that the court erred in awarding custody to appellees because she was a de facto parent, when the court asked counsel for Michelle G. whether de facto parenthood or exceptional circumstances applied, she stated exceptional circumstances, thereby abandoning her de facto parent argument.

appearing to focus solely on the fact that Crystal E. and Daryl F. were D.E.'s biological parents, and without making any other findings of fact, the circuit court ordered the custody of D.E. to his parents.

Without any factual findings from the court, we cannot assess whether the court abused its discretion in rendering its custody decision. On remand, the court is directed to make findings, in accordance with the factors set forth in *Burak*, 455 Md. at 648, 659, whether there are exceptional circumstances that make custody to the parents detrimental to the best interest of D.E.²²

**JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S
COUNTY VACATED. CASE
REMANDED TO THE
ADMINISTRATIVE JUDGE FOR
REASSIGNMENT. COSTS TO BE
PAID BY APPELLEES.**

²² Given the trial court's statement that it had made it clear that it would never give Michelle G. custody, we agree with Michelle G. that reassignment to a different judge on remand is warranted.