Circuit Court for Howard County
Case No. 13-C-16-108276

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1527

September Term, 2017

CATHERINE DARLING

v.

BARBARA BLUMMER

Friedman,
Fader,
Kenney, James, A. III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.
Dissenting Opinion by Kenney, J.

Filed: July 27, 2018

Parents have a fundamental constitutional right to the care and custody of their children. In this third-party custody case, however, the Circuit Court for Howard County awarded primary physical and joint legal custody to Appellee Barbara Blummer, the Child's paternal Grandmother. We hold that the circuit court misapplied the legal standards under which custody of a child may be awarded to someone other than its parent. We conclude that Mother is entitled to sole legal and sole physical custody of Child and therefore reverse.

BACKGROUND

Mother and Russell Blummer, Child's father, lived together in Grandmother's house for most of their approximately two-year relationship. Three months after Mother gave birth to the couple's only child, the parents ended their relationship and Mother moved out. The parents entered a consent order regarding custody of Child that provided Father with primary residential custody. The consent order also provided that the parents would have joint legal custody of Child. Mother exercised her visitation rights periodically, but did not do so consistently. Accordingly, the parents modified their consent order, giving Father sole legal custody and reducing the frequency of Mother's visitation.

While the consent orders were in effect, Father worked long hours six days a week as a car salesman. To accommodate Father's demanding work schedule, Grandmother took on the role of primary caregiver for Child, delivering him to and picking him up from daycare, coordinating his extracurricular activities, and playing with him after school. Mother sporadically exercised her visitation during this period, and at times failed to appear

without notice. At other times, however, Mother complied fully with the agreed-upon visitation schedule.

In July of 2016, when Child was seven years old, Father contracted spinal meningitis. After Father had been hospitalized for about two weeks, Grandmother sent Child to stay with Mother. Father died shortly thereafter. When Grandmother requested that Child return to her home following Father's death, Mother refused. Grandmother filed a complaint for emergency custody in the Circuit Court for Howard County. Mother counterclaimed, seeking to modify her existing visitation to obtain sole physical and sole legal custody of Child on the grounds that Father's death constituted a material change in circumstances.

The parties proceeded to a two-day merits trial at the end of which the circuit court found that both parties were fit, but that exceptional circumstances existed that warranted granting custody to Grandmother. The circuit court also concluded that Grandmother was a *de facto* parent of Child. The circuit court awarded the parties joint legal custody, and awarded Grandmother primary physical custody with visitation to Mother. Mother noted this timely appeal.[1]

[1] Prior to oral arguments, Mother filed a motion to strike Grandmother's appendix on the grounds that it contained documents from outside the record, namely, documents from the litigation and custody proceedings between Mother and Father. The circuit court in this case, however, took judicial notice of the litigation that occurred between the parents prior to Father's death. Thus, Grandmother violated no rules in presenting documents from that litigation for our review. We therefore decline to strike Grandmother's appendix.

Mother also moved to strike Grandmother's brief in its entirety due to Grandmother's failure to support every factual statement with a citation to the record. We (Continued)

DISCUSSION

Mother raises three challenges on appeal: *first*, that the circuit court erred in finding that exceptional circumstances existed that gave Grandmother status above that of a third party and allowing her to contest custody against Mother; *second*, that the circuit erred in finding that Grandmother was a *de facto* parent of Child; and *third*, that the circuit court erred in concluding that it was in the best interests of Child to award Grandmother primary physical and joint legal custody. Mother argues that no exceptional circumstances existed and that Grandmother was not a *de facto* parent of Child. As a result, Mother argues that the circuit court should not have reached the best interests analysis.[2] As we shall explain below, we agree with Mother and reverse the circuit court's grant of primary physical and joint legal custody to Grandmother.

I. STANDARD OF REVIEW

There are three aspects to our review of a child custody dispute. First, we review the circuit court's findings of fact for clear error. Md. Rule 8-131(a); *Burak v. Burak*, 455 Md. 564, 616 (2017). Second, we determine whether the circuit court erred as to matters of law

note that it will be a rare event in which we will decide a case concerning the proper care and supervision of a child based on who wrote how many cites to the record. Thus, in the exercise of our discretion, we deny Mother's motion to strike Grandmother's brief in its entirety. *See* Md. Rule 8-504(c) (noting that when a party fails to comply with the rule governing required contents in a brief, this Court *may* dismiss the appeal or order other relief, but is not so required).

[2] Mother argues, alternatively, that the circuit court abused its discretion by finding that the Child's best interests favored awarding primary physical custody to Grandmother. Because we conclude that no exceptional circumstances existed and that Grandmother was not a *de facto* parent of child, we hold that the circuit court erred in reaching the best interests test at all. Thus, we need not reach the merits of this issue.

by reviewing its legal conclusions without deference. *Burak*, 455 Md. at 616. Third, we review the circuit court's ultimate determination of custody for abuse of discretion, considering whether it based its conclusion on sound legal principles and on factual findings that are supported by the record. *Id.* at 617.

II. EXCEPTIONAL CIRCUMSTANCES

Parents have a fundamental, constitutional right to raise their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *McDermott*, 385 Md. at 353. Thus, "[w]here the dispute [over custody] is between a fit parent and a private third party … [the] parties do not begin on equal footing. … Generally, absent a constitutional statute, the non-governmental third party has no rights, constitutional or otherwise, to raise someone else's child." *McDermott*, 385 Md. at 353. To overcome the presumption in favor of the natural parent and have equal status to contest custody, a third party, including even a grandparent, must show either that the natural parent is unfit or that exceptional circumstances exist. *Id.* at 375; CYNTHIA CALLAHAN & THOMAS C. RIES, FADERS' MARYLAND FAMILY LAW § 5-5(a)(1) (6th ed. 2006) (discussing the preference for parents).

To determine whether exceptional circumstances exist, the circuit court must first consider "the length of time the child has been away from the biological parent." *Ross v. Hoffman*, 280 Md. 172, 191 (1977) ; *Burak v. Burak*, 455 Md. 564, 662-63 (2017) ("the court must first determine that the child at issue has spent a long period of time away from his or her biological parent before considering the other *Hoffman* factors"). The purpose of this first factor is to determine whether the time in which a child has been away from the care and control of the natural parent is sufficient for "a court to conclude that the

constructive physical custody of the child has shifted from the biological parent to a third-party. Stated another way, the first … factor seeks to determine **whether a biological parent has, in effect, abandoned his or her child**." *Id.* at 663 (emphasis added). While it is clear that abandonment need not be defined as the parent's complete and total absence from a child's life, to satisfy the first exceptional circumstances factor, a circuit court must find that a natural parent has demonstrated an intent to surrender control of the child to a third party.[3] *Id.* Only if a circuit court finds abandonment may it move on to the remaining factors, including:

> [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 in 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 child,
>
> [7] the stability and certainty as to the child's future in the custody of the parent.

[3] If there was any doubt about the proper interpretation of the first exceptional circumstances factor, the Court of Appeal's recent decision in *Burak v. Burak* clarified the standard that courts must apply. 455 Md. at 663-64. *Burak* makes clear that the test for exceptional circumstances is strict and that they will only be found in situations when a parent has abandoned his or her child by "in effect, transferr[ing] constructive custody of the Child" to a third party. *Id.* at 664.

Hoffman, 280 Md. at 191. It then weighs all of these to determine whether exceptional circumstances exist. Only if they do may the court move on to weigh the best interests of the child between the third party and the parent. *McDermott*, 385 Md. at 375.

Here, in reaching its conclusion that exceptional circumstances existed, the circuit court placed significant weight on the first factor: the "length of time the child has been away from the biological parent." But, the circuit court interpreted this factor as meaning "not residing with or in the primary care of [the biological parent]," and concluded that because the Child had resided in Grandmother's home with Grandmother as the primary caretaker from the time Child was four months old until he was seven years old, the first factor was satisfied.[4]

We conclude that the circuit court failed to apply the proper legal standard to the first exceptional circumstances factor, abandonment, and as a result, it erred in finding that exceptional circumstances existed. From the factual record in this case, we see no evidence at all that would tend to show that Mother had an intent to surrender control of Child. Although the record reveals that Mother often failed to exercise her visitation, she maintained a relationship with Child during the entire time he resided with Father and Grandmother. Further, Mother and Father worked out custody of Child between themselves, entering consent orders that gave Mother express rights of visitation with Child, thereby evidencing her intent to remain involved in Child's life. Most importantly,

[4] The circuit court made findings regarding the remaining factors, and concluded that because exceptional circumstances existed that gave Grandmother "status above that of any third party," she could "ask the court to do the weighing of the best interest of the child in making a custody decision."

however, the circuit court explicitly found that Mother did not voluntarily abandon or surrender Child. In fact, the circuit court reasoned, "if you leave the child with the other natural parent or you make your own arrangements to have the child cared for by somebody else, *that's not abandonment or surrender*." (emphasis added); *see, e.g., McDermott*, 385 Md. at 325-26 (exceptional circumstances were not present despite fact that Father, a merchant marine and the child's only fit parent, was required to be away at sea for months and made arrangements for grandparents to provide care to the child during those times). Thus, we conclude that the trial court erred as a matter of law in its understanding of the first exceptional circumstances factor.[5] We, therefore, reverse the award of custody to Grandmother. *See Burak*, 455 Md. at 617 (a circuit court's determination of custody that is based on erroneous legal conclusions is an abuse of discretion).

We note that the circuit court's reasoning risks placing every non-custodial parent in danger of losing his or her children based on a finding of exceptional circumstances. The circuit court found that because Child resided with someone other than Mother throughout his life, that was sufficient to satisfy the first step for exceptional circumstances. If this were the applicable standard, it would make it possible for any third party with whom a child resides, such as a stepparent, nonparental relative, or even a family friend, to assert

[5] Assuming for the sake of argument that exceptional circumstances did exist, to rebut the presumption in favor of custody in the natural parent, a circuit court must also find that the exceptional circumstances were "detrimental to the welfare of the child." *McDermott*, 385 Md. at 375. The circuit court made no such finding here. Thus, even if the circuit court had correctly determined that exceptional circumstances existed, it nevertheless erred in concluding that it was in Child's best interest to award Grandmother primary physical and joint legal custody. *Id.* at 325.

equal rights to a child as its biological parent. This cannot be the test. Parents must be allowed to leave their children with caretakers without the fear that a court could, on that basis, make a finding of exceptional circumstances.

III. *DE FACTO* PARENTHOOD

Mother next challenges the circuit court's finding that Grandmother was a *de facto* parent of Child. In Maryland, courts apply a four-factor test in determining whether a third party enjoys *de facto* parent status. Those factors are:

> (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.

Conover v. Conover, 450 Md. 51, 74, 85 (2016) (quoting *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wi. 1995)). *De facto* parent status exists to promote the principle that a "legal parent does not have a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it." *Conover*, 450 Md. at 75; *see also* FADER'S MARYLAND FAMILY LAW at § 5-5(a)(1) (discussing the policy behind *de facto* parenthood status but noting that it does not diminish the fundamental right of

biological parents to the care and custody of their children). The status, however, "cannot be achieved without *knowing participation* by the biological parent" and the factors "preclude such potential third-party parents as mere neighbors, *caretakers*, baby sitters, nannies, au pairs, *nonparental relatives*, and family friends from satisfying these standards." *Conover*, 450 Md. at 74-75 (internal citation omitted) (emphasis added). The factors necessarily create a strict test because a third party who has satisfied the requirements for *de facto* parent status can contest custody of a child without first proving parental unfitness or exceptional circumstances. *Id.* at 74-75, 85.

Here, the circuit court found that Grandmother met all four requirements to be considered a *de facto* parent of Child, weighed Child's best interests, and awarded custody to Grandmother. With respect to the first factor the circuit court found that prior to his death, Father consented to and fostered a parent-like relationship between Grandmother and Child by allowing Grandmother to take on the primary caregiving responsibilities after Mother left Grandmother's home. To reach this conclusion, the circuit court placed great weight on Grandmother's testimony that due to the demands of Father's job, "[h]e clearly agreed that she would be the one who would five or six days a week be providing for whatever the child needed after school, put into bed, and deal with the majority of his home waking hours."

We think this finding betrays that the trial court misunderstood the test. That Father allowed—or even relied on—Grandmother to provide primary caretaking duties does not constitute the *knowing participation* by the biological parent required to establish a *de facto* parent relationship. *Conover*, 450 Md. at 74-75. Instead, the record makes clear that Father

never consented to Grandmother assuming a parental role in Child's life. Father maintained final authority for all decisions regarding Child, and Grandmother's involvement was subject, always, to Father's approval. For example, although Grandmother researched daycare providers and schools for Child and enrolled him in extracurricular activities, Father attended the intake interviews and signed the relevant contracts authorizing Child to enroll. Moreover, during the period when Grandmother served as Child's primary caretaker, Father and Mother modified their consent order regarding custody of Child to give Father sole legal custody, but at no time did Father seek to grant parental rights or responsibilities to Grandmother. Thus, while we do not wish to diminish the close relationship that exists between Grandmother and Child, it is clear from the factual record before us that Father never consented to or participated in fostering a parent-like relationship between Grandmother and Child. *See Conover*, 450 Md. at 74-75 (noting that the test for *de facto* parenthood is necessarily strict due to the concern that a nonparent might interfere with the relationship between legal parents and their children). As a result, the trial court erred as a matter law in finding that Grandmother met the first *de facto* parenthood factor.[6]

[6] In arguing that the circuit court's grant of custody was correct, Grandmother argued that Mother impliedly consented to the parent-like relationship that Father fostered between Grandmother and Child. Because we conclude that Father never consented to the formation of a parent-like relationship between Grandmother and Child, however, it necessarily follows that Mother did not impliedly consent to that relationship.

IV. CONCLUSION

We conclude that the circuit court misunderstood the law, which led it to err in finding that exceptional circumstances existed and that Grandmother was a *de facto* parent of Child. Given that, it should never have reached the question of whether granting custody to Grandmother was in Child's best interest. We reverse the circuit court's award of joint legal and primary physical custody to Grandmother because, as a third party, Grandmother's rights are subordinate to Mother's, Child's biological parent. We note, however, that our decision does not foreclose the possibility that the circuit court could fashion an award of reasonable visitation to Grandmother. *Koshko v. Haining*, 398 Md. 404, 442-43 (2007) ("the standards and processes relevant to all manner of custody and visitation determinations are nearly identical"). As such, we remand this case to the Circuit Court for Howard County to conduct further proceedings as necessary to enter an order granting Mother sole physical and sole legal custody of Child.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY REVERSED AND REMANDED FOR FURTHER PROCEEDINGS TO ENTER AN ORDER AWARDING APPELLANT SOLE LEGAL AND SOLE PHYSICAL CUSTODY OF CHILD; COSTS TO BE PAID BY APPELLEE.

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Dissenting Opinion by Kenney, J.

Filed: July 27, 2018

I respectfully dissent. In its exceptional circumstances discussion, the Majority addresses the first factor of *Ross v. Hoffman*, 280 Md. 172, 191 (1971), as it was discussed in *Burak v. Burak*, 455 Md. 564, 662-63 (2017). The first *Hoffman* factor is "the length of time the child has been away from the biological parent."[1] And, although it is not the only consideration in an exceptional circumstances inquiry, it is a threshold inquiry that must be satisfied before consideration of the other *Hoffman* factors. *Id.* The stated purpose of the time-away factor is "to determine whether the child at issue has been outside the care and control of the biological parent for a sufficient period of time for a court to conclude that the *constructive physical custody* of the child has shifted from the biological parent to a third-party." *Id.* at 663 (emphasis added). The *Burak* Court continued, "Stated another way, the first *Hoffman* factor seeks to determine whether a biological parent has, *in effect*, abandoned his or her child." *Id.* (emphasis added).[2]

Assuming *Burak* "clarified," slip op. at 5, or, as characterized by the *Burak* dissent, "transform[ed] the well-settled factor test for exceptional circumstances,"[3] 455 Md. at 672 (Getty, J., dissenting), the trial court in this case did not have the benefit of *Burak* for

[1] The facts in this case on that issue are much more similar to the facts in cases cited by the *Burak* Court than those in the *Burak* case.

[2] The *Burak* Court, in its discussion, referenced *McDermott v. Dougherty*, 385 Md. 320, 325-26 (2005) and *Ross v. Pick*, 199 Md. 341, 351-52 (1952).

[3] The dissent also speaks of the "significant overlap between the new factors that the Majority sets forth for unfitness and the already-extant factors described in *Hoffman* for exceptional circumstances." 455 Md. at 672. That overlap is reflected in the trial court's opinion in this case.

guidance. The merits hearing was held on July 13 and 14, 2017 and the Custody Order on the Merits was entered August 11, 2017. *Burak* was not filed until August 29, 2017.

And, I am not persuaded on this record that the trial court's conclusion as to the first *Hoffman* factor would necessarily fail under *Burak* as a pure matter of law. The test is whether the biological parent has, "*in effect*, abandoned his or her child." In other words, that the time that the child has been away from the care and control of the natural parent is sufficient for the court to conclude that the *constructive* physical control has shifted from the parent to a third party. As the Court of Appeals noted in *Pick* and quoted in *Burak*, "the ties of companionship [with those who actually perform the parental duties] strengthen by lapse of time, and upon the strength of those ties the welfare of the child largely depends." 199 Md. at 351-52. Thus, the time-away factor should not be solely measured by the biological parent's intent, but also by the resulting impact on the child.[4]

Moreover, concepts of "in effect" abandonment and "constructive" physical custody present mixed questions of fact and law that traditionally rest within the province of the trial judge. As the *Burak* Court stated, "[B]road discretion is vested in the [hearing court] because only he [or she] sees the witnesses and the parties, hears the testimony, . . . he [or she] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of

[4] The trial court noted that, from the time she left until Father's death, appellant was aware of Father's limited day-to-day involvement in the child's life and that Father's "help" with his child centered on the grandmother. It concluded that appellant "consented to the parent-like role that [appellee] was playing" and that the seven-year period during which appellee acted "in a parental role" was sufficient to create a "bond[ing]" and thus, a "dependent relationship that's parental in nature."

the minor." 455 Md. at 914 (quoting *In re Yve S.*, 373 Md. 551, 585-86 (2003)). In this case, an experienced trial judge heard the testimony of witnesses for two days, made credibility findings, in which he questioned appellant's "veracity" and "candor," resolved evidentiary conflicts, and drew inferences in an oral opinion spanning approximately 43 pages of transcript. I am not persuaded that he erred as a matter of law, but if, in light of *Burak*, he did, the answer in my view is to remand for further proceedings to consider that case.

As to the *de facto* parenthood finding, which in my view is also a mixed question of law and fact, the trial court concluded that Father had "clearly agreed" that appellee "would be the one who would five or six days be providing for whatever the child needed after school, put [sic] into bed, and deal with the majority of his home waking hours." Concluding that appellant was aware of Father's out-of-the-home commitments when she voluntarily left appellee's home, it found that Mother was consenting to someone "filling the gap that she herself as primarily caregiver had performed before." As the trial court saw it, Mother was "willfully shutting her eyes" to the situation of which she was clearly aware. And, by her "course of conduct with awareness," she, "in effect, consented to [appellee's] parent-like role."

The Majority focuses on the finding of Father's consent and concludes that his involvement and "final authority" in such things as education and extra-curricular activities demonstrate that Father never consented to appellee assuming a parental role. It then concludes that the trial court "misunderstood the test," slip op. at 10. But, as I see it, this conclusion is a form of "Monday morning quarterbacking" and appellate fact-finding.

Based on a cold record, it is drawing inferences and weighing the testimony of the parties differently than the trial court, without recognizing that parental roles may vary with individual parents; one may be the physical caretaker and the other the financial and operating officer.