Circuit Court for Montgomery County
Juvenile Petition No. 06-I-16-000082

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2180

September Term, 2016

IN RE: J.M., JR..

Wright,
Berger,
Leahy,

JJ.

Opinion by Wright, J.

Filed: July 25, 2017

*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.

On May 13, 2016, a Child in Need of Assistance Petition ("CINA") was filed by the Montgomery County, Maryland Department of Health and Human Services/Child Welfare Services ("the Department"), alleging that J.M., Jr. ("J.M."), a ten year old child, was a CINA because his legal guardian, his maternal grandmother ("Grandmother"), was unable to meet his mental health needs.[1] On May 31, 2016, sitting as a juvenile court, the Circuit Court for Montgomery County held a CINA adjudication and disposition hearing. The court found that the facts were sufficient to demonstrate that J.M. was a CINA as a result of his mental health needs.

At a review hearing on October 25, 2016, the court *sua sponte* scheduled a hearing to determine whether his maternal aunt ("Aunt") was a *de facto* parent. The hearing took place on November 17, 2016, and December 20, 2016. The juvenile court determined that Aunt was a *de facto* parent, granting her equal party status with the natural parents.

Mother timely appealed.[2] We have reworded her questions for clarity.[3]

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[1] A child in need of assistance is a child who requires court intervention because the child has been abused or neglected, or has a development disability or mental disorder, and whose parents, guardian, or custodian cannot or will not give proper care and attention to the child and the child's needs. See Md. Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP") § 3-801(f).

[2] The appellees to the case are Father, J.M., and the Department. Father, represented by a Public Defender, submitted a brief and argued before the panel at oral arguments. J.M.'s attorney adopted Father's brief and also spoke to the panel at oral arguments. The Department declined to submit a brief and was present at oral arguments but did not participate.

[3] In her brief, Mother, appellant, asks:

> I. Does a juvenile court have jurisdiction to award *de facto* parent status in a CINA case?
>
> II. Did the Circuit Court for Montgomery County, sitting as a juvenile court, err when it determined that the child's maternal aunt was a *de facto* parent as described in *Conover v. Conover,* 450 Md. 51 (2016)?

For the reasons discussed below, we reverse the juvenile court's award of *de facto* parent status to Aunt, and we remand for a review hearing to assess J.M.'s current status and to determine if additional guardianship or custody proceedings are required.

Facts

CINA Adjudication

Since 2008, J.M. has received therapy and psychiatric treatment, and he has been diagnosed with Post Traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder.

> I. Did a juvenile court, lack jurisdiction to award *de facto* parent status, in a CINA case, where CJP § 3-803 does not confer authority upon the juvenile court to make such a determination; and where CJP § 3-801 does not recognize a *de facto* parent as a parent under the subtitle or permit granting party status to such an individual?
>
> II. Did the Circuit Court for Montgomery County, sitting as a juvenile court, err when it determined that the maternal aunt was a *de facto* parent as described in *Conover v. Conover,* 450 Md. 51 (2016), where the child at issue was placed in the custody of the maternal grandmother, and not the maternal aunt, pursuant to court order, and no evidence showed that the mother was aware that her son was living with the aunt, encouraged him to view her as a parent; or that the aunt ever held herself out as a parent to J.M., Jr.?

On May 13, 2016, an Emergency Shelter Care Order was granted following the filing of a CINA petition by the Department. The order placed J.M. at St. Vincent's Residential Treatment Center ("St. Vincent's").[4] The juvenile court made findings that J.M. was in the legal and physical custody of Grandmother following a consent order entered by Prince George's County Circuit Court on September 16, 2009, but noted that J.M. had resided with Aunt for the past six years by agreement between Grandmother and Aunt. J.M. had not been in the custody of Mother since 2008, when the Circuit Court for Prince George's County awarded Grandmother sole custody. J.M. has never been in the custody of Father and has had extremely limited contact with Father.

On May 31, 2016, the court held a CINA adjudication and disposition hearing. The parties to the hearing were J.M., the Department, both natural parents, and Grandmother as J.M.'s legal guardian. Aunt was not a party to the proceedings. Both parents and Grandmother consented to the facts in the First Amended CINA Petition. The juvenile court sustained the facts and found they were sufficient to demonstrate that J.M. was a CINA because Grandmother's mental health and physical needs prevented her from effectively caring for J.M.'s mental health needs.[5]

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[4] J.M. was hospitalized at Adventist Behavioral Health pending admission to St. Vincent's.

[5] Many of the parties have reported histories of mental health needs and physical limitations, including Aunt and Grandmother. As these facts are not relevant to the legal questions before us, we have chosen not to include these details, but note their inclusion in Mother's brief, and we further note that these facts may be relevant on remand.

Following the emergency shelter and care order, J.M. was placed under the jurisdiction of the juvenile court and committed to the Department for placement at St. Vincent's. Visitation and phone calls between J.M. and Mother, Father, and Grandmother were ordered to be supervised in accordance with regulation of St. Vincent's and to occur when deemed clinically appropriate. The court added an additional provision for visitation with relatives.

Review Hearings

Review hearings were held on July 12, 2016, September 6, 2016, and October 25, 2016.

At the review hearing on July 12, 2016, the Department stated that it was in J.M.'s best interest to be reintroduced to his biological parents. Both parents agreed they did not want to do anything disruptive and cooperated with the clinicians. At this hearing, Mother's counsel stated that this was "an alienation case where there was something tragic that happened when [J.M.] was 2 and that [Mother] was alienated from him over time." Counsel continued, "there are a lot of serious issues regarding [Aunt], which are not addressed in the court order because she's not a party . . . ." Finally, counsel stated that, "[o]ne of the things that happened in this alienation process is that [J.M.] was told [by Aunt] that [Mother] was going to cut off his head if he saw her, and that's from [J.M.] himself." Counsel for Grandmother requested that the introductions occur while J.M. was in placement so that St. Vincent's could respond to any ramifications.

At the review hearing on September 6, 2016, the Department reported concerns about J.M. having unsupervised visits with Aunt and Grandmother, in part because of challenges in determining what traumas may have occurred in J.M.'s early life, and in part due to concerns about the mental health status of Grandmother and Aunt. The Department reported that Mother was doing everything that she needed to do to reintroduce herself into J.M.'s life. J.M.'s counsel and the Department agreed that the St. Vincent's was waiting for direction from the juvenile court to make determinations about progressing therapeutically with the natural parents.

At the review hearing on October 25, 2016, the Department reported that J.M. was doing better, but that he was still struggling in an academic setting. It was reported that J.M. had a supervised visit with Mother, and Mother's confidential psychological evaluations had concluded that she did not have any significant mental health issues that may negatively impact J.M.'s mental health treatment. The psychologist recommended that Mother be permitted to continue to engage in the therapeutic process.

Also at the October 25, 2016 hearing, the juvenile court *sua sponte* scheduled a hearing to determine whether Aunt was a *de facto* parent.

***De Facto* Parent Hearing**

The *de facto* parent status hearing took place on November 17, 2016, and December 20, 2016. Aunt testified that J.M. came to reside with Grandmother on July 8, 2008, and in August of 2008, Grandmother was awarded "full temporary custodianship."

From the time the order was issued, J.M. lived with Grandmother and Aunt.[6] In 2011, they all moved to a house that was broken into apartments. The children lived in a unit with Aunt, and Grandmother lived in a separate one-bedroom apartment. Since moving to this address, Mother visited Grandmother, but not Aunt, and Mother could see J.M., but to Aunt's knowledge, J.M. did not know Mother was there.[7]

The juvenile court asked Aunt a series of questions that related to the factors to be considered for *de facto* parent status. Specifically, the court asked Aunt to talk about "how, if at all, [Mother] consented to and fostered the relationship between you and J.M." Aunt replied, "I don't – I would say it wasn't direct. If anything it was indirect simply by the amount of time he came to start spending at our home and the degree of interaction that we had – that I had to have with him . . . ." Aunt stated that she did not know what Mother might have known about their living arrangement, and that Grandmother would be more likely to answer questions about what Mother knew because she was in touch with her. Aunt again confirmed that she and J.M. had lived in the same household since 2008. The court directed Aunt to respond to whether she had assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contribution towards the child's support, without expectation of financial compensation. Aunt produced documents that showed payments for child care and stated that her salary alone supported J.M. before Grandmother obtained disability.

[6] J.M.'s sister also lived with Grandmother and Aunt.

[7] This was done by allowing J.M. to play on the courtyard where Grandmother and Mother could see him, but he could not see Mother.

On cross-examination, Aunt acknowledged that she received social security income for J.M., once he was in her care, for which Grandmother had applied as J.M.'s custodian. Finally, in response to the court's question about whether Aunt had been in a parental role for a length of time sufficient to have established a bond with the child, Aunt testified that she has attempted to create an environment to allow J.M. to thrive, that she taught him values, and she shared stories about their time together, including that J.M. was trying to teach her how to play chess.

Grandmother then testified that she did not contact Mother to advise her of the 2011 move. She stated that she never told Mother who was taking care of J.M., and Mother never asked. Grandmother believed that Mother was aware that J.M. was living with Aunt in addition to living with her. Grandmother also stated that Mother expressed concerns about Aunt's involvement in J.M.'s life, including that Mother "always expressed concerns whenever there was anything that involved [Aunt]. [Mother] and [Aunt] have had this ongoing animosity from childhood." Grandmother stated that she did not think that Mother was aware that Aunt was engaged in activities such as taking J.M. to his Individualized Education Program meetings. When asked about Mother's lack of visitation with J.M., Grandmother explained that Mother would often not call for several months at a time, and that Grandmother had prevented contact between Mother and J.M. because a therapist told her that the court order required that. Grandmother again explained that at the old apartment, she had allowed Mother to see J.M., but Mother could not speak with him and J.M. did not know she was present. Grandmother also

confirmed that J.M. told her that Aunt told him that Mother would cut off his head if she saw him. Grandmother said that this frightened J.M. Grandmother also testified regarding personal issues between herself and Aunt.

Mother testified that she did not consent to Aunt being the guardian of her son. She further testified regarding her visits with J.M. at St. Vincent's and stated that she had a place for her son if he were permitted to reunify with her. Mother stated that she made efforts over the years to communicate with her son, but was told by Grandmother that Child Protective Services would not permit it.

In closing, the Department deferred to the juvenile court regarding whether Aunt should be considered a *de facto* parent, but expressed concern about whether Mother consented to or fostered the relationship between J.M. and Aunt. Father also deferred to the court. Counsel for J.M. stated a belief that Aunt was a *de facto* parent, relying on the psychological bond between J.M. and Aunt. Grandmother agreed with child's counsel. Mother disagreed, stating that there was "no dispute that [Mother] did not consent to [Aunt] being guardian of the child." Mother again reiterated that this was an "alienation case where [Aunt] put in the mind of the child that [Mother] was scary and dangerous . . . ."

The court, sitting as a juvenile court, determined that Aunt was a *de facto* parent, granting her equal party status with the natural parents. Mother timely appealed.

Additional facts will be provided as they become relevant to our discussion, below.

Discussion

I. *De Facto* Parent Status in Maryland

Because this case addresses a relatively new area of the law in Maryland, before turning to the questions or the merits, we first lay out the relevant case law related to *de facto* parent status and parental rights to make decisions regarding care, custody, and control of a child.

Four key cases frame Maryland's history of recognition, or lack thereof, of *de facto* parent status.

In *S.F. v. M.D.,* 132 Md. App. 99 (2000), this Court first recognized *de facto* parent status and held that a *de facto* parent seeking visitation need not prove the unfitness of the biological parents, or exceptional circumstances, as a prerequisite to the best interests of the child analysis. *Id.* at 111-12. To determine whether a party was entitled to *de facto* parent status, we adopted a four-part test first articulated by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). *Id*. at 111. *S.F. v. M.D.,* was left to stand by the Court of Appeals for eight years, until it was overturned by *Janice M. v. Margaret K.*, 404 Md. 661, in 2008.

In 2000, the U.S. Supreme Court heard *Troxel v. Granville,* 530 U.S. 57 (2000), which addressed an appeal from a petition to obtain visitation rights filed by grandparents of two minor children, pursuant to a Washington State statute which provided that "[a]ny person may petition the court for visitation rights at any time, including, but not limited to, custody proceedings. The court may order visitation rights for any person when

visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Id.* at 61 (citing Wash. Rev. Code § 26. 10.160(3) (1994)). The Court, in a four-justice plurality, determined that the state trial court's visitation order in favor of the grandparents was an unconstitutional infringement on the parent's "fundamental right to make decisions concerning the care, custody, and control" of her children. *Id.* at 72. The Court further stated that the "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65. However, the Court declined to address whether substantive due process requires a showing of harm before non-parental visitation is ordered, and it did not strike down the Washington statute as unconstitutional on its face, but only as applied.

In *Janice M.,* for the first time since *S.F. v. M.D.* and *Troxel,* Maryland's appellate courts again addressed *de facto* parent status. In that case, Janice and Margaret were in a same-sex relationship when Janice, but not Margaret, adopted a child. *Janice M.,* 404 Md. at 665. Janice and Margaret separated a few years later. *Id.* Margaret filed a complaint in the circuit court seeking custody or visitation, and the circuit court relied upon *S.F. v. M.D.* to determine that Margaret was entitled to *de facto* parent status. *Id.* at 668-69. This Court affirmed. *Id*. at 669. The Court of Appeals then held that *de facto* parent status was not a recognized legal status in Maryland. *Id.* at 685.

Eight years later, in *Conover,* 450 Md. at 66, the Court of Appeals again revisited the question, overturned *Janice M.,* and recognized *de facto* parent as a legal status in Maryland.[8]

In *Conover,* the Court heard the request of a biological mother who argued that her former spouse and same-sex partner should be considered a non-parent/third party to their child. *Id*. at 55-56. The child was conceived by artificial insemination, from an anonymous donor, based on an agreement by both spouses. *Id.* at 55. The child's birth certificate listed the biological mother as the child's mother and did not identify a father. *Id*. The parents married in the District of Columbia in September of 2010, when the child was six months old, and they separated a year later. *Id*. From the date of separation until July 2012, the biological mother prevented her spouse from visiting the child. *Id.*

In February of 2013, the biological mother filed a Complaint for Absolute Divorce, stating that there were no children shared by the couple. *Id*. The non-biological parent answered and requested visitation rights, but did not request custody, and asserted that she had standing because she met the paternity factors for a "father" set forth in the Estates and Trusts Article ("ET").[9] *Id.* at 56.

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[8] What exactly is *de facto* parenthood? The Court in *Janice M.* explained that the phrase "*de facto* parent" is used generally to describe a party who claims custody or visitation rights based upon the party's relationship with a non-biological, non-adopted child. 404 Md. at 680-81.

[9] Md. Code (1974, 2011 Repl. Vol.), Estates & Trusts Article, § 1-208(b) provides:

> A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:

At an evidentiary hearing before the circuit court, the non-biological parent provided the following facts: both women helped choose an anonymous sperm donor with characteristics similar to the non-biological parent; the biological parent took on a more "female" role in the relationship, while the non-biological parent took on a more "masculine" role; the child called the non-biological parent "Dada" or "Daddy," and the biological parent sometimes referred to the non-biological parent as father; a document authored by the biological parent stated that both parties "verified" that they agreed to "joint custody" of the child with "[t]he exact terms of which to be determined at a later date;" and the non-biological parent testified that the parties considered initiating an adoption proceeding, but they could not afford the cost. *Id.* at 56-57. The non-biological parent argued that the biological parent was estopped to deny fatherhood. *Id.* at 57.

On these facts, the circuit court concluded that the non-biological parent did not have standing to contest custody or visitation. *Id.* The circuit court also found that the

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> (1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
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> (2) Has acknowledged himself, in writing, to be the father;
>
> (3) Has openly and notoriously recognized the child to be his child; or
>
> (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

ET § 1-208(a) states that "[a] child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother."

non-biological parent was a *de facto* parent, but relied on *Janice M.*, to conclude that *de facto* parent status was not legally recognized in Maryland. *Id.* at 58. This Court affirmed. *Id.*

The Court of Appeals granted the petition for writ of *certiorari* to address two issues: "(1) Should Maryland reconsider *Janice M. v. Margaret K.* and recognize the doctrine of *de facto* parenthood? (2) Did this Court err in holding that the non-biological parent is a 'third party' where the non-biological parent is a legal parent under ET § 1-208(b)?" *Id.* at 59.

The Court noted that Maryland was the only state that had interpreted *Troxel* as a bar to recognizing *de facto* parent status. *Id.* at 73. In distinguishing the status of a *de facto* parent from that of any other third party, the Court looked to the Delaware Supreme Court's determination that granting rights to a *de facto* parent, unlike a typical third party, does not infringe on the parent's right to control access to a child. *Id.* at 71-72 (citing *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011)).

The Court of Appeals adopted the four part test as stated by the Wisconsin Supreme Court in *H.S.H-K.*, stating:

> Under this test, a third-party seeking *de facto* parent status bears the burden of proving the following when petitioning for 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.

Id. at 74-75 (quoting *H.S.H.-K.,* 533 N.W.2d at 435-36).

The Court of Appeals drew attention to the high standard set by these factors and the role the biological parent must play in the relationship:

> As other courts adopting this test have recognized, these factors set forth a high bar for establishing *de facto* parent status, *which cannot be achieved without knowing participation by the biological parent*. *See, e.g.*, *V.C.[v. M.J.)*, 748 A.2d [539,] 551-53 [(N.J. 2000)] ("Prong one is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child."); *Rubano [v. DiCenzo]*, 759 A.2d [959,] 974 [(R.I. 2000)] ("[These] criteria preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives, and family friends from satisfying these standards."); *[In re] E.L.M.C.*, 100 P.3d [546,] 560 [(Colo. App.2004)] ("These four factors ensure that a nonparent's eligibility for psychological parent treatment with respect to an unrelated child will be strictly limited.").

Id. at 74-75 (emphasis added).

The Court concluded that the high bar set by these factors largely eliminated the "concern that recognition of *de facto* parenthood would interfere with the relationship between legal parents and their children[.]" *Id.* at 75. According to the Court, "[t]he *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 a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it." *Id*.

We now turn to the questions before us.

II. Standard of Review

Appellees correctly state the three-level standard of review for child custody matters:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies. [Secondly,] if it appears that the [juvenile 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 [juvenile court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [juvenile court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Shirley B., 419 Md. 1, 18 (2011) (quoting *In re Yve S.,* 373 Md. 551, 586 (2003)).

Although this case arises from a juvenile court, the questions before us are not questions of fact, nor are they based upon the best interest analysis or other issues typically presented in a child custody case. The parties here present legal questions regarding the *de facto* parent doctrine in Maryland, and as in *Conover*, "we review the Circuit Court's decision without deference." *Conover,* 450 Md. at 60 (citing *Elderkin v. Carroll*, 403 Md. 343, 353 (2008) ("When the ruling of a trial court requires the interpretation and application of Maryland case law, we give no deference to its conclusions of law.")).

III. *De Facto* Parent Analysis

We begin by addressing the specific facts before us, and we agree with Mother that the grant of *de facto* status to Aunt was in error for multiple additional reasons.

A. Nonparental Relatives As *De Facto* Parents

Aunt is a nonparental relative. At first blush, as a matter of law in Maryland, it appears that nonparental relatives cannot be granted *de facto* parent status. *Conover,* 450 Md. at 74-75. A review of the cited authority indicates that such a holding may be overbroad. However, a grant of *de facto* status to a nonparental relative would be quite rare.[10] We explain.

In *Conover,* the Court of Appeals makes clear that an equity court's ability to grant *de facto* status is limited, so as to assuage concerns that *de facto* parent status would not infringe upon the parental rights to determine access to a child. *Id.* at 71-72. The Court notes that the *H.S.H.-K.* factors set a high bar for that reason, and that the factors specifically "preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, *nonparental relatives*, and family friends from satisfying these standards."[11] *Id.* at 74-75 (quoting *Rubano*, 759 A.2d at 974) (emphasis added).

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[10] We recognize that there are rare occasions where a family member may raise a child truly standing in as a parent - where the child believes the relative to be their parent, uses parental language towards the relative, and the relationship is presented publically as parent and child. This is not such an occasion.

[11] In *Conover*, the Court of Appeals referenced *de facto* parent statutes from other jurisdictions, some of which do allow explicitly allow nonparental relatives to be awarded *de facto* parent status. *Conover*, 450 Md. at 80 n.21. It is certainly within the General Assembly's power to codify *de facto* parent status, and in doing so, to explicitly address whether or not nonparental relatives may be granted this status, but *Conover* did not do so. Rather, the above quoted list of "potential third-party parents" who are likely precluded from *de facto* parent status by the H.S.H.-K. factors share the common

A court's grant of *de facto* parent status is rooted in the doctrine of estoppel. *Id.* at 62 n.6 (the American Law Institute defines a *de facto* parent as an "individual other than a legal parent or a parent by estoppel") (citation omitted). A parent who voluntarily cultivates a parental relationship between their child and a third party may then be estopped from unilaterally removing the third party from the child's life. *Id.* at 75 ("[W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced.") (Quoting *Marquez v. Caudill*, 656 S.E.2d 737, 744 (S.C. 2008)). However, typically, nonparental relatives, nannies, and other caretakers are not introduced to a child *as a parent*. In the usual relationships between relatives and a child, even where the relative provides care, the child understands that the relative is not a parent. It is therefore unlikely that a typical relationship between a nonparental relative and a child would evolve to be a true parental relationship, even where the nonparental relative is a caretaker.

Said another way, an individual may obtain legal recognition of parental rights to children where the individual has "been significantly involved in caring for and supporting children *and for whom they have acted as parents*[.]" *Rubano,* 759 A.2d at 974-75 (emphasis added) (citation omitted). The requirements of both "caring for and supporting" and as having "acted as a parent" are distinct, and a person does not typically

characteristic of short-term caregivers, either by contract or relationship to the child's parents.

act "as a parent" when their relationship with a child is an otherwise defined, nonparental role, such as nanny or aunt. Rather, the individual acts in his or her defined role, and the child understands the relationship as distinct from a parental relationship, no matter how close it may be.[12]

There is no dispute that Aunt cared for and supported J.M. However, she acted as his aunt - not as his parent. Unlike in *Conover*, where the child used parental language to refer to the party seeking *de facto* parent status, and where the party held herself out to be a parent to the child, there is no evidence in the record to suggest that J.M. had any doubt as to his familial relationship to Aunt as his biological aunt, or that Aunt held herself out to have any relationship to J.M. other than being his aunt. In fact, Aunt constantly referred to Mother, albeit in unfavorable terms.

Finding no basis for a claim of estoppel because Aunt was acting in a defined nonparental role, rather than as a parent, we find the grant of *de facto* parent status to Aunt to be legal error.

Further, to allow it would create the possibility of legal chaos, where a child could have an unlimited number of *de facto* parents based on close relationships with extended family who cared for the child.[13] This is clearly not what the Court of Appeals envisioned in *Conover.* Instead, d*e facto* parent status is to be reserved for the rare cases

[12] This is true for nonparental relatives as well as paid caretakers.

[13] This is especially true in this case, where the child has a mother and a father. *Conover,* 450 Md. at 75 n.18 ("A court should be very cautious and avoid having a child or family to be overburdened or fractured by multiple persons seeking access.").

where a parent "alters a child's life by essentially providing him with another parent[.]" *Conover,* 450 Md. at 75 (quoting *Marquez*, 656 S.E.2d at 744). Although Mother allowed Grandmother and Aunt to care for J.M., doing so did not invite a third party into his life as a parent or provide him with another parent.

Moreover, as a matter of public policy, to allow relatives to be granted *de facto* parent status based on providing care and support to a child in situations where the legal parent does consent to and foster that care, but *not* a parental relationship, would discourage parents from seeking assistance from family members when they themselves cannot provide adequate care for a child.

B. Procedural Distinctions from *Conover*

The general genesis of this case is quite different from *Conover.* There, the appeal arose out of a divorce and involved a disagreement over one spouse's right of access to a child. In this case, a third party was granted legal rights equal to that of the natural parents, which she did not seek or initiate.

Conover addresses where a party is seeking a right to a child. 450 Md. at 55. The majority opinion also notes that under the *H.S.H.-K* test, "a third-party seeking *de facto* parent status bears the burden of proving [the four factors] when petitioning for access to a minor child[.]" *Id.* at 74 (citing *H.S.H.-K,* 533 N.W.2d at 435-36). The concurring opinion reinforces this posture and states that the process of gaining *de facto* parent status should be initiated by the party seeking the status. *Id*. at 93. ("In satisfaction of the first prong of the *H.S.H.-K.* test, an action for *de facto* parenthood *may be initiated only by an*

existing parent or a would-be de facto parent by the filing of a verified complaint attesting to the consent of the establishment of *de facto* parent status.") (Battaglia, J., Green, J., and Watts, J., concurring) (emphasis added).

In this case, Aunt did not initiate the action, file a complaint, or in any way demonstrate that she was "seeking" legal rights to J.M. Instead, Aunt merely participated by answering the court's questions, without counsel, on the four factors of the *H.S.H.-K.* test.

The tenor of *Conover* indicates a general cautiousness regarding the grant of *de facto* status, and the entire case is framed in the context of party who has initiated legal proceedings seeking access to the child. Therefore, *Conover* does not provide the court the power to *sua sponte* determine the need for a *de facto* parent hearing, and to do so was in error.

C. On These Facts, Mother Did Not Consent and Foster the Relationship between J.M. and Aunt, and the Grant of *De Facto* Status Was In Clear Error

Finally, we turn our attention to the merits of the grant of status following the *H.S.H-K.* factors, focusing specifically on the facts affecting the first prong and the relationships between Aunt and J.M., and between Mother and Aunt. This analysis is a review of a finding of fact and is reviewed under the clearly erroneous standard. *In re Shirley B.,* 419 Md. at 18 (quoting *In re Yve S.,* 373 Md. at 586 ("When the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies.")).

Even if the juvenile court had jurisdiction, and even if Aunt wasn't excluded from this status by her status as a relative, it is clear from the record that Aunt fails to meet the first prong of the four factor test, because Mother did not consent to and foster the relationship between J.M. and Aunt. *Conover,* 450 Md. at 74 ("Prong one is critical because it makes the biological . . . parent a participant in the creation of the psychological parent's relationship with the child.") (Quoting *V.C.*, 748 A.2d at 551-53).

Aunt herself recognized that Mother did not directly foster the creation of the relationship, stating instead "*if anything it was indirect* simply by the amount of time he came to start spending in our home[.]" This position was essentially affirmed at oral arguments, where counsel for Father and J.M. both argued that Mother had abandoned J.M. to a home where she knew Aunt would be a significant presence. Both parties fail to offer *any* legal support for the assertion that abandonment is adequate to meet the first prong of the test.

Further, Grandmother stated that she did not tell Mother that Aunt was caring for J.M., and Grandmother further testified that Mother expressed concerns about Aunt's involvement in J.M.'s life. Grandmother's testimony makes clear that not only did Mother not foster the relationship, but she may not have even known of its existence. The record lacks any evidence that Mother consented to the relationship between Aunt and J.M. In fact, Grandmother's testimony shows that if Mother had known of Aunt's level of involvement, she may have protested it.

At oral arguments, Mother raised the requirements of "clean hands" in a request for relief in equity. The maxim, "he who comes into equity must come with clean hands," is based upon public policy and, "may be said to mean that courts of equity will not lend their aid to anyone . . . who has been guilty of fraudulent, illegal, or inequitable conduct in the matter with relation to which he seeks assistance." *Hilista v. Aletvogt,* 239 Md. 43, 48 (1965). We need not answer whether the doctrine applies to this subject, and we are not the finders of fact to determine whether Aunt frustrated the formation of a relationship with Mother. However, we agree with Mother that the presence of evidence, which raises the possibility of alienation, cuts against appointing Aunt as a *de facto* parent, as it is contrary to a finding of consent and fostering of the relationship by Mother.

Without turning to the merits of the remaining three factors, where appellees focus their attention, we find that these facts cannot meet the "high bar" set by the *H.S.H.-K* factors, and the court's grant of *de facto* status was clear error.

IV. Jurisdiction Analysis

Mother also asks whether the juvenile court lacked jurisdiction to award *de facto* parent status in a CINA case. Because we find that the grant of *de facto* parent status to Aunt was error based on the facts of this case, we need not answer the question of jurisdiction. However, we briefly address the issue.

Appellees do not respond to this assertion, stating only that jurisdiction to review "the de facto parent, guardian, and custodian of J.M. was pursuant to the May 31, 2016

Adjudication and Disposition Order." Appellees offer no further explanation of how the court's own order provided itself jurisdiction over the matter that might not otherwise have existed.[14]

Jurisdiction involves the power, or authority, of a court to render a valid, final judgment. *Stewart v. State,* 287 Md. 524, 526 (1980) (citations omitted). "[J]urisdiction over the person and the subject matter goes to the very basic *power* of the . . . court. If jurisdiction is lacking . . . a decree rendered by the court would be void." *Moore v. McAllister,* 216 Md. 497, 507-08 (1958) (emphasis in original).

"The power which a court possesses to hear and determine cases, other than that which is inherent in it, is delineated by the applicable constitutional and statutory pronouncements." *First Federated Commodity Trust Corp. v. Comm'n of Secs. for Maryland,* 272 Md. 329, 335 (1974) (citations omitted).

The juvenile court is a court of limited jurisdiction. CJP § 3-803; *In re: Glenn S.,* 293 Md. 510, 511 (1982) ("when the circuit court exercises its powers as a juvenile court, it may exercise only those powers granted to it by statute"). Juvenile courts have jurisdiction over CINA guardianship and adoption proceedings. CJP § 3-803(a).[15]

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[14] At oral arguments, appellees asserted that this argument is waived because it was not raised below. However, while appellate courts will not typically review issues first raised on appeal, lack of subject matter jurisdiction can be raised for the first time on appeal. Md. Rule 8-131(a) ("The issues of jurisdiction of the trial court over the subject matter . . . may be raised in and decided by the appellate court whether or not raised in and decided by the trial court.").

[15] CJP § 3-803(a) provides in full:

Juvenile courts also have exclusive original jurisdiction over CINA cases, including guardianship reviews, terminations of parental rights, and adoptions following terminations.[16] CJP § 3-803. Equity courts and juvenile courts have concurrent jurisdiction over child custody, visitation, support, and paternity of a child who has been determined to be CINA. CJP § 3-803(b). In examining where the juvenile court has concurrent jurisdiction, CJP § 3-803(b) does not fill the void identified by the petitioner.

Custody "means the right and obligation . . . to provide ordinary care for a child and determine placement." CJP § 3-801(k). The Code does not define "visitation," but cases refer to it as time with a child granted to a party who does not have primary physical custody. *Taylor v. Taylor,* 306 Md. 290, 296-97 (1986); *Gillespie v. Gillespie,* 206 Md. App. 146, 174-75 (2012). Similarly, "support" itself is undefined by the Code

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> In addition to the jurisdiction specified in Subtitle 8A of this title, the court has exclusive original jurisdiction over:
>
> (1) Voluntary placement hearings;
>
> (2) Proceedings arising from a petition alleging that a child is a CINA;
>
> (3) Proceedings arising under the Interstate Compact on the Placement of Children;
>
> (4) Proceedings to terminate parental rights after a CINA proceeding;
>
> (5) Guardianship review proceedings after a TPR proceeding; and
>
> (6) Adoption proceedings, if any, after a TPR proceeding.

[16] CJP § 3-801(t) defines "parent" to mean a natural or adoptive parent whose parental rights have not been terminated.

but is commonly understood to mean a duty to financially provide for a child, and the Code definitions detail the nuances of this obligation. Md. Code (1984, 2012 Repl. Vol.), Family Law ("FL") Article § 12-201. Paternity refers to the biological relationship of a father to a child. *See generally Mulligan v. Corbett,* 426 Md. 670, (2012). Although custody may be a resultant determination following the grant of *de facto* parent status, the grant itself is not a custody determination, nor does the award of *de facto* parent status grant or deny a party visitation, support, or paternity. Rather, it is a distinct grant of a parentage status, not included in the above discussed legislation. *Conover,* 450 Md. at 67 n.11 ("[*de facto*] parents, third parties who have, in effect, become parents").

This concept is discussed in *Conover,* where the Court of Appeals directly addressed the issue of whether the legislature must recognize *de facto* parent status in order to overturn *Janice M*. *Id*. at 82-85. The Court concluded that *de facto* parent status need not be left to the General Assembly, and stated its reasoning as follows:

> The General Assembly has granted **equity courts** jurisdiction over the "custody or guardianship of a child." [FL] § 1-201(b)(5). **As part of their broad power to fashion appropriate relief, equity courts** have "plenary authority to determine questions concerning the welfare of children." *Stancill v. Stancill*, 286 Md. 530, 534, 408 A.2d 1030 (1979). "In other words, a court of chancery stands as a guardian of all children and may interfere at any time and in any way to protect and advance their welfare and interests." *Ross v. Hoffman*, 280 Md. 172, 176, 372 A.2d 582 (1977).

Id. at 82 (emphasis added). The Court also recognized the importance of the best interest of the child standard in family law, and the legislative intent to effectuate that interest through the courts, stating:

> Yet, simply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned. We cannot read the legislature's pronouncements on this subject to preclude any potential redress to [minor child] or [putative *de facto* parent]. In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law—**to effectuate the best interests of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state**.

Id. at 83 (quoting *In Parentage of L.B.,* 122 P.3dd 161, 176 (2005)).

Although the Court of Appeals did address potential jurisdictional limitations, in the final analysis the Court addressed *de facto* parent status as an equity issue, rooted in the doctrine of estoppel, and answered *only* whether the *Conover* circuit court, an equity court, had the power to assign this status. The Court did not address the limits of the state's courts to grant *de facto* parent status, neither explicitly granting nor denying the power to juvenile courts. Additionally, as noted previously, the General Assembly has not codified the law on this issue, so we may not look to the legislature for jurisdictional parameters, as it is silent on *de facto* parenthood entirely. Although we would typically address a jurisdictional issue at the threshold, in the case before us, because the Court of Appeals has not explicitly addressed the limits of jurisdiction, and because the jurisdictional issue was not fully briefed by the parties, we decide that the court's grant of *de facto* parent status was error based on the clearly presented questions which are answered by decisional law and discussed above, and we decline to answer the jurisdiction question here today.

V. Conclusion

To allow Aunt to be granted *de facto* status would directly violate the protection of parental rights guarded by the Court of Appeals in *Conover,* and the constitutional rights and principals of *Troxel*. The juvenile court has the power to grant custody and guardianship following an analysis of J.M.'s best interest, but for the many reasons discussed above, the juvenile court should not have granted *de facto* parent status to Aunt.

Recognizing the complicated health statuses and interpersonal histories of all of the parties, we remand the case to the juvenile court for a status hearing and further proceedings as necessary in order to develop a plan for J.M.'s care.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY SITTING AS A JUVENILE COURT REVERSED. CASE REMANDED TO THE JUVENILE COURT FOR A STATUS REVIEW HEARING AND FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEES.