Circuit Court for Washington County
Case No. 21-C-16-056189

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3126

September Term, 2018

BRIANNA CLANTON

v.

JACOB SABINE-PROSSER

Wright
Graeff,
Nazarian,

JJ.

Opinion by Wright, J.

Filed: September 17, 2019

*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.

This case is an appeal arising from the Washington County Circuit Court's grant of custody of A.S. to a third party, following the permissive intervention of Michelle Sabine ("Paternal Grandmother").

On May 12, 2017 Brianna Clanton ("Mother"), filed a Petition to Modify Custody. On September 10, 2018, with the Modification of Custody hearing still pending, the child's paternal grandmother filed a Petition to Intervene. Appellee Jacob Sabine-Prosser ("Father") consented to the intervention. Mother did not file responsive pleading. On November 14, 2018, the parties appeared for a hearing on the merits, the circuit court issued a bench opinion on December 12, 2018, declaring Mother to be unfit before awarding primary physical custody to paternal grandmother. Mother filed a timely appeal.

Mother presents two questions for our review:

I. Did the Circuit Court err as a matter of law in granting the paternal grandmother's Petition to Intervene?

II. Did the Circuit Court abuse its discretion in awarding the paternal grandmother primary custody of the child?

For the reasons below, we affirm the court's judgment that both biological parents were unfit, and the granting of custody to the paternal grandmother.

BACKGROUND

Mother and Father are parents to A.S., born March 29, 2011. The custody dispute over A.S. has been long and contentious. From birth until 2014, A.S. was under Mother's primary physical custody. In November 2014, Father alleged that A.S.

disclosed sexual abuse to him by Mother's boyfriend, which resulted in an investigation by Frederick County Department of Social Services ("Department").[1] Those allegations were followed by a report of physical abuse, with Mother being accused of striking A.S. with a paddle, leaving severe bruising on A.S.'s legs and buttocks. Mother was ultimately indicted on charges of second-degree child abuse and second-degree assault, and she pleaded guilty to the latter charge while the former was *nolle pross*ed.

A.S. was subsequently placed with Mother's brother and sister-in-law in West Virginia, pending a decision in CINA proceedings regarding A.S.'s placement in kinship care with A.S.'s maternal grandmother. Notably, maternal grandmother had an extended history of substance abuse. During the proceedings maternal grandmother was asked to submit to urinalysis, which she refused, before removing herself as a resource for A.S.'s placement. Consequently, in September of 2015, A.S. was placed in foster care and then shortly thereafter transitioned to "aftercare," residing with Father under the supervision of the Department.

Roughly two weeks after A.S. was placed in "aftercare" with Father, Mother made a report to the Department indicating that Father had made sexual advances toward her in front of A.S. Then, on October 8, 2015, Mother made a second report, this time presenting a video with A.S. making allegations against Father. Both allegations were ruled out. On December 10, 2015, the Circuit Court for Frederick County entered a Closure Order granting Father physical custody of A.S., and joint legal custody for both

[1] The product of said investigation is not available in the record.

parents with tie-breaking authority reserved for Father. Mother was granted unsupervised visitation every other weekend.

A.S. remained in Father's physical custody from September 2015 until March 2017. During this period, on February 5, 2016, Father filed a Complaint for Custody challenging Mother's entitlement to unsupervised visitation. Specifically, Father cited Mother's history of abuse, as well as an instance of A.S.'s sexual contact with Father's nephew, a boy of similar age, during Mother's visitation. The court, noting that neither party had taken any further action to investigate the incident or otherwise provide counseling or treatment for A.S., resolved to maintain the existing custody arrangement *pendente lite*. A hearing on the merits was held on November 10, 2016, and the established custody arrangement was preserved upon agreement of both parties.

On February 22, 2017, Father again sought to modify visitation, this time to accommodate his prospective relocation. Father intended to move to Texas with A.S., and to reside with his mother, Michelle Sabine. A hearing was held on March 21, 2017, and with Mother's consent to the modification, the circuit court granted Father permission to relocate along with A.S. Mother was granted summer visitation when school was not in session, with holiday visitation left to the parents' discretion. Mother was also granted telephone contact with A.S. twice a week.

Less than a week after the order was entered, Mother came forward with new allegations of Father's inappropriate conduct. Mother alleged that on March 25, 2017, A.S. disclosed that Father had engaged in sexual contact with her. Notably, despite the

supposed revelation, Mother returned A.S. to Father's care the following evening. No immediate report was made either to police or Department; however, Mother did report A.S.'s allegations to the school on March 27, 2017.

On March 28, 2017, Mother filed for a Protective Order on A.S.'s behalf. A Final Protective Order was issued on April 3, 2017 — valid through June 1, 2017 — with Father's consent, though he did not admit to the allegations, and there was no finding of abuse. Mother then followed up on May 12, 2017, with a Motion for Emergency Custody along with a Petition to Modify Custody. The former Motion was denied the same day and the latter set for a hearing at a later date.[2] At this point in time a safety plan had been implemented, granting custody over A.S. to Mother while Father was prohibited from having any contact.

On October 30, 2017, a *pendente lite* hearing was held regarding Mother's Petition to Modify Custody. Consistent with the existing arrangement, the circuit court granted primary physical and sole legal custody to Mother and continued the prohibition of all physical contact between A.S. and Father. Mother was obligated to provide monthly educational and medical updates to Father's attorney, and Father would be able to have weekly phone calls, subject to the approval of A.S.'s two therapists and Mother's supervision. Mother testified that, during this same period, A.S. demonstrated significant strain on her mental health. A.S. was enrolled in a partial hospitalization program,

[2] Father filed an Answer to Defendant's Petition to Modify Custody on June 29, 2017. A *pendente lite* hearing was scheduled for October 30, 2017.

following Mother's report that A.S. had attempted to cut herself. As part of the program, A.S. was obligated to make daily attendance and received psychiatric care. She also received therapy and was prescribed medication. During this period of time, Mother engaged in "homeschooling" which was not accredited by the proper authorities according to Maryland law, and A.S. lacked regular attendance when enrolled in school.

On September 10, 2018, A.S.'s paternal grandmother, Michelle Sabine, filed a Petition to Intervene pursuant to Md. Rule 2-214, stating her intention to seek legal and physical custody of A.S. On September 13, 2018, Father filed a pleading consenting to the intervention. At the September 17, 2018 status conference for Mother's Motion to Modify Custody, Father appeared along with his counsel and counsel for Paternal Grandmother; Mother made no appearance. Father and Paternal Grandmother's counsel both acknowledged a lack of communication from Mother, including a failure to meet her reporting obligations pursuant to court order, and addressed the possibility of assigning a best interest attorney for A.S. The circuit court acknowledged the propriety of such appointment, noting Mother's prior lack of compliance, as well as her being unrepresented by counsel.[3] An order was issued on September 19, 2018, appointing a best interest attorney for A.S.[4]

[3] The same request had been raised in Paternal Grandmother's Complaint for Third Party Custody.

[4] Of note, A.S.'s best interest counsel filed the only brief in response to this appeal.

Paternal Grandmother's Petition to Intervene was granted on October 1, 2018, and on November 14, a hearing on the merits for Mother's Motion to Modify Custody was finally held. At the hearing, testimony was taken from Ms. Patricia Knode, Mother's Aunt, and Christine Lescalleet, A.S.'s teacher, along with Mother and Paternal Grandmother. Father took no position on custody but rather, through counsel, consented to the viewpoint and requests of Paternal Grandmother and the Best Interest Attorney.[5] In terms of relevant testimony, Lescalleet noted that A.S. demonstrated no significant or chronic behavioral issues, and generally got along well with other students. She also testified that A.S. struggled in several subjects, falling below grade-level. A.S.'s Best Interest Attorney emphasized a number of areas of concern regarding Mother's care for A.S., including Mother's failure to ensure that A.S. received necessary mental health services, to ensure that A.S. consistently attended school, and generally to exercise adequate judgment as to A.S.'s care. Lastly, Paternal Grandmother testified primarily to indicate the living circumstances that she would be able to provide should she be granted, explaining subjects ranging from the size of her home, to her planned daily routine for A.S., to her willingness to keep A.S. away from Father, if necessary.

After an initial postponement due to inclement weather, the circuit court rendered its final decision on December 12, 2018. The court, upon review of the factual record

[5] At the time of proceedings, Father was incarcerated with charges pending, as a result of the March 2017 abuse allegations.

before it, highlighted a number of issues regarding Mother's capacity to provide A.S. with the appropriate level of care, and determined Mother to be unfit.

In discussing Mother's fitness, the circuit court explained, in part:[6]

> [I]n this case the court must determine whether unfitness . . . has been proven by the Paternal Grandmother or proven by the evidence . . . before any change in custody would be permitted. In this case . . . there was significant and substantial testimony given by the parties, as well as the best interest attorney. We go back in time a bit with DSS. Significant social services records were supplied to the Court. The Court did review them. There was the . . . 2015 finding of abuse against [Mother] for an admitted over-disciplining of the child, in this case some type what was alleged to be a wooden paddle . . . . [I]t did cause significant bruising which was recognized by family members and the complaint was made and ultimately found . . . to exist as an abuse case. Criminal case came out of that as well. [Mother] at least at the time of . . . the last hearing was still on probation, was pending a violation of probation for failure to follow-through with mental health therapy as directed by the Court in Frederick County. DSS records were extensive beyond that incident, however, and indicated certain that things . . . that [Mother] has low stress threshold, that [Mother] complained of PTSD symptoms, that the family . . . of [A.S.] has been transient since her birth, that [Mother] has limited coping skills, that there has always seen some level of instability in the home life surrounding Addison while with [Mother], and that there are limited parenting skills . . . with some mental issues as well . . . .
>
> After [Mother] received custody of [A.S.] [pursuant to safety plan following allegations of sexual abuse against Father], there is a complete failure to see that [A.S.'s] educational needs were met. It was so egregious that by the Fall semester, 2018, [A.S.] had fallen significantly behind . . . up to two grades behind, and [Mother] must be found responsible for this failure. The Court would note that while in her care there [are] periods of homeschooling . . . which was not accredited or certified by appropriate authorities. And there was, right before this hearing, a complete lack of any

[6] In addition to the quoted remarks, the court also made note of Mother's propensity for arbitrarily diagnosing A.S. with various issues, and then failing to follow up with health professionals on the supposed issues.

> schooling in Washington County which had to be remedied by a motion and order on behalf or by the best interest attorney to force the child back into school. There were significant unacceptable absences during this time period as well. In the fourth quarter alone, [the] school period ending in June of 2018, [A.S.] had 28 absences and 11 tardies . . . .
>
> The educational failure continued as indicated into 2018-2019 school year. Toward the end of October, after the filing of the . . . motion by the best interest attorney, and about the same time, [A.S.] was finally enrolled in school and began October 23rd. In the short time between October 23 and the [custody] hearing, it was put into evidence that [A.S.] had already had three absences and three tardies. All in all, the Court has to find that is due to [Mother's] failure to have [A.S.] in school regularly . . . since May of 2017, that [A.S.] fell behind.

* * *

Then, discussing the facts as they applied to the applicable legal framework, the circuit court stated:

> Going back to the *Burak* factors[7] in this case, the Court believes that education and personal development are as important to a young person as any other factor to consider in that child's upbringing. They are what give the child the opportunity to live independently and to succeed in future endeavors. The Court has no ill will towards the defendant but finds that at least at this time that where [Mother] is certainly not unwilling, [she] is unable to meet these needs. Under the definition of neglect, the Court would find that she is unable due to multiple factors. The mental health issues that need to be treated. The issues that the Court has seen in almost transferring problems that [A.S.] faces to medical issues that [A.S.] may or may not have as opposed to acknowledging the difficulties raised through failure to ever provide a stable home life for [A.S.]. The Court would note that the past incidents of abuse and the multiple times that the State intervened. The court would also find that based on the testimony of Ms. Lescalleet, which again the court finds . . . most credible or most valuable in this case because it is from a person whose sole job is to try and work

[7] *Burak v. Burak*, 455 Md. 564 (2017).

> with [A.S.] to get her to move forward and advance in her education, personal and social development, and that by the time Ms. Lescalleet received [A.S.] as a student, long after the time that she should have, she was woefully behind and in need of significant encouragement, direction and attention if she is going to move forward . . . . [T]he Court does find by preponderance of the evidence that at this time the defendant is unfit and cannot give [A.S.] what she needs.
>
> * * *

The circuit court addressed the potential benefits of third-party custody and noted the following about Paternal Grandmother and her capacity to care for A.S.:

> Ms. Sabine, paternal grandmother, lives alone near Houston, Texas. She has . . . stable living. She does have a home more than large enough to accommodate a small girl, to give her a private room, live near appropriate schooling, and because she is retired . . . I think indicating going back to work perhaps part-time, that she does have the time and ability to give [A.S.] the attention she needs. Photographs corroborated that at times when [Paternal Grandmother] had access to [A.S.], that they did form a strong relationship . . .
>
> [Paternal Grandmother] has the time and the ability to provide [A.S.] with what she needs on a continual day-to-day basis that can give [A.S] the opportunity to grow and flourish.
>
> * * *

Finally, speaking directly to the A.S.'s best interest, the circuit court remarked:

> [Mother] has her own . . . difficulties to face, not just the ones addressed by the Court and those noted, and although this does not go to fitness for the purpose of permitting a third-party Paternal Grandmother, the potential to take custody of a child, they do go to best interest. As noted before, there was and seems to be some marital disharmony between [Mother] and her husband. Her husband, being military, will be deployed at some point in the near future at about the same time when [Mother] expects to receive her next child born into this earth.

* * *

On the basis of the foregoing, the circuit court granted primary physical custody to Paternal Grandmother, and joint legal custody to Paternal Grandmother and Mother. Mother was allowed to have access to A.S. via digital communication, "albeit, over significant distance." The court also allowed for a two-week visitation while school was out of session. Father was ordered to have no physical contact pending the outcome of trial on his sexual abuse allegations, at which time the court would revisit the issue.

DISCUSSION

Mother, on appeal, challenges the validity of Paternal Grandmother's participation in the instant matter, as well as the circuit court's decision that Mother was unfit as a parent, and the court's granting of physical custody to Paternal Grandmother.

As a preliminary matter, we deny the Paternal Grandmother's motion to dismiss the appeal. The best interest attorney filed a Consent to Intervene/Motion to Dismiss. Mother did not file an opposition. We had previously ruled that on June 26, 2019, Mother shall correct the deficiency in her brief within 15 days. The deficiency notice indicated that the mother's brief was missing the certification of word count. As the brief was only 13 pages (10 of substance) is, therefore, almost certainly within the 3100 word limit, we decline to dismiss this appeal for this unsubstantial violation of Md. Rule 8-503(d). *See In Re: Joshua W.*, 94 Md. App. 486, 490-91 (1993).

For matters tried without a jury at the trial level, Md. Rule 8-131 provides guiding authority. The Rule states:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Id.

With specific respect to third-party intervention, a court's determination as to whether such intervention is proper "is dependent upon the individual circumstances of each case and rests in the sound discretion of the trial court, which, unless, abused will not be disturbed." *Md. Radiological Soc., Inc. v. Health Services Cost Review Comm'n*, 285 Md. 383, 388 (1979) (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973)).

With respect to child custody disputes, there are three aspects of appellate review. First, consistent Md. Rule 8-131 above, "[w]hen the appellate court scrutinizes factual findings, the clearly erroneous standard . . . applies." *In re Yve S.*, 373 Md. 551, 586 (2003) (quoting *Davis v. Davis*, 280 Md. 119, 126 (1977). Second, "if it appears that the [circuit court] erred as to matters of law, further proceedings will ordinarily be required unless the error is determined to be harmless." *Id.* Lastly, "when the appellate court views the ultimate conclusion of the [circuit court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [hearing court's] decision should be disturbed only if there has been a clear abuse of discretion." *Id.*

Further, considering the grant of custody itself:

> [I]t is within the sound discretion of the [ciruit court] to award custody according to the exigencies of each case, and as our decisions indicate, a reviewing court may interfere with such a determination only on a clear showing of abuse of that discretion. Such broad discretion is vested in the

> [circuit court] because only he sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; he 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 the minor.

Id. at 585-86.

I.

We consider first whether the circuit court erred as a matter of law in permitting paternal grandmother's permissive intervention. Mother contends, in cursory fashion, that the court's allowance of paternal grandmother's intervention contravened controlling authority drawn from *Burak v. Burak*, 455 Md. 564 (2017), and *Harford Ins. Co. v. Birdsong*, 69 Md. App. 615 (1987). Generally, Mother's contentions focus on the issue of timeliness. Mother argues that, because Paternal Grandmother's Motion to Intervene was not timely, the court abused its discretion in allowing the intervention. Further, Mother avers that the court erred due to procedural defects under Md. Rule 2-214, though she makes no specific allegations as to what those defects were.

Neither Father nor Paternal Grandmother filed briefs in response to this appeal. However, A.S.'s Best Interest Attorney did file, offering responsive arguments. Best Interest Attorney argues, first, that Mother failed to preserve a challenge to the intervention for appeal, having never objected or responded to Paternal Grandmother's initial Petition for Intervention. Best Interest Attorney's other arguments focus on the court's discretionary judgments, arguing both that the court appropriately found Paternal Grandmother to have met the pleading requirements set out in *Burak*, and that the

Petition to Intervene was "timely" within the parameters of Md. Rule 2-214. Ultimately, we hold that Mother's challenges to paternal grandmother's intervention must fail, as Mother never preserved any of the cited issues for appellate review.

Maryland Rule 2-311(b) provides that "a party against whom a motion is directed shall file any response within 15 days after being served with the motion, or within the time allowed for a party's original pleading pursuant to Rule 2-321(a)." Md. Rule 2-321(a) adds that "[a] party shall file an answer to an original . . . third-party claim within 30 days after being served." All of the foregoing deadlines prove inconsequential in the instant matter, however, because Mother failed to file any response to paternal grandmother's Petition to Intervene. The Petition was initially filed on September 10, 2018, and no answer was ever supplied.

We note, as did Best Interest Attorney in their brief, that upon review of the trial court docket, numerous mailings sent to Mother were returned to sender. However, we must also acknowledge Mother's numerous address changes, evidenced in the record, and also that the Petition was served at the court's address of record. Further, Mother made no appearance at the September 17, 2018 status conference on her own Motion to Modify Custody, where the court explicitly acknowledged the need for her response before issuing a ruling on intervention. Throughout this period, Mother was largely out of contact, having failed even to make her requisite monthly reports on A.S.'s status to Father's attorney pursuant to court order.

Per Md. Rule 8-131, "[o]rdinarily, [an] appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ." *See also Zellinger v. CRC Development Corp.*, 281 Md. 614, 620 (1977) ("A contention not raised below either in the pleadings or in the evidence and not directly passed upon by the trial court is not preserved for appellate review."); *Devereux v. Berger*, 264 Md. 20, 31 (1971). In failing to respond, Mother waived her opportunity to object to the timeliness or propriety of paternal grandmother's intervention. Because these issues were raised for the first time on appeal, the circuit court need not address them, and we find no reason to do so here. This determination extends to the alleged procedural defects under Md. Rule 2-214, which also were never addressed before the court and which were apathetically raised even on appeal. *Electronics Store, Inc. v. Cellco Partnership*, 127 Md. App. 285, 405 (1999) ("[I]t is not [the] Court's responsibility to attempt to fashion coherent legal theories to support appellant's sweeping claims."). In general, the sustained paucity in Mother's responsiveness warrants a finding that she waived her right to any challenges to paternal grandmother's intervention. Accordingly, we affirm the circuit court's allowance of paternal grandmother's intervention.[8]

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[8] At oral argument, counsel for Mother drew attention to the docket entries for this matter, noting that there was no entry indicating that the requisite complaint for third-party custody had been filed. Counsel ostensibly offered this observation in support of the argument that the complaint was not timely filed, or that it may not have been filed at all. However, a copy of the complaint is available in the record, filed just three days after the Petition to Intervene, the lack of notation in the court docket notwithstanding. Indeed, "[i]t is settled that a party to litigation, over whom the court has obtained

II.

We now turn to whether the circuit court erred and abused its discretion in granting custody to Paternal Grandmother. Mother challenges the court's judgment, first, on the grounds that the court's judgment rested upon improperly considered facts. Mother argues that any change in custody subsequent to the court's October 31, 2017 *pendente lite* custody order must be based upon material changes in circumstances that arose after that date. Mother also contends that the circuit court improperly considered testimony about her personal sex life, and that such testimony was irrelevant to her fitness as a parent. Second, Mother avers that the facts elicited during the court proceedings indicate that A.S. was making substantial progress while in Mother's care.

Best Interest Attorney offers several arguments in response. Best Interest Attorney first challenges Mother's assertion that any change in custody subsequent to the October 31, 2017 *pendente lite* order must be based upon a material change in circumstances, arguing that there is no legal authority to support the position. Second, Best Interest Attorney avers that, consistent with the Court of Appeals decision in *Burak*, Mother was properly determined to be "unfit." Best Interest Attorney cites A.S.'s DSS, health and educational records, as well as Mother's own testimony to indicate that the

jurisdiction, is charged with the duty of keeping aware of what actually occurs in the case and is affected with notice of all subsequent proceedings and that his actual knowledge is immaterial." *Baltimore Luggage Co. v. Ligon*, 208 Md. 406, 421-22 (1955). Lastly, no objection was raised before the trial court indicating that there was an issue with the complaint, or the absence of its filing. As such, we hold that any contentions predicated on the absence of the complaint or errors with its filing are without merit, and do not warrant any further judicial review.

circuit court's findings of fact undergirding the unfitness determination were adequately supported. Third, Best Interest Attorney avers that the trial court properly considered evidence regarding Mother's personal sex life, asserting that said evidence was relevant to Mother's credibility, as well as potential ulterior motives in reporting Father for child abuse. Fourth, Best Interest Attorney argues that the circuit court's determination that granting custody to Paternal Grandmother was properly founded, citing the relationship that had developed between Paternal Grandmother and A.S., as well as the resources she may provide.

A.

We first consider the preliminary issue of whether a material change of circumstances should have been found before granting custody to Paternal Grandmother. As noted above, Mother contends that a material change in circumstances must be demonstrated for the period after the circuit court entered its *pendente lite* order to warrant a change in custody, whereas Best Interest Attorney argues, on the basis of authority in *Knott v. Knott*, 146 Md. App. 232 (2002), that no such finding was necessary. We find Best Interest Attorney's argument persuasive and determine that, because Mother's custody was pursuant to a *pendente lite* award, a finding of material change in circumstances post-October 31, 2017 order was not necessary.

Generally speaking, when considering a modification of custody, courts apply a two-step analytical process:

> First, unless a material change of circumstances is found to exist, the court's inquiry ceases . . . . If a material change of circumstance is found to

> exist, then the court, in resolving the custody issue, considers the best interest of the child as if it were an original custody proceeding.

Wagner v. Wagner, 109 Md. App. 1, 28 (1996). However, while this process is applicable when considering modification from final custody orders, the same cannot be said for *pendente lite* orders. *Payne v. Payne*, 73 Md. App. 473, 481 (1988) ("[W]e think it is not appropriate to apply the 'change in circumstances' requirement to *pendente lite* orders."). Specifically, "the change in circumstances requirement is not applicable in establishing a final award that terminates a *pendente lite* order." *Knott*, 146 Md. App. at 259. Consequently, Mother's contention that a material change of circumstances must be demonstrated after the entrance of the October 31, 2017 order are erroneous. What is more, to the extent that the circuit court ought to have identified material changes since the entrance of the preceding final custody order — the March 21, 2017 Order granting custody to Father — it was sufficient for the court to note that the parent entrusted with A.S.'s care had been charged and was awaiting trial for sexually abusing her. The latter part of the inquiry, focusing on the best interest of the child, was addressed during the court's analysis of Mother's fitness and the propriety of granting third-party custody. *See infra*. Consequently, Mother's argument — that a change in custody must be predicated on a material change in circumstance occurring after October 31, 2017 — is without merit, and to the extent that such a finding needs to be made since the implementation of the last final custody order, the circuit court both appropriately noted a change in circumstance and considered the child's best interest.

B.

We next consider the circuit court's grant of custody to Paternal Grandmother. Generally, when a custody dispute exists between a child's parents, the law has no preference for either party, and the determination of custody and visitation is made according to the child's best interest. *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 494 (2007). However, an additional layer of complexity is added when a dispute over custody arises between a parent and a third party. In such cases, courts must be mindful of a parent's constitutional right to raise their children independent of the State's unwarranted influence. As such,

> in private actions in which private third parties are attempting to gain custody of children of natural parents, it is necessary first to prove that the parent is unfit or that there are extraordinary circumstances posing serious detriment to the child, before the court may apply a 'best interest' standard.

McDermott v. Dougherty, 385 Md. 320, 374-75 (2005).

The analytical framework for assessing parental fitness is supplied by the Court of Appeals' recent opinion in *Burak v. Burak*, 455 Md. 564 (2017). In *Burak*, the Court sought to clarify the parameters of a parental fitness assessment. Upon a survey of the holdings from various other jurisdictions on the matter, the Court distilled six primary factors for courts to reference. The Court opined as follows:

> [A] court, in determining whether a parent is unfit, 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 a finding of 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. at 648. Significantly, the enumerated factors are not exhaustive or exclusive criteria, but rather a guide for courts when making their findings. *Id.* at 649. Also, unfitness may be demonstrated by a preponderance of the evidence. *Id.*

Considering then the case at bar, we identify the following general findings of fact recognized by the circuit court, which are stated broadly for brevity and clarity: (1) that Mother has a history of abusive behavior toward [A.S.]; (2) that Mother has been transient throughout A.S.'s life, denying A.S. a sense of stability; (3) that Mother attributes A.S.'s problems to mental health issues she "may or may not have," and does so without acknowledging her own shortcomings as a parent; (4) that Mother has failed to properly ensure that A.S. regularly attends school, causing A.S. to fall significantly behind as a result; (5) that Mother has mental health issues that undermine her capacity to discharge her parental duties; (6) that Mother has personal circumstances undermining her capacity to provide adequate care for A.S.; and, (7) that Paternal Grandmother is in position to provide A.S. with a stable environment that is favorable compared to her current circumstance.

The first factual finding is not disputed. In January of 2015, a DSS report was filed after family members saw significant bruising on A.S.'s legs. Mother was alleged

to have beaten A.S. with a wooden paddle, resulting in severe marks.[9] Mother was charged with second-degree child abuse, as well as second-degree assault, and pled guilty to the latter offense. As such, there was adequate evidence in the record to support a finding that Mother had a history of abusive behavior, and the finding was not clearly erroneous. This finding, of course, directly implicates the third *Burak* factor.

The second factual finding, that Mother was transient throughout A.S.'s life, also finds ample support in the record. To wit, between October 2017 and May 2018, Mother changed her address of record with the circuit court three times. Further, the court noted during the September 17, 2018 status conference that mail sent to the most recent address of record was being returned to sender, indicating that even that address was invalid.[10] Further, Best Interest Attorney testified that during the total five-year period that A.S. was in Mother's custody, she had moved "at least" fourteen times. Taken together, the foregoing evidence indicates that there was sufficient basis in the record to deduce that Mother was in a constant state of displacement, and that such a circumstance could deprive A.S. of stability that would be important in A.S.'s development, particularly at her young age. Thus, the court did not err in its finding. Further, the finding implicates

[9] At the time of the abuse, A.S. was not yet four years of age.

[10] What is more, during the November 14, 2018 custody hearing, Mother identified her address as 15 South Conococheague Street, Apt. 1, Williamsport, Maryland — indicating a fourth change of address, and that the address on record with the court was outdated. Moreover, Mother filed yet another address change after the conclusion of the proceedings that are the subject of this appeal.

the sixth *Burak* factor, as Mother's constant movement could be reasonably judged to have a deleterious impact on A.S.'s development.

The circuit court next found that Mother tended to "transfer[] problems that [A.S.] faces to medical issues that [A.S.] may or may not have as opposed to acknowledging the difficulties raised through failure to ever provide a stable home life for [A.S.]." As to this finding, we note that the evidence educed in the hearing was contradictory and inconclusive. In the record, Mother repeatedly alleged that A.S. had mental issues, resulting in aggressive behavior. Specifically, she testified that A.S. would have "severe temper tantrums;" that A.S. had always had meltdowns and disciplinary problems; that A.S. had once dislocated her friend's jaw during a tantrum; and that A.S. had attempted self-harm, among other issues. These extreme accounts were countered with testimony from Ms. Lescalleet, A.S.'s teacher at the time of the hearing, who testified that she had not noticed any problematic or violent behavior from A.S., that A.S. had done well in acclimating to her classroom, that A.S. had gotten along well with other students, and that she had demonstrated active participation. Ms. Lescalleet also testified that A.S. had access to a crisis pass, which she had never asked to use.

There was also testimony taken from Ms. Knode, who explained that she had seen A.S. on a regular basis,[11] that A.S. had actually improved in her disposition while in Mother's care, and that she had not seen or noticed any problematic behavior from A.S.

[11] Ms. Knode testified that she would see A.S. "at least" two times a week.

Best Interest Attorney, for her part, testified that in assessing the accounts of A.S.'s behavior, it would be difficult to discern whether any problems were the product of a lack of discipline or "true symptoms of a trauma." She also highlighted the dissonance between Mother's claims that A.S. had various mental health issues on the one hand, and Mother's failure to ensure that A.S. received sustained care for these issues on the other.[12]

On the basis of the evidence produced at the hearing, along with Ms. Lescalleet's testimony, which the court identified as "imminently credible," and the testimony of Ms. Knode and Best Interest Attorney, the circuit court determined that the claims made by Mother regarding A.S.'s mental health issues were questionable and, if legitimate, may nonetheless have had less to do with A.S.'s behavior than the circumstances of her upbringing. However, we must also take due note of the fact that at the time of her

[12] Specifically, Best Interest Attorney made the following statement:

> And the fact that [Mother] testifies that her child tried to commit suicide, tried to cut her wrists and kill herself and [Mother] withdrew her from a partial hospitalization program or just didn't show up. And those records are telling your Honor, because they worked with her over and over again to try to get her there. And at that same time she's receiving [Interagency Family Preservation] services from DSS and Potomac Case Management services and abundant of other services to try to support the family and get what she needs, but she makes a decision that this isn't going to happen. And that really concerned me because a child who is that far that she would try to harm herself, needs some serious intervention. And then she's at Safe Place [Child Advocacy Center] but that's trauma therapy. She's not getting medicine maintenance by a psychiatrist. She's not dealing with . . . a psychologist or mental health provider that's dealing with that kind of stuff.

testimony, Ms. Lescalleet had only known and taught A.S. for less than a month, and that Ms. Knode, if consistent in her opportunities to observe A.S., nonetheless could not do so at all times or under all circumstances. We also take notice of the fact that, while no formally adjudicated outcome has been rendered in the matter, there nonetheless are allegations of sexual abuse against A.S. perpetrated by her own father. Further, the record does include evidence indicating that A.S. had received significant therapy and psychiatric treatment. Thus, while there is evidence in the record that could support a finding that A.S.'s problematic behavior, to the extent that A.S. does in fact exhibit such behavior, may be attributable to Mother's care, there is also evidence to suggest that A.S. may have had behavioral issues generally, or that such issues may have risen as the result of abuse.

Nonetheless, given Mother's failure to sustain mental health care for A.S., despite her expressed concerns about A.S.'s behavior, as well as the testimony from both Ms. Lescalleet and Ms. Knode indicating that they witnessed no particularly troubling behavior, there is adequate evidence in the record for the circuit court to determine, at a minimum, that Mother's accounts of A.S.'s behavior may have been exaggerated, and to the extent that A.S. did demonstrate such behavior, it was attributable to Mother's care rather than any alleged mental issue. As such, the circuit court did not err in making its finding. Further, the finding implicates the first *Burak* factor, as it indicates Mother neglected to get A.S. care for issues that she herself identified, and potentially in the alternative, the fourth factor, insofar as Mother's tendency to attribute A.S.'s behavior to

mental health issues demonstrates an emotional immaturity leaving her unable to appreciate the detrimental impact her care may have on A.S.'s behavior and development.

The next finding — that Mother failed to ensure that A.S. regularly attended school, resulting in A.S. falling significantly behind — also finds substantial evidentiary support. In the first marking period after Mother regained custody of A.S., she missed 21 days of school. During the Fall term of 2017, Mother resolved to homeschool A.S. but concededly did so without reference to an established homeschooling program. In the Spring of that school year, A.S. returned to school, and upon review of school attendance records, the circuit court noted that A.S. had been absent 28 times and tardy 11 times. In October of 2018, Best Interest Attorney was forced to file an *ex parte* motion to have A.S. enrolled in school after Mother was unresponsive to her requests and had no approved home school plan on file. At the beginning of the 2018-2019 school year, in the space between A.S.'s first attendance on October 23, 2018 and the hearing on November 14, 2018, A.S. had already missed three days and been tardy on three occasions. Further, Ms. Lescalleet testified that in math and reading A.S. was below grade level. Thus, the circuit court did not err in its finding.

Here, the first, fifth, and sixth *Burak* factors are implicated, as the failure to ensure that A.S. received adequate education indicates that Mother was not taking appropriate steps to foster A.S.'s intellectual development, and was failing to discharge a basic

parental duty mandated by law,[13] and threatened to undermine A.S.'s welfare by impairing her capacity to acquire basic skills.

The circuit court's next finding focused on Mother's mental status. Specifically, the court noted various concerning issues, such as Mother's complaints of post-traumatic stress disorder (PTSD) symptoms and limited coping skills. The record substantiates the court's concerns. For instance, in a note from Safe Place Child Advocacy Center it is stated that Mother presented with "intrusive thoughts, intense psychological distress, diminished interest, poor concentration, sleep disturbances, and distorted beliefs/expectations about herself and her performance," requiring the clinician to develop a treatment plan to assist in building Mother's capacity to "parent effectively by maintaining a safe and protective environment for her children." Likewise, a February 2015 assessment taken by the Maryland Department of Human Resources provided:

> [Mother] has a number of limitations in her parenting skills. She experiences a low stress threshold, which can cause her to lose her temper very quickly . . . . [S]he is limited in her ability to effectively guide and discipline. [Mother] acknowledges her poor discipline choices but continually gives excuses . . . . [She] has described a number of symptoms related to post-traumatic stress disorder, although not officially diagnosed at this time. She is not currently in any formalized treatment although was prescribed anti-depressants by a primary care physician.

Thus, there was significant basis for the circuit court to find that Mother had mental health issues bearing directly on her capacity to function as a parent. This finding

[13] Effective July 1, 2018, the compulsory attendance age in Maryland is 18 years old. A child under 18 must either be enrolled in school or participating in a home instruction program, or have completed a home instruction program. Md. Code (1978, 2014 Repl. Vol.), Education Article § 7-301.

directly implicates the fourth *Burak* factor, with deficits in Mother's mental health being directly linked to her capacity to provide the appropriate level of care to her children by a mental health professional.

In sum, the circuit court made five central factual findings,[14] each implicating one or more of the factors set out in *Burak*. In each instance, the factual finding was based upon at least adequate and at times substantial evidentiary support. Taken together, there was sufficient basis for the court to determine that Mother demonstrated an incapacity to properly discharge her parental duties, did not take reasonable steps to care for her child, and had engaged in behavior that would be detrimental to A.S.'s health and welfare. For these reasons, we hold that the circuit court's judgment that Mother was unfit was proper.

At this point we would briefly address one of Mother's ancillary arguments. Specifically, she avers that the circuit court improperly considered testimony regarding Mother's personal sex life that was irrelevant and had no impact on the child. The contested issue is, presumably, the court's noting that "prior to the May [sexual abuse] allegations [against Father], that [Mother] and [Father] began a sexual affair, even while [Mother] was otherwise married." The contention is without merit because the circuit court placed no significant reliance on Mother's personal sex life in its discussion Mother's fitness.

[14] The sixth and seventh findings identified above were relevant specifically to the subject of A.S.'s best interest, and are addressed in our discussion of that subject, *infra*.

With that, we turn our attention to the second prong of the court's analysis. As we explained above, when considering the prospect of granting custody to a third party, courts begin by asking whether a parent is unfit or if exceptional circumstances exist; these, however, are only preliminary findings before an assessment of the child's best interest. The circuit court made two principal findings impacting A.S.'s best interest and justifying its grant of custody to Paternal Grandmother. We discuss them in turn.

First, the circuit court found that Mother had personal circumstances that could undermine her capacity to take care of A.S. The court focused principally on marital issues between Mother and her husband, stating that "there seems to be some marital disharmony between [Mother] and her husband. Her husband, being military, will be deployed at some point in the near future at about the same time when [Mother] expects to receive her next child born into this earth." Indeed, Mother testified during the November custody proceedings that she was, in fact, pregnant and expected to deliver her next child in March of 2019. Her husband, per her testimony, was due to deploy in February. Additionally, her extramarital relationship with Father indicates that there was at least some marital discord in the marital relationship to be contended with. These facts warrant two conclusions: first, that allowing Mother to maintain custody could subject A.S. to an unhealthy family relationship; and second, that Mother, who was already struggling to manage her parental obligations, would be burdened with the additional stress of caring for a newborn, and at least for the interim period while her husband was deployed, would be forced to handle the corresponding responsibilities without any day-

to-day support from her spouse. As such, it was appropriate for the circuit court to conclude that Mother's personal circumstances could be detrimental to A.S. and had bearing on her best interest.

Next, the circuit court made note of the potential benefits that would accompany A.S.'s placement with Paternal Grandmother. The court emphasized Paternal Grandmother's capacity to provide a stable environment for A.S., and to attend to her needs on a day-to-day basis. The court also noted Paternal Grandmother's previous efforts to develop a relationship and rapport with A.S. In terms of factual support, the court heard testimony from Paternal Grandmother indicating that she lived alone in a 2175 square foot, four-bedroom home located outside of Houston, Texas within walking distance of the local elementary and junior high school. Paternal Grandmother testified that she was employed and had spoken with her employers to ensure that, in the event she was awarded custody, she would maintain an 8 a.m. to 5 p.m. work schedule. Paternal Grandmother testified that, while her son (Father) maintained custody of A.S., she was able to visit with her more than a dozen times and would regularly skype with her multiple times per week. Paternal Grandmother also noted being a member of multiple community groups, including Gulf Coast GAP,[15] a group that provides support for

[15] Gulf Coast GAP was "established to lend support to the many grandparents as parents in [the local] community" and describes itself as "a charitable organization that strives to provide educational and resource assistance for kinship families through monthly programs, holiday celebrations, an annual conference, as well as[] assistance in the event of unforeseen circumstances." *Gulf Coast GAP*, Texas A&M Agrilife Extension, https://brazoria.agrilife.org/gulfcoastgap/. Gulf Coast GAP's monthly programming focuses on various matters, including: the development of coping strategies, anger

grandparents that gain custody of their grandchildren. Lastly, Paternal Grandmother testified to her willingness to keep A.S. away from Father if necessary. Based on this testimony, the circuit court could reasonably find that, as compared to her circumstances with Mother, A.S. would have greater stability with Paternal Grandmother.

Taking these two findings together, there was an adequate basis for the circuit court to find that continuing A.S.'s custody with Mother would subject her to further detrimental treatment and a potentially worsening living situation, particularly in light of Mother's impending new child coupled with the stepfather's deployment. Likewise, the court was sufficiently warranted in its judgment that Paternal Grandmother, by comparison, was in a better position to provide A.S. with the stability that she lacked. We give no short shrift to the notion that removing a child from her home and family and then having her relocate to another state could have negative implications in its own right. However, Mother's transient living situation, paired with her demonstrated and sustained failure to ensure that A.S.'s needs are met, indicates that the prospect of normalcy offered by placement with Paternal Grandmother would be of greater benefit and better serve A.S.'s interests than allowing Mother to maintain custody. Consequently, the circuit court did not err in determining that placing A.S. with Paternal Grandmother was in her best interest.

CONCLUSION

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management, improving problem solving skills, academic success, and assistance with legal issues.

Mother of A.S. challenges the permissive intervention of Paternal Grandmother, and the circuit court's award of custody of the child to Paternal Grandmother. We hold that Mother failed to preserve her challenge to the third-party intervention for appellate review. We also hold that the circuit court relied on well-supported factual findings and applied controlling law. Therefore, the circuit court did not abuse its discretion, and its judgment is affirmed.

JUDGMENTS OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.