

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2149

September Term, 2015

SHERRI LUCKHARDT, ET AL.

v.

SHARON COLEMAN, ET AL.

Eyler, Deborah S.,
Graeff,
White, Pamela J.
(Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: June 16, 2016

*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.

Sherri Luckhardt, appellant, appeals from an order of the Circuit Court for Anne Arundel County granting third-party visitation of her three minor children to the children's maternal grandmother and step-grandfather, Sharon and Donald Coleman, appellees.¹ On appeal, Ms. Luckhardt raises the following question for our review:

Did the trial court err as a matter of law when it granted the [g]randparents' third-party complaint for visitation after finding that both parents were fit and that no exceptional circumstances existed?

For the reasons set forth below, we shall reverse the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Ms. and Mr. Luckhardt are the parents of three minor children: Mackenzie (born December 23, 2003), Mason ("Alex") (born October 6, 2007), and Max (born May 5, 2010). On February 24, 2014, the circuit court granted Mr. Luckhardt an absolute divorce from Ms. Luckhardt and awarded Ms. Luckhardt custody of the minor children, with reasonable rights of visitation to Mr. Luckhardt.

On May 1, 2014, Mr. Luckhardt's visitation with the children was modified by consent order to include a more specific schedule. On July 16, 2014, Mr. Luckhardt filed a motion to modify custody, seeking sole legal and physical custody of the children. On July 17, 2014, Ms. Luckhardt filed a motion to modify visitation, seeking to modify Mr. Luckhardt's visitation with the children because Mr. Luckhardt had "refused to return the children as per [the consent] agreement."

¹ The order also granted visitation to Ms. Luckhardt's ex-husband, Mason Luckhardt. Ms. Luckhardt has not challenged that portion of the order.

On July 21, 2014, Mr. Luckhardt filed an ex parte complaint for emergency custody, alleging that Ms. Luckhardt was unable to provide proper shelter, care, clothing, and food for the children. He asserted that the children had been in the care of their maternal grandparents, the Colemans, from June 25 to July 6, 2014, with no contact from Ms. Luckhardt. He also asserted that, while the children were in Ms. Luckhardt's care, they had sustained bumps, bruises, and scrapes, and were afraid to disclose where the injuries came from. He alleged that Ms. Luckhardt was abusing prescription pain medication, exhibited poor judgment, was financially unstable, and lacked secure housing, and she "has been dropping the children off every weekend at either their maternal grandparents' home or [Mr. Luckhardt's] home because she does not want to deal with the children on the weekends." On July 25, 2014, the court granted Mr. Luckhardt temporary custody of the children.

On December 31, 2014, the Colemans filed a motion to intervene in the Luckhardts' pending custody and visitation modification case. In the motion, the Colemans asserted that the children were subject to "severe verbal abuse . . . when in the care of [Mr. Luckhardt] and his current girlfriend." On January 26, 2015, the court granted the motion to intervene.

On February 3, 2015, pursuant to the court's order, the Colemans filed a third-party complaint for custody, or in the alternative, visitation, alleging that the minor children had been suffering from "neglect, severe verbal abuse, mental, and emotional abuse while in the care of [Mr. Luckhardt] and his girlfriend." They asserted that the children had advised them that "they are petrified to return home to [Mr. Luckhardt's] residence, that

[Mr. Luckhardt's] girlfriend verbally abuses the minor children . . . , that they are not fed properly, not provided with proper clothing, and their basic needs are not provided for appropriately." They alleged that Mr. Luckhardt had been diagnosed with bipolar disorder, and he was non-compliant with his medication and treatment program. They further asserted that he had possible anger management issues, no consistent source of income, was in danger of being evicted from the residence in which he and the children resided, and did not have the financial ability to care for the children's needs.

With respect to Ms. Luckhardt, the Colemans asserted that she was in the process of being evicted from her residence for failure to pay rent, and she abused prescription medication, which resulted in her inability to provide adequate care for the children. The Colemans asserted that they "have an exceptionally strong emotional bond with the minor children, and the minor children feel comfortable telling [them] everything." They alleged that exceptional circumstances existed "based upon the relationship between [the Colemans] and the minor children, and based upon the inability of [the Luckhardts] to provide a stable, appropriate, safe, and adequate environment for the minor children to be raised." Thus, they asserted, it was in the children's best interest that the Colemans be awarded sole custody, or in the alternative, reasonable rights of visitation.

On February 11, 2015, Katherine Nutile, a custody evaluator for the circuit court, filed her first report and recommendation in the case. In compiling the report, Ms. Nutile interviewed Mr. Luckhardt, who told her that Ms. Luckhardt was obsessed with medications, abused prescription medication, and had given the children medication to get them to sleep. He stated that Ms. Luckhardt exposed the children to multiple boyfriends,

and Mackenzie had seen Ms. Luckhardt having sexual relations with a boyfriend. He also stated that Ms. Luckhardt had moved 11-12 times since the Luckhardts separated, causing the children to change schools multiple times; the children had difficulty waking Ms. Luckhardt; Ms. Luckhardt had beaten the children with a spatula; Ms. Luckhardt had been in multiple car accidents; Ms. Luckhardt fed the children junk food; and Ms. Luckhardt interrogated the children about Mr. Luckhardt.

Ms. Luckhardt similarly reported to Ms. Nutile negative things about Mr. Luckhardt: he rarely visited the children when she had custody; he lied about her abusing drugs; he had anger management problems; he worked long hours and his girlfriend, Caryn Short, took care of the children; Mr. Luckhardt and his girlfriend were kicked out of Mr. Luckhardt's mother's home for fighting; Ms. Short calls the children derogatory names; Mr. Luckhardt has bipolar disorder; and Mr. Luckhardt does not follow through with the children's medical and educational needs.

Mackenzie reported that she began living with Mr. Luckhardt because Ms. Luckhardt kept moving in with different boyfriends. She had seen Ms. Luckhardt beat her brothers. Mackenzie often had to make breakfast for her brothers because Ms. Luckhardt would not wake up in time. Sometimes Ms. Luckhardt would take 5-6 pills and become very sleepy, and the children missed school because Ms. Luckhardt was asleep. Mackenzie stated that the Luckhardts fought all the time, and she "really enjoys spending time at her grandmother's house where its [sic] lots of fun." Mackenzie did not want to live with Ms. Luckhardt after she observed her having sex with her boyfriend in the living room. Mackenzie liked living with Mr. Luckhardt, and she stated that Ms.

Luckhardt was not telling the truth when she described Ms. Short's treatment of the children. When asked what she wanted to happen, Mackenzie told Ms. Nutile that "she would like to see her grandparents more often and be allowed to call them. She'd like to live with dad and see mom on weekends."

Alex also reported that he liked living with Mr. Luckhardt and Ms. Short, and he was unsure how much he wanted to see Ms. Luckhardt. He wanted to see the Colemans more often.

Mackenzie was interviewed a second time, outside of Mr. Luckhardt's apartment. During the second interview, she reported that she had been hesitant to tell Ms. Nutile everything because Ms. Short had been listening. She stated that Ms. Short had stolen a cell phone that had been given to her by the Colemans, and that Mr. Luckhardt had sold clothing given to her by the Colemans. Mackenzie was upset and crying during the interview, and she stated that she felt she had to "protect her brothers and shield them from the family problems." Mackenzie did not feel that either parent listened to her or was focused on her at all.

Ms. Nutile also interviewed Ms. Coleman, who reported that she had been estranged from her daughter, Ms. Luckhardt, for about one year. While the Luckhardts were married, she had the children frequently, and she and Mr. Coleman had "practically raised the three children." She believed that Mr. Luckhardt wanted the children so that he did not have to pay child support, and Ms. Luckhardt wanted the children so she could receive child support. Ms. Coleman reported that Ms. Short was verbally abusive to the children, and when the children visited her, they "beg to stay there." She stated that she filed to intervene

in the custody case because she believed it was in the children's best interests to stay with her until either Mr. or Ms. Luckhardt could prove that they could provide a stable home.

Based on her interviews with the Luckhardts, the children, and Ms. Coleman, as well as her review of medical and school records, Ms. Nutile made several observations. Mr. Luckhardt "appears to be trying to do his best to adjust to parenting three children," but he "admittedly is under a great deal of stress." He is "struggling financially" and is "very dependent" upon Ms. Short. Although the children were doing "fairly well" in school, they were not always getting their homework done. Mackenzie "feels cut off from her grandparents to whom she is very close."

Ms. Luckhardt had moved the children several times, often with different boyfriends. If the children were to be placed in her custody, "it could entail one or more school changes." Most concerning to Ms. Nutile was Mackenzie's emotional status. Ms. Nutile concluded that Mackenzie "is feeling sad and disappointed in both her parents who seem to be more focused on their own agendas than on her needs. She feels responsible for her younger brothers, believing it is her job to protect them. She has been cut off from her grandparents," and she "is in great need of nurturance and attention." Ms. Nutile noted that, shortly after she completed the evaluation, Mr. Luckhardt left his residence and withdrew the children from school. Since then, the children had been living with Ms. Luckhardt. As a result of the Colemans' petition to intervene, Ms. Nutile concluded that the "investigation is not yet complete."

On February 23, 2015, the Luckhardts entered into a temporary consent order for custody and visitation, which granted them joint legal custody of the children and returned

primary physical custody to Ms. Luckhardt.² On July 17, 2015, all of the parties entered into a supplemental temporary consent order for custody, visitation, and support. The supplemental temporary consent order granted joint legal custody to the Luckhardts, with Ms. Luckhardt having tie-breaking authority. The order granted primary physical custody to Ms. Luckhardt, with visitation by Mr. Luckhardt and the Colemans.

On June 1, 2015, Ms. Nutile filed an updated custody evaluation report. In the updated report, Ms. Nutile noted that Mr. Luckhardt was no longer seeking custody, and the Colemans had filed for custody. The report indicated that the Colemans had alleged that the children had been with them for nearly every weekend throughout their lives, and they had concerns about Ms. Luckhardt's ability to care for the children. Ms. Luckhardt was requesting that she retain physical custody.

During Ms. Nutile's interview with the Colemans, they raised multiple concerns. When the Luckhardts were together, they exposed the children to violence and instability. The Colemans had the children at their home virtually every weekend of their lives, and they had bedrooms, toys, and outdoor play space for the children. The Luckhardts both were financially unstable, and for years, the Colemans had to provide food and clothing for the children. The children do not go outside or have any involvement with "kid activities," such as sports or scouting. The Colemans initially supported Mr. Luckhardt seeking

² On November 20, 2014, the Luckhardts participated in a *pendente lite* hearing. After the hearing, on December 5, 2014, Ms. Luckhardt filed exceptions to the Master's report and recommendation. The exceptions hearing was scheduled for February 23, 2015, but on that date, the Luckhardts entered into the temporary consent order for custody and visitation. The Colemans did not sign the temporary order on advice of counsel.

custody, but after the Colemans refused him money for rent and for a car, he stopped speaking to them. Mackenzie shut down emotionally after living with Ms. Luckhardt.

Ms. Nutile found that the Colemans lived in a spacious and well-kept home in a residential neighborhood. The home has bedrooms for the children, a play room, an above-ground pool, as well as toys, clothing, and recreational items for the children in the home. The Colemans are in good health, do not have criminal records, and deny having problems with drugs or alcohol. Ms. Coleman and Ms. Luckhardt were estranged, but despite the estrangement, the Colemans were able to continue to see the children on the weekends.

The Colemans continued to have concerns about the children since they were back in the custody of Ms. Luckhardt. They noticed that Mackenzie had become “aloof and angry.” The Colemans preferred for the Luckhardts to become stable and raise the children, but they were willing to take over care of the children until that time.

Mackenzie reported that she was no longer living with Mr. Luckhardt because Ms. Short left, and Mr. Luckhardt had no money. Mackenzie lived with Ms. Luckhardt and her brothers. She slept in a bedroom, and the boys slept in the living room on the couch. She stated that it was “better now with mom. There’s no anger and fighting. Mom said they may possibly move.” Mackenzie knew that the Colemans were seeking custody, but she did not understand why. She stated that “[t]hings are not as good with her grandparents as they once were.” When asked to explain, Mackenzie stated that, when the Colemans opened the pool the previous weekend, they “didn’t even tell her.” The Colemans also told Alex that he could use Mackenzie’s phone after he lost his, which Mackenzie thought was wrong “because she needs her privacy.” Mackenzie felt a lot of

anger toward her brothers. She stated that her mom's boyfriend, Mr. Dennis, was nice to her mother, and that they did not fight. She did not know what she wanted, stating that she "loves her mother" and "wonders if her grandparents are trying to buy her love."

Alex stated that the children had to leave Mr. Luckhardt's home because there was no one to watch them. He stated that his mother and Mr. Dennis "beat their butts," and although Mr. Dennis did not live with them, he was there "most days until nighttime." Alex shared that his mother forgot to wake up to take him to school the previous day, but most days she had no problem waking up. He stated he never got to play outside at his mother's house because she "doesn't like the sun." He stayed with his grandparents on weekends, and they "ride four wheelers, the tractor, swim and play with 200 toys." He stated that the best things about being at his mother's house were "the internet and going places, but not outside." He and Max slept on the couch or chair at his mother's house. At his grandparents' house, "everyone gets along and they get to go camping and swimming."

Based on her interviews and review of records, Ms. Nutile reported:

There is no question the Luckhardt children have had a great deal of instability in their lives. Since the marital separation, Mackenzie has attended eight different schools. Neither parent has been financially independent nor have they had stability in housing. The children have been exposed to fighting between their parents and between their father and his former girlfriend. They were called derogatory names. They report hearing their mother having sex. They have gotten themselves up and ready for school when their mother couldn't be awakened. Mackenzie has been particularly affected by this.

Reportedly Sherri Luckhardt has qualified for disability benefits. She states she plans to obtain more suitable housing. Presently, the children sleep on couches and have little dedicated space for their belongings. They seem to have minimal opportunity for outdoor activities. The children, however, express positive feelings about their mother. They are hopeful she is going

to make a home for them. They are doing well in school and their attendance has not been problematic. They have regular contact with their father. In the opinion of this evaluator, Sherri Luckhardt is doing as well as she is able to at the present time. She has been responsive to the school and has enrolled the children in therapy. Hopefully she will be able to continue to maintain this level of functioning.

Sharon and Donald Coleman have been a regular fixture in the lives of these children. They have provided a safe, secure environment for them on weekends. Recently their relationship with Makenzie has deteriorated as Mackenzie continues to feel the brunt of the family's conflict. While Sherri Luckhardt appears to be managing at least adequately at this time and should be granted custody, it is important that the children are able to maintain an on-going relationship with the grandparents. As the estrangement between Ms. Luckhardt and her parents is deep with little hope of reconciliation, it is the opinion of this evaluator that there [be] some regular contact specified in a court order for visitation.

On September 17, 18, and 29, 2015, the parties all appeared for a trial on the merits of the Colemans' complaint. Counsel for the Colemans argued that they would present sufficient evidence for the court to find that the Luckhardts were unfit or, in the alternative, that "exceptional circumstances exist to award the Colemans custody, or at least visitation," and "the best interests of the minor children would be served by setting forth a specific schedule of access for the Colemans to have with the children to ensure their stability." Counsel stated that the exceptional circumstances are "the strength and the involvement of the Colemans in the minor [children's lives] from their birth to most recently."

Ms. Luckhardt's counsel stated that neither requirement to award custody or visitation to the Colemans, i.e., unfitness or exceptional circumstances, was met in this case. Counsel stated that it was not in the best interests of the children to visit with the Colemans. Mr. Luckhardt stated that he did not object to the Colemans having visitation, as long as Ms. Luckhardt had custody.

Ms. Coleman testified that she and Mr. Coleman live in a four-bedroom house. One bedroom is decorated for Max and Alex, a second bedroom is decorated for Mackenzie, and a third is a “toy room.” The children have their own bathroom. The Colemans have a fenced-in yard. Ms. Coleman stated that Alex has asthma and stutters, and all three children were “nervous” and had stomach problems.

When the Luckhardts were married, the children would stay with the Colemans every weekend and sometimes during the week. The children also stayed with the Colemans “a lot” during the summer months and spent holidays with them. Ms. Luckhardt “never had a problem” with the children visiting the Colemans. While the children were in the care of the Colemans, they played kickball, baseball, swam, rode bikes, and spent time outdoors.

After Ms. Luckhardt was granted custody in 2014, the children still stayed with the Colemans on weekends because Ms. Luckhardt “went out every weekend.” In June 2014, when Mr. Luckhardt filed for custody modification, Ms. Coleman paid for his lawyer because she was concerned about Ms. Luckhardt’s care of the children. After Mr. Luckhardt was awarded custody, the children still spent a lot of time with the Colemans, until Ms. Coleman refused to pay his personal bills or buy him a car. Ms. Coleman agreed that she was concerned about Mr. Luckhardt’s care of the children, stating that Mr. Luckhardt’s girlfriend was “not a very good person,” who would scream at the children. Ms. Coleman bought the children clothes and school supplies, but “[e]verything . . . disappeared.” The children were “[d]irty, filthy” and “so hungry.”

When Mr. Luckhardt gave custody back to Ms. Luckhardt in January 2015, Ms. Coleman filed for custody or visitation. Although the Colemans were granted visitation pursuant to the February 2015 consent order, Ms. Luckhardt refused to allow the Colemans access to the children, and she took away the phones that the Colemans had provided to the children to contact them. After the Colemans were provided specific access to the children pursuant to the June 2015 order, the Colemans were denied additional time with the children, despite their requests.

Ms. Coleman stated that when the children were in Mr. Luckhardt's care, their clothing was always dirty and they were always hungry. The children told Ms. Coleman that they would ask Ms. Short for food when they got home from school, but she would tell them to wait. She also was concerned because Mr. Luckhardt and Ms. Short fought a lot. The children would beg not to go back to Mr. Luckhardt's house after visits. Ms. Coleman stated that after the children were returned to Ms. Luckhardt's custody, they were filthy, had dirty hair, and were "scared to death." The children also would appear with physical injuries, and their clothing did not fit.

Through January 2015, Ms. Coleman had a good relationship with the children, and the children were visiting on a regular basis. In May, however, Mackenzie called and said she was not coming over, and after that, Mackenzie stopped talking to the Colemans. Ms. Coleman had observed that, since June 2014, after Mr. Luckhardt filed for custody, Mackenzie became a "[v]ery angry girl. Unhappy." She had a bad temper and would fight with her brothers. When the children were returned to Ms. Luckhardt's custody, they would get upset when it was time to go home from the Colemans' house.

Ms. Coleman stated that she and Ms. Luckhardt had not had a relationship for years. She occasionally would think things were going well, and “the next thing you know, she’s causing more trouble.” Ms. Coleman had not spoken with Ms. Luckhardt since December 2014. She was concerned about Ms. Luckhardt’s use of medications and about Mr. Luckhardt’s anger. She also was concerned about the Luckhardts’ ability to care for and provide for the children. Ms. Coleman felt that she was the only “voice for the kids,” and she had to try to gain custody or visitation. She did not believe that she would have any relationship with the children any other way because Ms. Luckhardt made the point that, if she got custody, Ms. Coleman would “never see them kids again.” Ms. Coleman at least wanted visitation with the children to “make sure they’re safe and not – not beat up, not hurt. And they’re happy. They’re happy when they’re with us.”

Mr. Coleman testified that, prior to the Luckhardts’ divorce, he and Ms. Coleman saw the children regularly. They played in the backyard, played ball, swam, played on the swings, and did anything outside. He stated that, for the “whole 11 years, those kids have always been [at] our house. They’ve always done stuff with us. They’ve always went on vacation with us. Everything that we do, we done with them.”

Mr. Coleman stated that the children would come over “hungry all the time” with “marks on them.” They were never dressed properly, and their clothes did not fit. He was concerned about the children’s behavior after they were returned to Ms. Luckhardt’s custody because they were increasingly “withdrawn” and did not want to say anything because they were scared. Alex had begun stuttering, and Max became withdrawn and wanted to fight.

Mr. Coleman would try to contact Ms. Luckhardt for visitation, but she mostly was unresponsive. He also did not have a relationship with Mr. Luckhardt. Mr. Coleman was concerned about Ms. Luckhardt's stability because she did not have a vehicle, paid her rent late each month, was threatened with eviction, and the children never had any food to eat. Mr. Luckhardt also was unstable in that he did not have a vehicle or a place to live. Mr. Coleman stated that, in the "whole 11 years that the kids have been around, there's been absolutely no stability in their life. None. If it wasn't for me and my wife, these kids wouldn't have the life that they have because we supply them with everything." He stated that Mr. and Ms. Luckhardt had "done absolutely nothing for them." Mr. Coleman stated that he and Ms. Coleman would like custody or visitation "and for Sherri to get the proper help that she needs."

Ms. Luckhardt testified that she lived in a two-bedroom apartment with her three children. The two boys shared the larger bedroom, and Mackenzie had the smaller bedroom, although they preferred to sleep in the living room with the bigger television. Ms. Luckhardt did not mind the children sleeping in the living room as long as they went to sleep by 9:30 p.m. She had lived in the apartment for a year, although she was thinking of relocating to southern Maryland. Prior to living in her current residence, Ms. Luckhardt lived with her boyfriend in various locations. Ms. Luckhardt's boyfriend, Dennis, did not live in the apartment with Ms. Luckhardt and her children, but he "comes over occasionally and stays." She denied that Dennis had ever disciplined the children or verbally abused them. Ms. Luckhardt denied receiving assistance from the Colemans "in recent years."

Ms. Luckhardt is disabled and receives social security benefits, as well as child support from Mr. Luckhardt, food stamps, temporary cash assistance, and some income from “part time under the table work.” Her disability is due to ruptured and herniated discs in her neck and back, degenerative disc disease, “bilateral carpal tunnel,” two bouts of cancer that left her with only one kidney that works at 75%, neurological damage, severe migraines, anxiety, depression, and anemia. She takes medications for her conditions, including oxycodone, morphine, Cymbalta, Klonopin, muscle relaxers, and Ambien, but the medications do not affect her ability to care for the children.

Ms. Luckhardt stated that the Colemans were “always really good with [her] kids . . . until recently.” She recently noticed a change in the children, including that the boys had “attitude” and Mackenzie “is so hurt and she yelled” at Ms. Luckhardt “in front of her counselor.” Although “[a]t one point . . . [b]efore all this happened,” Ms. Luckhardt believed it was important for the children to see the Colemans, she did not anymore.” Ms. Luckhardt stated that she had always “tried to be fair no matter what [her] feelings” were, but Mackenzie had “gotten to the age where she sees for herself and she’s hurt.” Mackenzie had “tried to talk” to the Colemans, but they “ignored her.” When Mr. Coleman told Mackenzie that she needed to apologize to Ms. Coleman for hurting her feelings, Mackenzie said that the Colemans had hurt her feelings by coming to her softball game and not saying “hi” when they got there, and “it snowballed from there.” Ms. Luckhardt stated that Mackenzie “more or less was being made to feel guilty for something that they did.”

Ms. Luckhardt denied that she did not allow the Colemans to have access to the children pursuant to the terms of the June 2015 consent order. She denied failing to respond to the Colemans' requests for additional time. Ms. Luckhardt stated that the boys are very angry after they return from the Colemans' house, and they are "fine when they come back" from Mr. Luckhardt's, house. She stated that "there's something going on there," and the last "three to four times" that Alex had been to the Colemans' house, "he's come back angrier," "really nasty and disrespectful. And even Max came back disrespectful." Ms. Luckhardt thought the Colemans were "great grandparents" until recently. She acknowledged, however, that the children "call it Disneyland" at the Colemans' house. She stated that the children "love" Mr. Coleman, but she thought they needed more therapy before they could continue a relationship with the Colemans. Ms. Luckhardt stated that the children's therapists told her that the Colemans called and requested information. She agreed that the *pendente lite* consent order permitted the Colemans to participate in therapy with the children, but she stated that she is their mother, and although she does not communicate with the Colemans, the therapist is "not allowed to give them information or contact them without the parent's permission. So, there's no way that [the therapists] can talk to [the Colemans]."

Ms. Luckhardt agreed that the children love going to the beach with the Colemans, but she thought that "there has been so much put on these children in the last year that needs to be worked out" before they could go on vacation again with the Colemans. She stated that she did not want to have a relationship with her parents "any longer" because she "just can't do it. I can't deal with the stress." Ms. Luckhardt requested the court to

return the children back to her care. She stated that the children “need to get situated and work through what’s going on in their minds and then we need to work things back in gradually.” She agreed that the children “are close to their grandparents,” and she stated that, regardless of her feelings toward their grandparents, she never has taken it out on the children and kept the children from them. Mackenzie “wants nothing to do with them,” and Ms. Luckhardt asked the court to deny a specific visitation order. She could foresee a relationship between the children and the Colemans in the future, but she stated:

[T]hey are not going to demand this and that and we’re going to see them here. You don’t get that right. I am their mother. Their father doesn’t have that right. If we have a family night, I’m sorry, I’m not stopping a movie and stopping eating pizza and popcorn with my kids so that you can talk to my children. We’re having a family time. We don’t get it often. I want that time with my children. That’s our bonding time.

She stated that she has “always allowed proper visitation with their grandparents. I’ve never kept them from their grandparents.”

Mr. Luckhardt testified that he lived in a room rented from his mother, and he had the children in his care every other weekend. He filed for emergency custody of the children in July 2014 because Ms. Luckhardt did not have a place to live, and she was abusing prescription drugs. He “feel[s] like she’s straightened up since then,” and “[s]he’s been a great mother all her life.” Mr. Luckhardt believed that the Colemans had “ma[de] things up” about Ms. Luckhardt’s boyfriend, Dennis. He stated that Ms. Coleman is “very coldhearted” and “has no feelings for anybody.” Mr. Coleman, on the other hand, “has all the feelings for the kids and does things with them.” Mr. Luckhardt’s relationship with Ms. Luckhardt was “not good,” and with the Colemans, “nonexistent.” Mr. Luckhardt had

no concerns about Ms. Luckhardt's care of the children, and he stated that they "get just as many injuries and marks with the Coleman's as they do" when they stayed with Ms. Luckhardt.

Ms. Nutile testified that she had recommended that the Colemans have visitation with the children at least one weekend a month, in addition to time in the summer. She stated that the Colemans had been "a really integral part of the children's lives from day one," the estrangement between parents and daughter was unfortunate, and "if there wasn't something in a court order, I – I don't know whether [visitation] would happen or not. I think the kids would really miss out if they didn't have that opportunity." She acknowledged, however, that Ms. Luckhardt previously allowed the Colemans contact with the children, stating: "I know that recently there has been some concerns about [Mackenzie] not wanting to go, and – and that kind of thing. But other than that I think she's – I think – I think her belief is if the children want to go, then she's okay with them going." She agreed, without elaboration, that if the children did not visit with the Colemans, there would be a negative effect.

The court then questioned Ms. Nutile about Mackenzie's anger, to which Ms. Nutile responded:

I really feel like she's – kind of gets pushed out. And she's really torn. She really loves her mother, and she really wants her mother to be there for her, and her mom's let her down a lot. And then there's the conflict between the mother and the grandmother, which is so apparent. And, so, it's hard for her to love her grandmother. She feels she's disappointing her mother, and vice versa, you know, and she really takes that it.

The court interviewed Mackenzie on the record. When asked if she thought she should see her grandparents, she stated: “I don’t really want to go over there.” When asked why, she said: “[T]hey’ve done some things. Like, first when my littlest brother, Max, almost drowned in the pool, they blamed it on me and Alex.” And they asked her “too many questions[s].”

When asked if “things could change, how would . . . you want them to change,” she responded: “I’d just live with my mother, and my grandparents would sort of back off, and [not] ask for any more visitation or anything like that, because they have perfect visitation.” The court asked whether, if the Colemans were to “back off,” Mackenzie would want to see them, and she responded: “I guess.”

At the close of evidence, the court ruled from the bench, stating that it considered Mackenzie’s opinion, and it found Ms. Nutile’s testimony to be helpful. It found that there was insufficient evidence to persuade it that “either the mother or the father is unfit, period. That’s the finding.” It then found that there were not exceptional circumstances. The court explained:

[W]e have a mom and dad who aren’t very well off, who had instability, whose [sic] had drug – result of injuries and physical difficulties, and who may or may not have had drug problems, we’ll call it, nonetheless. I wish that was exceptional. It isn’t. It’s not good, but it’s not exceptional. It’s not sufficient to justify taking their – a child away from her or for that matter her father. And, so, I’m unwilling, and not going to do that. So, that the complaint for custody is denied.

With respect to visitation, the court noted that Ms. Luckhardt argued for no visitation to be specified. It stated:

Counsel cites the case that I'm familiar with to that effect.^[3] The distinction that counsel made, and that opposing counsel doesn't deny, which is that there was – there is in this case testimony from a – from the [c]ourt's own custody evaluator, that if there isn't something in the order, that there is a good chance, because of the animosity between the parties, that there will be no visitation.

This is an example, where you have a child, [Mackenzie], who, at this time, doesn't want to see . . . her grandmother or visit. And I spent a considerable amount of time exploring that. Okay? And . . . her preference is not as important as what's best for her. And simply because she doesn't want to is not a reason for her not to. That said, I would say to her grandmother, and her aunt, and her step-grandfather, that if you force the issue in the . . . way that you have been, she is not going to want to see you, and she isn't going to see you at some point. There's – that's part of what ought to be in the counseling.

I believe that [the] best interest of all three of these children is to have the love and affection of all sides, whether they like each other or not. And that the counseling ought to be to that effect.

The court directed the parties to attempt to agree on a complete access schedule for the Colemans with respect to the children, or to return for a hearing where the court would render a final decision based on the parties' proposals. In that regard, the court stated:

You've already got the framework. Okay? I don't believe – I believe the mother should not – she should have these children at least one weekend a month. Okay? That will be my order. I think we ought to take advantage of if there are days where – and I believe that the grandparents should have one weekend, and I intend to order it. And that father should have what he's got. But in the meantime if there are days that can be substituted that aren't weekends, that makes sense.

So that the model order is somewhat – you can start off with the supplemental temporary consent order for custody, visitation, support that was dated. If you can come up with a joint order, we'll cancel the hearing.

³ Counsel cited *Brandenburg v. LaBarre*, 193 Md. App. 178 (2010).

If you can't, then I would like you to submit your own order within the framework of what I just announced.

On October 29, 2015, after the parties were unable to reach an agreement, they returned for the hearing and submitted their proposals. The court indicated that it had decided to "sign the order containing the more specific visitation," stating that:

I do that with the understanding that the parties can, whenever they agree, modify the order. The [c]ourt doesn't care as long as . . . everybody is in agreement. And, obviously, for the benefit of the children what should be . . . the deciding factor is . . . what's best for them. Meaning, if they have something going on and they want to do it, unless it's for the wrong reasons . . . then that's the deciding criteria.

But the [c]ourt has to sign an order that says specific things. It can't say you should agree to agree on something, even though you can. So, that's the rationale. . . . But at this stage, with the relationship of the parties, my feeling is that it's better to be specific than to leave it up to the parties to agree when the history is, at best, mixed.

If the parties agree to be – to a more flexible order at some time in the future, I'm willing to consider it.

On October 30, 2015, the court issued an order granting joint legal custody of the children to the Luckhardts, with tie-breaking authority to Ms. Luckhardt. It awarded Ms. Luckhardt primary physical custody, with visitation to Mr. Luckhardt and the Colemans. Specifically, the Colemans' visitation schedule was as follows:

ORDERED, that Sharon and Donald Coleman (hereinafter referred to as "Grandparents") be and hereby are awarded visitation with the Minor Children the third weekend of every month from Friday after school through Sunday evening at 5:00 p.m. In the event school is closed the Friday prior to their weekend visitation for any reason (i.e., summer recess, holiday, in-service day, etc.), Grandparents shall have the Minor Children in their care from Thursday after school to Sunday evening at 5:00 p.m. In the event school is closed the Monday following their weekend visitation (i.e., summer recess, holiday, in-service day, etc.), Grandparents shall have the Minor

Children in their care from Friday after school through Monday evening at 5:00 p.m.; and it is further,

ORDERED, that during the Minor Children's summer vacation from school, Grandparents shall have an additional two (2) days per month with the Minor Children, with Grandparents providing Mother no less than two (2) weeks notice of the days they wish to exercise said visitation. Mother shall not object to Grandparents' request unless she has verified plans for the Minor Children that day (i.e., previously scheduled vacation or trip); and it is further,

ORDERED, that Grandparents shall have the Minor Children in their care for one (1) week during the summer months, and that said week shall always include July 4th, to allow Grandparents to take the Minor Children to the beach; and it is further,

ORDERED, that Grandparents shall have the following visitation with the Minor Children during the holidays:

- **Christmas:** Every year Grandparents shall have the Minor Children in their care from December 27th at 12:00 p.m. to December 29th at 12:00 p.m.;
- **Thanksgiving:** Every year Grandparents shall have the Minor Children in their care from 9:00 a.m. the Friday after Thanksgiving through 12:00 p.m. the Saturday after Thanksgiving; and
- **Easter:** Every year Grandparents shall have the Minor Children in their care from 5:00 p.m. the Friday prior to Easter through 5:00 p.m. the Saturday prior to Easter; and it is further,

ORDERED, that the holiday and summer vacation schedule supersedes the normal schedule of access; and it is further,

ORDERED, that Grandparents shall pick up the Minor Children at the beginning of the visitation period and shall return the minor child to the Mother's residence at the end of the visitation period. In the event that Mother relocates from her current residence, the parties would meet at an agreed upon location equidistance between Grandparents' and Mother's residences; and it is further,

ORDERED, that Grandparents shall be able to transport the Minor Children to Delaware (where their beach house is located), Pennsylvania, Washington D.C., and Virginia without advanced permission from Mother, provided Grandparents advise Mother where they are taking the Minor Children. In the event Grandparents wish to transport the Minor Children to any other state, Grandparents shall obtain permission from Mother before doing so, and shall provide Mother with itinerary information as well as contact information for the Minor Children related to said travel; and it is further,

ORDERED, that Grandparents shall participate in the Minor Children's therapy without restrictions, and this shall include open communication between the therapist and Grandparents for Grandparents to express their concerns, and participate in the therapy sessions as determined necessary by the therapist. Neither Mother nor Father shall prohibit Grandparents participation in the Minor Children's therapy; and it is further,

ORDERED, that Grandparents shall be entitled to communicate with the Minor Children two (2) times per week by contacting Mother's cell phone. Mother shall permit the Minor Children to speak to Grandparents, and if the Minor Children are unavailable at the time of Grandparents' call, Mother shall have the Minor Children promptly return their call. Grandparents' phone calls and text messages will be acknowledged and responded to promptly.

This appeal followed.

STANDARD OF REVIEW

In reviewing an action that has been tried without a jury, the standard of review for this Court is as follows:

An appellate court reviews a trial court's factual findings for clear error, and reviews the trial court's legal conclusions *de novo*. See Md. R. 8-131(c) (An appellate court "will not set aside the judgment of [a] 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."); *Ramlall v. MobilePro Corp.*, 202 Md. App. 20 (2011) ("The clearly erroneous standard does not apply to [a trial] court's legal conclusions, however, to which [an appellate court] accord[s] no deference and which [the appellate court]

review[s] to determine whether [or not] they are legally correct.”). The appellate court views the evidence in the light most favorable to the prevailing party, *City of Bowie v. MIE Props., Inc.*, 398 Md. 657, 676 (2007), and resolves all evidentiary conflicts in the prevailing party’s favor. *First Union Nat’l Bank v. Steele Software Sys. Corp.*, 154 Md. App. 97, 107 n.1 (2003), *cert. denied*, 380 Md. 619 (2004).

Brault Graham, LLC v. Law Offices of Peter G. Angelos, P.C., 211 Md. App. 638, 659–60 (quoting *Dynacorp Ltd. v. Aramtel Ltd.*, 208 Md. App. 403, 451 (2012)), *cert. denied*, 434 Md. 312 (2013).

In the context of visitation orders, this Court has explained that such orders generally are “within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion.” *Brandenburg v. LaBarre*, 193 Md. App. 178, 186 (2010) (quoting *Barrett v. Ayres*, 186 Md. App. 1, 10 (2009)). Where, however, “the order involves an interpretation and application of statutory and case law, the appellate court must determine whether the circuit court’s conclusions are ‘legally correct’ under a *de novo* standard of review.” *Id.* (quoting *Walter v. Gunter*, 367 Md. 386, 391-92 (2002)). Here, as in *Brandenburg*, the order involves the application of the law of third-party visitation to the facts, and therefore, we review the ultimate order *de novo*.

DISCUSSION

Ms. Luckhardt asserts that, after the court “properly found that both parents were fit and that there were no exceptional circumstances,” the court erred as a matter of law when it awarded visitation to the Colemans. She asserts that the trial judge awarded visitation “because the custody evaluator said so,” which “improperly delegated his decision making authority and judgement to the custody evaluator.” She contends that the “expert testimony

of the custody evaluator . . . was insufficient to establish extraordinary circumstances that would give rise into the inquiry of the best interest of the child, and as a matter of law, the trial judge erred.”

The Colemans respond that the trial court correctly awarded visitation to them after they produced expert testimony that supported a finding that there were exceptional circumstances, which allowed the court to “then look[] to determine what [was] in the children’s best interest, which it did, when it stated that without an order awarding visitation to the Colemans, due to the animosity between the parties, that there will be no visitation provided to the Colemans.”

In addressing the circuit court’s order, we note that Ms. Luckhardt, as the mother of Mackenzie, Alex, and Max, is “invested with the fundamental right of parents generally to direct and control the upbringing of [her] children.” *Koshko v. Haining*, 398 Md. 404, 422 (2007). *Accord In re Samone H.*, 385 Md. 282, 300 (2005) (“A parent’s interest in raising a child is, no doubt, a fundamental right, recognized by the United States Supreme Court and this Court.”). The ability to deny to third parties visitation with the children, absent unfitness or exceptional circumstance, “is an undeniable part of that right.” *In re Victoria C.*, 437 Md. 567, 589 (2014). Grandparents constitute third parties with respect to custody and visitation disputes. *Id.* at 589. There is a “long-settled presumption that a parent’s decision regarding the custody or visitation of his or her child with third parties is in the child’s best interest.” *Koshko*, 398 Md. at 423.

Where, as here, third-party grandparents seek visitation, a trial court must make a threshold determination of parental unfitness or exceptional circumstances as a prerequisite

to determine whether visitation is in the best interests of the children. *Koshko*, 398 Md. at 445. *Accord Aumiller v. Aumiller*, 183 Md. App. 71, 78 (2008). This is so because the “bests interests of the child standard is, axiomatically, of a different nature than a parent’s fundamental constitutional right.” *McDermott v. Dougherty*, 385 Md. 320, 417 (2005).

As the Court of Appeals has explained:

Quite simply, the non-constitutional best interests of the child standard, absent extraordinary (*i.e.*, exceptional) circumstances, does not override a parent’s fundamental constitutional right to raise his or her child when the case is between a fit parent, to whom the fundamental parental right is inherent, and a third party who does not possess such constitutionally-protected parental rights.

Id. at 418. Thus, to obtain visitation rights, a third party “must make a *prima facie* showing of parental unfitness or exceptional circumstances that the lack of visitation ‘has a significant deleterious effect upon the children who are the subject of the petition.’” *In re Victoria C.*, 437 Md. at 592 (quoting *Koshko*, 398 Md. at 441).

Here, the court explicitly found that the Luckhardts were fit parents and that no exceptional circumstances existed. The court then concluded, nevertheless, that it was in the best interests of the children to have a specific visitation access schedule with the Colemans. As the cases discussed, *supra*, make clear, a ruling giving a third party visitation against the parent’s wishes is erroneous in the absence of a finding of parental unfitness or exceptional circumstances.

Counsel for the Colemans does not disagree with that general legal proposition. He asserts, however, that the court’s finding that no exceptional circumstances existed related only to the custody determination. In support, he notes that the finding that no exceptional

circumstances existed was made prior to the ruling denying the Coleman’s request for custody. Although counsel concedes that the court did not specifically mention exceptional circumstances again, he argues that it can be inferred from the court’s ruling that it found that exceptional circumstances existed with respect to visitation. Counsel could not, however, point to any specific language that supported such an inference, and we are not persuaded.

The gist of the Colemans’ argument was based on Ms. Nutile’s testimony that the Colemans had been an integral part of the children’s life, that she did not know if visitation would occur without a court order, and that there would be a negative effect on the children if they did not have visitation with the Colemans. We conclude that this evidence was not sufficient to meet the “weighty task” required “for a third party . . . to demonstrate ‘exceptional circumstances’ which overcome the presumption that a parent acts in the best interest of his or her children and which overcome the constitutional right of a parent to raise his or her own children.” *McDermott*, 385 Md. at 424 (footnote omitted).

In *Brandenburg v. LaBarre*, 193 Md. App. 178, 186, 189-90 (2010), we recognized that exceptional circumstances based on future detriment to the child may be found if there is solid evidence in the record to support the finding. We rejected the LaBarres’ argument, however, that evidence that they cared for the children on a daily basis for several years, that the children frequently spent the night at their house, and that the LaBarres were “‘ever-present adult figures in the lives’” of the children, was sufficient to find exceptional circumstances, noting that there was no evidence of harm to the children caused by the

cessation or absence of visitation, and that there was no expert testimony with regard to the impact on the children of the cessation of contact with the LaBarres.

Here, although the Colemans presented Ms. Nutile’s expert testimony that there would be a “negative effect” on the children if they did not see the Colemans, she could not say, beyond speculating, whether the children would have visitation with the Colemans absent a court order, and she offered no specific testimony regarding the “negative effect.”⁴ At best, the evidence presented “possible future detriment” to the children if they did not have visitation with the Colemans. *Aumiller*, 183 Md. App. at 82 (a finding of future detriment “must be based on solid evidence in the record, and speculation will not suffice.”). To allow “possible future detriment” to overcome the “weighty” presumption, however, would “render *Koshko*’s threshold requirement superfluous and allow third parties to reach the best interest analysis in virtually every case.” *Id.*

Because the trial court found that the Colemans had failed to show parental unfitness or exceptional circumstances, a finding supported by the record, the court erred in granting visitation on the ground of the best interests of the children.

**JUDGMENT REVERSED. COSTS
TO BE PAID BY APPELLEES.**

⁴ The evidence, including Ms. Nutile’s own testimony, indicated that, despite the continuing estrangement between Ms. Luckhardt and the Colemans, the Colemans had always had reasonable access to the children, and that, “if the children want to go [to the Colemans’], then [Ms. Luckhardt was] okay with them going.”