Circuit Court for Prince George's County
Case No. CAD1924554

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 310

September Term, 2020

DARLENE RAINEY, *ET AL*.

v.

SIMONE SMITH

Nazarian,
Arthur,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: April 2, 2021

Darlene Rainey ("Grandmother") and Lamont Adair ("Grandfather") appeal the denial of their amended complaint seeking custody of M, their grandchild. Although M's father (their son) had died, M's mother is fit and present, and the Grandparents don't contend otherwise. They argue instead that they qualified as M's *de facto* parents and that it was in M's best interests that they have sole legal and physical custody of him. After awarding joint legal and shared physical custody *pendente lite*, the Circuit Court for Prince George's County held a hearing and found that the Grandparents had not met the standard for *de facto* parenthood and denied their request for custody. *Conover v. Conover*[1] sets a high bar for establishing *de facto* parenthood, and we agree with the circuit court that the Grandparents didn't clear it.

I. BACKGROUND

Simone Smith ("Mother") is the mother of M, who was born in August 2017. M's father, Lamont Adair, Jr. ("Father"), was involved in M's life from the time he was born until Father died in August 2018. In March 2018, Mother decided to move from Virginia to Maryland to live with Father and the Grandparents. After Mother's arrival, she, Grandmother, and Father all agreed that M would stay with Father or Grandmother while Mother was at work.

From May to June 2018, Mother worked two jobs. After work, she stayed frequently at her friend Urina Jackson's house because she didn't get off from work until 10:00 or 11:00 p.m. and didn't have a key to the Grandparents' house. Even so, Father was at the

[1] 450 Md. 51 (2016).

house to help care for M. After Father died, the childcare arrangement between Grandmother and Mother continued, and Grandmother watched M while Mother was at work.

Mother and M continued to live at the Grandparents' house, even after Father died, until June 2019. In June, Mother signed a lease and intended to move to her own apartment. But during the summer of 2019, Mother spent two weeks in jail in Montgomery County, Maryland and Delaware. Upon release, Mother moved into the apartment she secured before going to jail. She intended to retrieve M from the Grandparents' home and establish M's new home at her apartment. Mother was in contact with Grandmother while she was incarcerated, and she communicated to Grandmother her intention to pick up M and his possessions on August 8, 2019. When she arrived that day, Grandmother and Grandfather did not allow Mother to take M. Mother regained physical custody of M on August 12, 2019.

A. Procedural History

On July 30, 2019, while Mother was still incarcerated, Grandmother filed a complaint seeking sole legal and physical custody of M. Mother filed a counter-complaint on September 12, 2019. Grandmother then amended her complaint to add Grandfather as a plaintiff, answered the counter-complaint, and filed motions for custody and visitation *pendente lite* and for a status hearing.

On December 31, 2019, a magistrate heard testimony on the motion for custody and visitation *pendente lite*. The magistrate found that the Grandparents met the standard to be

de facto parents and recommended that the court award joint legal and shared physical custody of M to the Grandparents and Mother. Mother filed exceptions to the magistrate's order on January 10, 2020. The circuit court entered a *pendente lite* order on February 19, 2020 awarding joint legal custody to the Grandparents and Mother.

B. The Circuit Court's Ruling

The circuit court held an evidentiary hearing and received testimony and evidence on the merits of the custody dispute on February 24–25, 2020, then convened the parties by phone to deliver its ruling on March 13, 2020. The circuit court found that the Grandparents did not qualify as *de facto* parents and returned sole legal and physical custody to Mother. The court acknowledged that M had lived in the same home with the Grandparents but found that Mother encouraged and fostered a grandparent-type relationship between M and Grandparents, and Mother had not consented to a parent-like relationship. Additionally, the court recognized that the Grandparents cared for M and provided financial support, but again, their relationship with him was one of grandparents and grandchild, not parent and child. As a result, the court determined that it need not analyze whether awarding custody to the Grandparents was in M's best interests.

II. DISCUSSION

This custody case is not a dispute between divorcing parents. Nor is there any allegation that M's surviving parent, Mother, is unfit or that exceptional circumstances exist that justify an intrusion into Mother's right to parent him. In this case, the Grandparents' potential opportunity to gain custody of M depended, at the threshold, on

their ability to establish themselves as M's *de facto* parents. This is, as it should be, a difficult standard to meet.

The Grandparents argue that in denying their request for custody, the trial court erred in its application of the four-factor test for *de facto* parenthood adopted in *Conover v. Conover*, 450 Md. 51 (2016) and erred in considering abandonment and extinguishment in the course of finding that they weren't *de facto* parents.[2] Specifically, the Grandparents contend that the trial court failed to properly consider the first, third, and fourth factors of the *Conover* test because the court perceived their relationship as grandparental rather than parental.

[2] The Grandparents phrased the Questions Presented in their brief as follows:

> 1. Did the trial court err by failing to properly apply the first *Conover* factor when it determined that the biological parents did not consent to and foster the Appellants' formation and establishment of a parent-like relationship with the child?
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> 2. Did the trial court err by failing to properly apply the third *Conover* factor when it did not apply the specified elements to determine whether Appellants assumed obligations of parenthood, and focused instead on Appellants' assumption of responsibility for daycare and medical appointments to find a "grandparent/grandchild relationship" and "Not a parent/child relationship[?]"
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> 3. Did the trial court err by failing to properly apply the fourth *Conover* factor when it did not make a determination as to whether the Appellants had been in a parental role for a length of time sufficient to establish a bonded dependent relationship parental in nature?
>
> 4. Did the trial court err by applying an abandonment analysis to a *de facto* parent case?
>
> 5. Did the trial court err by applying an extinguishment analysis to a *de facto* parent case?

Mother counters that the circuit court applied its discretion appropriately and correctly found that she did not consent to the Grandparents assuming a parent-like relationship with M. Additionally, she argues that the court was correct in finding that the Grandparents' relationship did not rise to a parent-like relationship and correctly considered their level of involvement and the length of the relationship.

We review a circuit court's custody decision for abuse of discretion but if the "order involves an interpretation and application of statutory or case law, we review the trial court's conclusions *de novo*." *Kpetigo v. Kpetigo*, 238 Md. App. 561, 568–69 (2018) (*citing Walter v. Gunter*, 367 Md. 386, 391–92 (2002)). And we give deference to the circuit court's findings of fact unless they are clearly erroneous. *See Burak v. Burak*, 455 Md. 564, 617 (2017) (*quoting In re Yve S.*, 373 Md. 551, 586 (2003)). The trial court has such broad discretion to make factual findings because the trial judge is in a far better position "to weigh the evidence." *In re Yve S.*, 373 Md. at 586. This is because only the trial judge "sees the witnesses and the parties, [and] hears the testimony." *Id.* "There is an abuse of discretion 'where no reasonable person would take the view adopted by the [trial] court,' or when the court acts 'without reference to any guiding rules or principles.'" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (alteration in original) (*quoting North v. North*, 102 Md. App. 1, 13 (1994)).

A. The Circuit Court Correctly Applied the *Conover* Test.

Parents have the fundamental constitutional right to the "care, custody, and control" of their children, and court-awarded custody or visitation to non-parents infringes on that

right. *McDermott v. Dougherty*, 385 Md. 320, 353 (2005) (*quoting* Md. Code (1984, 1999 Repl. Vol, 2004 Supp.), § 5-203(d)(2) of the Family Law Article). Before the Court of Appeals recognized *de facto* parenthood in 2016, Maryland courts required third parties seeking custody to prove either that the child's natural parents were unfit to have custody or that there were exceptional circumstances making parental custody detrimental to the best interest of the child. *See Kpetigo*, 238 Md. App. at 569 (*quoting Ross v. Hoffman*, 280 Md. 172, 178–79 (1977)).

De facto parenthood recognizes that certain narrowly defined third parties who have a special parent-like relationship with a child can stand on equal footing with a biological parent. *See id.* at 570. Generally, *de facto* parenthood is "a relationship resulting in bonding and psychological dependence upon a person without biological connection [and] can develop during an ongoing biological parent/child relationship." *Conover*, 450 Md. at 76–77 (*quoting Monroe v. Monroe*, 329 Md. 758, 775 (1993)). A *de facto* parent does not need to establish exceptional circumstances or the unfitness of biological parents "before a trial court can apply a best interest[] of the child analysis." *Id.* at 85. Once established, a *de facto* parent is a legal parent with the same fundamental parental rights as a biological or adoptive parent. *See id.* at 71–72.

The standard, however, is a stringent one. The *de facto* parenthood test the Court of Appeals adopted in *Conover* was formulated initially by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435–36 (Wis. 1995), and measures the relationship between the potential *de facto* parent and the child against four factors,

beginning with the biological or adoptive parent's consent to a parent-like relationship with the child:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
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> (2) that the petitioner and the child lived together in the same household;
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> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Conover, 450 Md. at 76 (*quoting H.S.H.-K.*, 533 N.W.2d at 435–36). These criteria generally "preclude such potential third-party parents as mere neighbors, caretakers, baby sitters, nannies, au pairs, nonparental relatives and family friends from satisfying these standards." *Id.* at 74–75 (*quoting Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000)).

The Grandparents argue that the circuit court incorrectly applied the first *Conover* factor when it described their relationship with M as that of grandparent and grandchild rather than one of parent and child. They contend further that the court offered no specific explanation for its finding that Ms. Smith did not consent to the creation or formation of a parent-like relationship. This first factor, the parent's consent to the formation of the relationship, is paramount because "de facto parent status [] cannot be achieved without knowing participation by the biological parent." *Id.* at 74. Said another way, "[p]rong one is critical because it makes the biological or adoptive parent a participant in the creation of

the psychological parent's relationship with the child." *Id.* (*quoting V.C. v. M.J.B.*, 748 A.2d 539, 551–53 (N.J. 2000)).

The trial court found that the Grandparents' relationship with M didn't satisfy the first factor of the *Conover* test because "the biological mother consented and fostered the establishment of a grandparent-like relationship with the child. Not a parent." At the merits hearing, on February 24, 2019, Mother testified that she consented to Grandmother watching M while she was at work, but that was not consent for Grandmother to create a parent-like relationship:

> [MS. SMITH'S ATTORNEY]: And when you moved in with the [Grandparents], did you consider them to be taking your parenting role or did you consider them to have a normal grandparent role in helping with the child?
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> MS. SMITH: They had a normal grandparent relationship with [M] They played with him, they spoiled him. They have him all types of sweets and stuff. Just like normal grandparents do. I never assumed that they assumed my position -- me and Lamont's position because we all had a conversation about our roles, them being -- her being the babysitter while I was a work and Lamont was at work and me and Lamont taking care of [M] while he was in our care.

When Mother moved in with the Grandparents, Father and Grandmother understood that it had been customary for Grandmother to watch her grandchildren until the age of two, and M would not be an exception to that practice:

> [MS. SMITH'S ATTORNEY]: And did you have any discussions with anybody about who would watch [M] while you worked at the Children's Place?
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> MS. SMITH: Yes. Lamont initially told me that his mother would watch him because she watches all of the grandkids up until the age of two. So when me and her actually discussed it, we were in her kitchen and she said oh sure, yeah I will watch

> [M]. I will watch him. Because I brought to her who was going to watch him when I was away at work? And Lamont working at the tow company on and off. She came to me, we talked -- she came to me and she said I will watch him. It's no problem, he is my grandson.
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> We talked about money, she said oh you don't have to pay me, it is no problem, I watch all of the grandkids up until the age of two. She said go and work, work two jobs if you need to, save up your money so that you know, you can easily provide for the child, whatever the case may be.
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> * * *
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> [MS. SMITH'S ATTORNEY]: Now, after Lamont, Jr. passed away, did you have any discussions with Ms. Rainey about what was going to happen then?
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> MS. SMITH: Not -- not intentional like that. She was, like I said, the babysitter. We agreed in March of 2018 when I moved in that she was going to watch my child while I was at work. And that was the only agreement that me and her had since I lived there.

Although the Grandparents dispute it, the record readily supports the circuit court's finding that Mother never consented to Grandmother or the Grandparents assuming a full parent-like relationship with M, and thus there is no clear error in the circuit court's finding or abuse of discretion in its conclusion that the Grandparents hadn't satisfied *Conover*'s consent requirement. And that ends the inquiry: *Conover* requires the putative *de facto* parent to satisfy all four factors. *De facto* parenthood can't just happen on its own—the biological or adoptive parent first must consent, affirmatively, to and foster a parent-like relationship of the same caliber as their fundamental, parental relationship with the child. Without Mother's consent, the Grandparents cannot be *de facto* parents, and we need not go any further down the analytical path.

The trial court suggested in its order that if it were to find the Grandparents *de facto* parents, Mother would be displaced in her role as M's parent. That would not have been the case. It is entirely possible for a child to have more than two parents—*de facto* parenthood recognizes parental rights in someone who isn't a parent by biology or adoption, and it doesn't replace or displace any existing parent. *See generally E.N. v. T.R.*, 247 Md. App. 234 (2020) (*de facto* parent, who had been in relationship with father, shared custody with mother and incarcerated father's parental rights weren't affected); *see generally Kpetigo*, 238 Md. App. 561 (step-mother qualified as a *de facto* parent for a child and shared custody with father; mother lived overseas and didn't participate in the custody proceeding). It also is possible, and a lot more common, for a child to have one parent. That is the case here: M's parent is, and remains, his Mother, and we affirm the circuit court's decision denying the Grandparents' request for custody.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.