Circuit Court for Howard County
Case No. C-13-FM-20-001220

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 0440

September Term, 2023

Carolyn G. Brown

v.

Markas A. Brown

Nazarian,
Leahy,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: February 6, 2024

* This is an unreported opinion. The opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Carolyn G. Brown ("Grandmother"), filed the underlying complaint for sole physical and legal custody of her grandchild, "H.," on grounds that: 1) she was H.'s *de facto* parent because, among other things, *she* had "consented to and fostered a parent/child relationship" between H. and herself; 2) exceptional circumstances exist; and 3) H.'s father, Markas A. Brown ("Father") was an unfit parent. Grandmother filed the complaint in the Circuit Court for Howard County on August 31, 2020—just under two years after the passing of her daughter and mother of H., Rahema Delisser ("Mother").

The case came before the circuit court for a hearing on April 17 and 18, 2023. At the close of Grandmother's case, Father moved for a directed verdict. The court granted the motion after finding that Grandmother failed to establish that she was a *de facto* parent for several reasons, including that Father had neither relinquished his parental role nor consented to Grandmother becoming the *de facto* parent of H. The court also found that Father was not unfit, and that there were no exceptional circumstances that would support the grant of sole custody to a third party. Grandmother appealed and now presents this Court with one question challenging only the first of the trial court's three-pronged decision: "Did the trial court abuse its discretion in finding that the Appellant was not a *de facto* parent?

We hold that the circuit court correctly applied Maryland's four-factor *de facto* parentage test in determining that Grandmother failed to establish that she had standing as *de facto* parent to request sole physical and legal custody of H. Accordingly, we affirm the judgment of the circuit court.

BACKGROUND

H. was born in October 2013, after Father and Mother ended their romantic relationship. Mother cared for H. from his birth until her unexpected death on September 19, 2019. From December 2013 until December 2018, H. lived in Mother's household.[1] At the close of 2018, Mother moved with H. into Grandmother's household where H.'s maternal half-sister, A., also lived. Mother shared joint legal and physical custody of H. with Father whereby H. stayed with Father every other weekend from Friday through Monday. Grandmother testified, and the court found credible, that after Mother passed away, she continued to care for H. in her home and Father continued visitation on the same schedule. Grandmother had been paying for H.'s private school education and served in the role as H.'s primary caretaker during the months following Mother's death.

On August 31, 2020, Grandmother filed the underlying complaint for sole physical and legal custody in the posture of a *de facto* parent, asserting that "[s]he wanted to be able to do what she needed to" do to care for H., "since he was primarily with her." The complaint averred that Grandmother, "acting as a De Facto Parent," had, among other things, prepared all meals for H., washed his clothes, assisted H. with his homework, and scheduled his medical and dental appointments. Grandmother averred that *she* had "consented to and fostered a parent/child relationship" between H. and herself.

[1] Grandmother states that from December 2013 until October 2016, H. lived alone with Mother. From October 2016 until June 2018, H. lived with Mother and Mother's boyfriend Ian. From June 2018 until December 2018, H. lived with Mother and Mother's boyfriend Luis.

The complaint also averred that "exceptional circumstances exist, and [Father] is unfit, for the following reasons," including that Father: "disciplines [H.] with physical violence"; "has refused to return [H.] to [Grandmother] when he is supposed to"; and "lives in a three[-]bedroom apartment with his two brothers," so that H. has to share a bedroom with his Father. The complaint also stated that when H. "returns from visitation with [Father], he reeks of smoke[,]" and that Grandmother had "smelled marijuana on [Father] on at least two separate occasions" when he picked up H.

On September 29, Grandmother filed a "Request For Emergency Relief" after Father failed to return H. to Grandmother on Sunday, September 27. Grandmother's request for an emergency hearing was denied on September 30.

On October 15, Father filed a verified answer to the complaint, in which he denied that Grandmother "is a fit and proper parent of his son" and requested that her complaint for custody and related relief be denied.[2]

Pendente Lite Custody Hearings

On November 18, 2020, Grandmother filed a second "Request For Emergency Relief," based on her concerns about H.'s education, and asked for sole physical custody,

[2] Later, and prior to the hearing in this case, Father filed verified responses to Grandmother's requests for admission of facts, in which he *denied* numerous averments, including that: he did not purchase clothing for H.; he did not contribute towards childcare expenses for H.; he did not attend any medical appointments for H.; he lives in a three-bedroom apartment with two other roommates; H. does not have his own bedroom at his house; he disciplined H. with physical violence; he allows smoking of marijuana in his apartment while H. is present; and, since September 2020, he does not assist H. with his homework.

pendente lite and permanently. A remote hearing on temporary custody and access was held before a magistrate on December 4, and the magistrate issued her report and recommendations on December 7, 2020. The magistrate found, among other things, that Father's testimony that H. "lived primarily with him [was] not credible and [was] not supported by evidence." However, she did find that H. had "significant, meaningful and regular access with the [F]ather throughout his life." The magistrate determined that Father "will not allow [G]randmother to see [H.] because he is afraid of what she will do," but concluded that Grandmother had been a "regular, steady, important support" in H.'s life and that losing contact with Grandmother would cause "irreversible consequences on [H.'s] social, emotional and educational well-being." The magistrate noted that Father "should have access to all school books, records and information[,]" and recommended that the circuit court order that H.'s "school books and passcode information should travel with [H.] from the respective houses." The recommendations also included that Grandmother have access with H. every Tuesday through Friday, and that Father have access "at all other times." On December 9, 2020, the circuit court held a hearing and issued an immediate order for temporary access on the same day, granting access in accordance with the magistrate's recommendations.

The parties appeared before a different magistrate for another remote *pendente lite* hearing on January 14, 2021. That magistrate heard testimony from Father, Grandmother, Mr. Michael Gall, Head of School of Christian Academy, and several teachers from the Christian Academy. She found that H. had been "doing well" in school, earning A's and

B's, while "he was residing primarily with Grandmother[.]" However, in recent months H.'s grades had dropped significantly, and "[h]e failed all but two classes." Ms. Lynette Riddle, a substitute teacher at Christian Academy testified that in September, "[t]he quality of [H.'s] school work was excellent[,]" but in October, H. became a "changed student." H. hardly turned in any schoolwork, and his behavior became "listless and inattentive." Previously, H. would turn on his computer camera during lunchtime and "have fun with his friends[,]" but in October 2020, "[h]e would turn his video off at lunch."[3]

In her report and recommendations issued on January 20, 2021, the magistrate noted many factors supporting Father's retention of his full parental rights. The magistrate found that:

> Both [Father and Grandmother] are of good character and reputation. Both are sincere in their desire to have significant time with the child. Grandmother is the party better able to maintain natural family relations. There was no evidence regarding the preference of the child. Both parties are able to provide for the material needs of the child. The child is a healthy seven year old little boy. The parties live close enough together for a shared access schedule to be manageable. There has been no lengthy separation, voluntary abandonment or surrender of the child.

The magistrate also determined that Grandmother has standing as a *de facto* parent, declaring:

> The Court finds Grandmother to be a de facto parent. She has a parent-like relationship with the child. She and the child lived in the same household. Grandmother assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing to the child's support without expectation of financial compensation. Grandmother has been in a parental role since at least 2018

[3] Due to the COVID-19 pandemic, school was virtual in the year 2020. The children's lunch and recess time was online.

> and has established a bonded parental relationship with the child. The Court finds that Father con[s]ented to and fostered Grandmother's formation and establishment of a parent-[l]ike relationship with the child. If not before, he did so when he chose to leave the child with Grandmother except on alternating weekends even after the [Mother's] death. **Even if that was not the case, [the Appellate Court of Maryland] has held that a de facto parent relationship can be created by only one legal parent consenting to and fostering the relationship. This was done by Mother prior to her death**.

(Emphasis added). The magistrate based her decision on *E.N. v. T.R.*, 247 Md. App. 234 (2020), *rev'd*, 474 Md. 346 (2021), which held that the consent of only one legal parent is required to foster a parent-like relationship with the would-be *de facto* parent, even when there are two extant legal parents. *Id.* at 247.[4] In addition, the magistrate found that "[e]ven if Grandmother was not a *de facto* parent, exceptional circumstances exist for Grandmother to have custodial rights[,]" because H. "has suffered educationally and emotionally from being removed from Grandmother's care." The magistrate recommended the parties have joint legal and shared physical custody of H., with Father having visitation on the weekends, and every other week during the summer.

On February 1, Father filed exceptions to the magistrate's report and recommendations, contesting the magistrate's finding that Grandmother was a *de facto* parent when H. "had not been in her exclusive care for one-year, and the surviving parent did not give his consent." Father further asserted error in the magistrate's findings that

[4] The magistrate's report and recommendations were issued on January 20, 2021. On July 12, 2021, the Supreme Court of Maryland reversed the Appellate Court's decision in *E.N. v. T.R.*, 247 Md. App. 234 (2020), and held that where there are two existing legal parents, both parents must be shown to have consented to a third party's formation of a *de facto* parent relationship. *E.N. v. T.R.*, 474 Md. 346, 394-95, 413 (2021).

either he or Mother had "consented to and fostered" a parent-like relationship between H. and Grandmother. He denied the magistrate's finding of exceptional circumstances because H. had suffered educationally and emotionally from being removed from Grandmother's care; he alleged, instead, that Grandmother had H.'s schoolbooks[5] and passwords for remote work and refused to provide them to Father. Finally, Father challenged the magistrate's right to convene the January 14 hearing when the December 9, 2020 order was already in place, and argued that the resulting order was void *ab initio*.

On April 2, the circuit court denied Father's exceptions and issued a *pendente lite* order providing for the joint legal and shared physical custody of H. in accordance with the magistrate's recommendations.

The Custody Hearing

The parties appeared before a circuit court judge for the custody hearing on April 17 and 18, 2023. The first witness to testify was Ms. Riddle, then retired from substitute teaching at Christian Academy. She explained that she taught H. when he was in the second grade, and related that H. was "bubbly," "fun," and "[a] lot of just joy." She observed a difference in H.'s demeanor starting the end of September 2020, when H. was no longer living with Grandmother. According to Ms. Riddle, H. was "sullen" and "very unfocused" and "not the same boy that he had been in September." Ms. Riddle observed that H. did

[5] At the April 2023 custody hearing, Grandmother acknowledged that she kept H.'s schoolbooks "in [her] possession[,]" although Father attempted to retrieve them, because "he was taken without no type of agreement. So, I didn't see any reason for me to be sending books."

not have school supplies, such as "paper, pencils or any equipment[,]" after he had relocated to his Father's residence. She stated that she sent copies of homework "[a]lmost everyday" but "didn't get responses" from Father. However, Ms. Riddle observed that after the new year, "[f]rom Tuesday to Friday, all homework was turned in" and H. would "associate with [his classmates] during the snack time and lunchtime again[.]"

Ms. Jennifer Rowell, H.'s third-grade teacher, testified next. Ms. Rowell testified that she had "consistent communication" with Grandmother but did not know Father "until today." Ms. Rowell described H.'s demeanor as "pleasant" and "bright[,]" "consistently put[ting] effort towards doing his best work[.]" Ms. Rowell stated that during the first quarter of H.'s third-grade year, his grades were "average[,]" but she "saw him improve[.]" H. consistently turned in high-quality assignments, which showed "oversight in his work[,]" but H. would inconsistently return assignments if they were "due on a Monday." When asked if she had ever interacted with Father, Ms. Rowell stated "[n]ot at all."

The court also heard testimony from Mr. Michael Gall, Head of School, who reported that H. was an "Honor Roll student" with good grades until the Fall of his second-grade year, when academic performance declined and was "not consistent[.]" He confirmed H.'s enrollment at the Christian Academy since kindergarten, with Grandmother paying the annual tuition.

Grandmother testified on her own behalf. She stated that she was sixty-nine-years old and had been a school bus driver for Prince George's County Public Schools for thirty-four years. Grandmother recounted that when her daughter was pregnant, she moved in

with Grandmother, bringing H. "home from the hospital" to her house after he was born. H. and Mother moved out when H. was about a year old, returning to Grandmother's home in December 2018, where H. stayed until September 25, 2020. Grandmother claimed that she had "been taking care of [H.] from the time he was born[,]" providing essential care such as when she "gave him his first bath" and "name[d] him." Grandmother also testified that H. was "crazy about" A., who is seven years his elder, that "she helps him with his homework," and that "they play around a lot."

Grandmother described her parent-like role, such as providing health insurance through her employer for both H. and A., driving H. to school and medical appointments, and covering expenses like tuition, before- and after-school care, books, uniforms, and school supplies. She clarified that she did all this without expecting reimbursement from Father and never sought it, as she "didn't think he could afford it."

According to Grandmother, prior to September 25, 2020, Father visited H. every other weekend. Father "told [her] that he wanted [H.] to come live with him[,]" but Grandmother dissuaded him, citing his unemployment at the time and the lack of a separate bedroom for H. Grandmother expressed her opinion that Father seemed to want H. "so he could get benefits."

Grandmother testified that on September 25, 2020, H.'s paternal grandmother picked up H. and did not return the child to Grandmother's care. Then, she observed, from September 2020 to the end of November 2020, when H. was not in her custody, H.'s grades went from passing to failing. Grandmother observed that H. "seemed very depressed when

[she] talked to him." Following the December 2020 *pendente lite* hearing, Grandmother regained shared custody of H., and then she was able to help H. catch up on his schoolwork. Grandmother checked on his schoolwork "[e]veryday" and sat with H. downstairs while completed his homework.

On April 18, 2023, at the conclusion of Grandmother's case, counsel for Father moved for a directed verdict. Father's counsel, after reviewing Maryland decisional law governing third-party custody cases, reminded the court that the law "presume[s] that it is in the best interests of the child to be placed in the custody of the parent." Counsel urged that most of the allegations in the complaint were based on hearsay, and that Grandmother failed in her case-in-chief to make any showing that Father was an unfit parent or that exceptional circumstances existed to award custody to a third party. Counsel reiterated that Father had remained a consistent parent in his son's life and had expressed to Grandmother that he wanted to have H. in his care. Counsel asserted that there was never explicit or implied consent for Grandmother to form a *de facto* parent relationship with H. Father "absolutely' consented to Grandmother's relationship with H. as a grandparent, but not as a parent. Counsel also pointed out that Grandmother didn't have "anything in writing saying that her daughter had consented to ger being the de facto parent." Counsel expounded:

> [Grandmother] cannot say, well, since [H.] was living with me, he and his mother, that I then have parental—I am then the parent. His parent was alive at that time. So, that would just mean that anytime a child, for whatever reason, moves out of the house and moves back in the house with their parents with their child, that they somehow lose their parental rights. There's no showing of that. And that doesn't make any sense.

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> And in the complaint, [Grandmother] states that after the mother died, the father would not bring back the child when he was supposed to and would keep the child. That, to me, in and of itself, should be a glaring example of the fact that [Father] didn't think that [Grandmother had custody of [H.]. If there was some specific access schedule . . . and, again, [Grandmother] would have been the one that would have had to present that . . . . But clearly, there was an open-ended arrangement. Again, my client was transitioning [H.] away from the [Christian Academy] and into his care. He even expressed to [Grandmother], which she testified to, that he wanted to have [H.] in his care.

In response, Grandmother's counsel reviewed the testimony presented covering all of the parental responsibilities that Grandmother had assumed, and how H. had thrived under her care. Counsel stated that Father's "unfitness goes beyond merely a derelict of his duty to educate his child. There's nothing at all to establish that he has the means to provide." Counsel pressed that, among the extraordinary circumstances present were that H.'s grades have suffered greatly, and that when H. is with Father, "he comes back depressed. His schoolwork suffers. His friendships suffer." Counsel argued that Father did consent to Grandmother becoming H.'s *de facto* parent because he "knew that [Grandmother] was providing a parent/child relationship to the minor child, . . . he knew [Grandmother] was providing [H.] with all the necessities to live a happy and sustainable life and that he was more than willing to let [Grandmother] do it until the benefits went away."

The Custody Ruling

Following a recess, the circuit court judge delivered his ruling. The judge first addressed Grandmother's contention that she was a *de facto* parent to H. He quoted and then applied each factor in Maryland's *de facto* parentage test as recited in *E.N. v. T.R.*,

474 Md. 346 (2021):

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

E.N., 487 Md. at 352 (quoting *Conover v. Conover*, 450 Md. 51, 74 (2016)).

Concerning the first factor, the judge found "no testimony or evidence to suggest that [Father] expressly consented to or encouraged a parent-like relationship between [Grandmother] and the child." Although Grandmother testified that she "engaged in certain parent-like responsibilities[,]" she also acknowledged that "she never asked for defendant's consent or permission to do so." Thus, the judge continued, because Grandmother "never asked for these things" and "without knowledge of these, the Court finds that there could be no *express* consent by [Father]." (Emphasis added). The judge also determined that there was no evidence of *implied* consent because Father "continued to exercise his weekend access with the child, and he continued to visit school officials to obtain [H.'s] schoolwork and the likes." He found that Father "continued to act in a parental role and did not relinquish that role[,]" and, as such, "there was no implied consent

on [Father]'s behalf."[6]

Turning to the second factor, the judge determined that it was "undisputed" that Grandmother and H. "resided [together] for a period of time, which included from 2018 until September of 2020." However, the judge noted that "[o]f this time, only nine months passed between the mother's death and when [Father] requested [H.]'s return." In fact, Father spoke to Grandmother about returning H. to live with him "at the end of the schoolyear as not to disrupt [H.'s] schooling" but "[Grandmother] responded by conditioning the return of [H.] on [Father] obtaining employment and other things."

With regard to the third factor addressing the assumption of parental responsibility, the judge acknowledged the "extensive testimony regarding [Grandmother]'s assuming the responsibility for [H.]'s care, education and development without the expectation of reimbursement." However, in analyzing the fourth factor for a bonded, dependent, parent-like relationship between Grandmother and H., he observed that while Grandmother had been in H.'s life since he was born, H. had only been "in [Grandmother]'s exclusive

[6] Grandmother, when asked on cross-examination if Mother consented to her having custody of H., testified that Mother allowed her to take H. to doctor appointments; however, Grandmother clarified that Mother never granted Grandmother custody of H.

> Q: [D]id she ever say that she was giving you, [Grandmother], custody of [H.]?
> A. No. She just let me see about him.
> Q. Okay.
> A. And enroll him in school.
> Q. She let you take care of him?
> A. Yes.

control" for "a period of approximately nine months[,]"[7] and that during this time, "[Father] continued to exercise his weekend visitation." The judge found that this was "not enough time to establish a parental role with the child given the fact that [H.] has known [Grandmother] . . . as his grandmother his entire life."

Next, the judge addressed Grandmother's claims to custody as a third-party, examining the alleged unfitness of Father to have custody of H., or whether there existed "extraordinary circumstances" that are "significantly detrimental to the child remaining in the custody of the parent[.]" *McDermott v. Dougherty*, 385 Md. 320, 325 (2005). The judge said he found "no credible testimony demonstrating [Father's] unfitness." He noted that while Grandmother alleged that she "smelled marijuana on [H.] and [Father]," she acknowledged that she "never observed [Father] smoking marijuana[,]" and there was "no first-hand testimony of [Father] drinking alcohol in front of [H.]" The judge observed that while Grandmother testified "that she was afraid to go into [Father]'s home[,]" she could not "articulate a basis outside of suggestion [sic] that [Father]'s home was dangerous and unfit." Regarding the alleged exceptional circumstances, the judge noted that H.'s school grades declined while he was in Father's care, but also "that those grades improved over

[7] The record reflects, as the judge himself stated earlier in his ruling, that Grandmother and H. resided together "until September of 2020," which, as Grandmother points out, was actually twelve months after Mother's passing rather than nine. However, we view this factual error as harmless in the context of the facts of the case and evidence before the court. The time discrepancy does not disturb, in our view, the court's finding that it was "not enough time to establish a parental role with the child given the fact that [H.] has known [Grandmother] . . . as his grandmother his entire life."

time." He did not find that the "alleged academic decline rises to the level of an exceptional circumstance[,]" and that "[n]othing further was introduced at trial."

The judge summarized his findings:

> [O]ne, [Father] never consented, either expressly or . . . implicitly to [Grandmother] becoming the de facto parent. Two, not enough time passed for [Grandmother] to establish the parental role with [H.]. Three, [Grandmother] failed to establish that [Father] is an unfit parent. And four, no exceptional circumstances. For those reasons, [Grandmother]'s complaint for custody is hereby denied.

Addressing Father, the judge described Grandmother as "an excellent resource" and asked "please, for [H.]'s best interests, please foster a relationship, . . . and keep her in [H.]'s life." Addressing Grandmother, the judge encouraged her to remain engaged in H.'s life, because "[H.] deserves the best. And with you all working together, he will have the best." Father stated, "on the record, I'm going to still continue to let my son always see his grandmother."

The court's ruling, memorialized in a written order entered on April 26, 2023, granted Father's motion for a directed verdict, and dismissed Grandmother's complaint. Grandmother noted an appeal on May 4, 2023.

DISCUSSION

A. *Parties' Contentions*

At the outset, Grandmother contends that the trial court abused its discretion in finding that she was not a *de facto* parent because the court made "erroneous factual findings." First, she challenges the court's statement that she had testified that Father requested H. to be returned to him at the end of the school year so as not to disturb his

schooling. In fact, she notes, when she was asked on cross-examination if she "recall[ed] Father saying to [her] that he wanted [H.] to finish out the school year and then after that he wanted [H.] in his custody[,]" Grandmother responded, "No." Second, Grandmother asserts the court's statement that H. "had been in the exclusive control of [Grandmother] for a period of nine months[,]" following Mother's death was "not correct." Grandmother refers to her testimony that H. resided exclusively with her from the time H.'s mother passed away on September 19, 2020, until September 25, 2020, when H.'s paternal grandmother took him away, constituting a period just over one year.

Turning to the *de facto* parenthood test established in *Conover v. Conover*, 450 Md. 51, 74 (2016), although Grandmother concedes that "there was not express consent," Grandmother invokes *E.N. v. T.R.*, 474 Md. 346 (2021), for the principle that implied consent for *de facto* parentage can be "inferred from one's conduct[.]" Grandmother urges that in this case, "there were ample facts from which the trial court should have found implied consent by [Father]."

Grandmother argues that Father "knew that he had the primary rights as H.'s only living parent[,]" but "did not file for custody" after Mother died, and only did so "after being served with [Grandmother]'s custody complaint." Grandmother contends Father "knowingly and voluntarily chose to leave [H.] in the primary care and custody of the child's grandmother for nearly one year." She alleges that Father "consented to this arrangement by his own inaction[,]" while "knowing full well that she was acting as [H.]'s primary parent[.]" Furthermore, she says, Father did not "exercise any other parental

responsibilities[,]" such as "participate in [H.]'s schooling," "take [H.] to medical or dental appointments[,]" or "provide any financial support beyond some nominal effort[.]"

Grandmother asserts that "there is no question" that she has satisfied the second factor,[8] as "[t]here was ample testimony that [Grandmother] and [H.] resided together"; and the third factor,[9] as there was "significant testimony that [Grandmother] had assumed obligations of parenthood by taking significant responsibility for [H.]'s care and support." Grandmother asserts that the trial court also abused its discretion in its analysis of the fourth factor,[10] by concluding that Grandmother had not formed a parent-like relationship with H. She acknowledges that "[f]actor four requires that 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." However, she disputes the court's assessment of an insufficient length of time, asserting that there is no "Maryland case law that defines what the length of time is that is sufficient to establish a bonded relationship." Grandmother maintains that she "had provided parental care long enough to have established a bonded relationship with her grandson."

[8] The second factor requires "that the petitioner and the child lived together in the same household[.]" *E.N.*., 474 Md. at 352 (quoting *Conover*, 450 Md. at 74).

[9] The third factor requires "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[.]" *E.N.*, 474 Md. at 352 (quoting *Conover*, 450 Md. at 74).

[10] The fourth factor requires "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." *E.N.*, 474 Md. at 352 (quoting *Conover*, 450 Md. at 74).

Father, in return, emphasizes the "high bar for establishing *de facto* parent status" and asserts the centrality of "knowing participation by the biological parent" to prevent third parties from using the device to "interfere with the relationship between legal parents and their children[.]" Father asserts that neither Mother nor he ever consented to Grandmother forming a parent-like relationship with H., but only that of a grandparent. Father acknowledges that H. has ties to Grandmother but argues that H. recognizes only Father as a parent.

Father claims that the court cannot credit the time H. lived with both Mother and Grandmother toward Grandmother's opportunity to forge the parent-like relationship. He further contends that from Mother's death "up until the filing of the complaint, H. was with [Grandmother] but also was going back and forth with [Father]. H. never actually ever lived with [Grandmother] for any extended time without either one of his parents being present or involved."

Father asserts that he has "never been away from H." or "relinquished his care" and had remained in his life continuously after their family separated. He posits that he has demonstrated the "intensity and genuineness" of his desire "to not only have custody [of H.] but also to affirm his constitutional right to parent his son[,]" as evidenced by his active involvement in this case over three years.

Father urges that there is a constitutional presumption that it is in the best interests of the child to be placed in the custody of the parent. (Citing *McDermott v. Dougherty*,

385 Md. 320, 417 (2005)).[11] "Consequently," Father states that a non-parent who seeks to replace "the parent as custodian bears the burden of overcoming the parent's presumptively superior right to custody." (Quoting *McDermott*, 385 Md. at 417 (quotation omitted)).

Father chides Grandmother for addressing a "best interests" analysis in her briefing because under *McDermott* and its progeny, the trial court does not reach a "best interests" analysis before "a parent has been shown to be unfit or exceptional circumstances" exist. Father contends that Grandmother's evidence to demonstrate exceptional circumstances "did not come close to fulfilling this weighty task."

B. *Standard of Review*

Grandmother appeals from the trial court's grant of Father's "motion for directed verdict," which, in a case tried to the court and not a jury, is governed by Maryland Rule

[11] Although Grandmother does not challenge the trial court's determinations in regard to Father's fitness as a parent or the existence of exceptional circumstances, Father devotes several pages of his brief supporting the court's decisions. Father highlights the Maryland Supreme Court's holding in *McDermott v. Dougherty*, 385 Md. 320 (2005) that "absent extraordinary (i.e., exceptional) circumstances, the constitutional right [of legal parents] is the ultimate determinative factor and only if the parents are unfit or extraordinary circumstances exist is the best interest of the child test to be considered." *McDermott*, 385 Md. at 418. Father points out that in *McDermott*, the Supreme Court held that a fit father's "being away for months at a time" as a merchant marine did not constitute exceptional circumstances warranting the transfer of custody to the maternal grandparents. *McDermott*, 385 Md. at 435. Comparing his actions to those identified by McDermott as demonstrating unfitness, Father argues that Grandmother "did not meet her burden."

He further asserts that Grandmother did not meet her burden of demonstrating that he was unfit: "There was no evidence presented of neglect . . . abandonment for an appreciable among of time . . . immorality . . . failure to provide essential care when based on reasons other than poverty along . . . gross misconduct . . . [or] that a strong mutual bond did not exist between [Father] and H."

2-519(b), and is more appropriately referred to as a "motion for judgment." The rule provides:

> **(b) Disposition.** When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

Md. Rule 2-519(b). In *Cattail Associates, Inc. v. Sass*, we explained that "[w]hen a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court," under Rule 2-519(b), *"***we review the circuit court's judgment in accordance with Maryland Rule 8–131(c)**." 170 Md. App. 474, 486 (2006); *see also Boyd v. Bowen*, 145 Md. App. 635, 650 (2002) (stating that "we review the trial court's decision to grant a defendant's motion for judgment at the close of the plaintiff's case in a court trial under Md. Rule 8–131(c)"). Accordingly, "when an action has been tried without a jury, [we] will review the case on both the law and the evidence. [We] 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." Md. Rule 8-131.

We "apply the clearly erroneous standard of review to the trial court's factual findings and review the court's decision for legal error." *Basciano v. Foster*, 256 Md. App. 107, 128 (2022) (citing Md. Rule 8-131(c)). Our Supreme Court has further distilled "three distinct aspects of review in child custody disputes" as follows:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Rule 8-131(c)] applies. [Secondly,] [i]f it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

In re Yve S., 373 Md. 551, 586 (2003) (first, fourth, fifth, and sixth alterations added) (emphasis removed). Generally, "[a] trial court's findings are not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion." *Azizova v. Suleymanov*, 243 Md. App. 340, 372 (2019) (quotation omitted). An abuse of discretion occurs:

> when no reasonable person would take the view adopted by the [trial] court, when the court acts without reference to any guiding rules or principles, when the court's ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is violative of fact and logic, or when its decision is well removed from any center mark imagined by the reviewing court.

Jose v. Jose, 237 Md. App. 588, 598-99 (2018) (alteration in original; quotation marks and citations omitted).

C. *Legal Framework*

Fundamental Constitutional Rights of Parents

The United States Supreme Court has consistently recognized a parent's fundamental liberty interest "in the care, custody, and control of their children[.]" *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (establishing that parents have a "cognizable and substantial" interest in retaining custody of their children); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the

substantive Due Process clause of the Fourteenth Amendment protects the right to "establish a home and bring up children").

Maryland appellate decisions embrace these holdings, and maintain that "[t]he proper starting point for legal analysis when the State involves itself in family relations is the fundamental constitutional rights of a parent[,]" while also noting that "rights of a parent in the raising of his or her children, however, are not absolute." *In re Yve S.*, 373 Md. at 565, 568. Indeed, "[w]hen the custody of children is the question, 'the best interest[s] of the children is the paramount fact. Rights of father and mother sink into insignificance before that.'" *A.A. v. Ab.D.*, 246 Md. App. 418, 441 (2020) (quoting *Kartman v. Kartman*, 163 Md. 19, 22 (1932)).

Respecting the foregoing rights, our caselaw instructs that "[i]n the area of child custody, the law recognizes a rebuttable presumption that the child's best interests will best be served by custody in a biological parent, over a third party; and a third party bears the burden of showing the contrary." *Karen P. v. Christopher J.B.*, 163 Md. App. 250, 265 (2005) (citing *Ross v. Hoffman*, 280 Md. 172, 178 (1977)). The burden of proof rests with the third party seeking custody, who must rebut the presumption of a natural parent's rights by a preponderance of the evidence. *Shurupoff v. Vockroth*, 372 Md. 639, 662 (2003). The Maryland Supreme Court has held,

> Where the dispute is between a *fit* parent and a private third party, [ ] both parties do not begin on equal footing in respect to rights to "care, custody, and control" of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others.

E.N., 474 Md. at 371 (emphasis added) (quoting *McDermott*, 385 Md. at 353). Historically in Maryland, a third-party seeking custody of a child from her natural parents had to demonstrate parental unfitness or exceptional circumstances. *McDermott*, 385 Md. at 325. More recently, however, "courts across the country have recognized as *de facto* parents a narrow class of third parties who have a special relationship with a child." *Kpetigo v. Kpetigo*, 238 Md. App. 561, 570 (2018).

De Facto Parenthood

The Supreme Court of Maryland first recognized *de facto* parenthood in the landmark custody case, *Conover v. Conover*, 450 Md. 51 (2016).[12] *Conover* centered around Michelle[13] and Brittany Conover, a same-sex married couple who shared custody of their child, J., conceived through artificial insemination. *Conover*, 450 Md. at 55. While J.'s birth certificate listed Brittany as the mother, it did not identify a father. *Id.* Following their legal separation in 2011, Brittany prevented Michelle from visiting J. *Id.* Brittany filed a Complaint for Absolute Divorce and Michelle sought visitation rights in respect to

[12] Maryland courts hesitated to recognize *de facto* parent status because it could "short-circuit[] the requirement to show unfitness or exceptional circumstances[.]" *Janice M. v. Margaret K.*, 404 Md. 661, 685 (2008), *overruled by Conover v. Conover*, 450 Md. 51 (2016). However, in her prescient dissent in *Janice M.*, Judge Irma Raker argued that "the *de facto* parent test is not inconsistent with *Troxel v. Granville*, 530 U.S. 57 (2000)" and highlighted decisions of sister states that rejected parental unfitness as a necessary predicate for interference with a biological parent's fundamental right to raise his children. *Janice M.*, 404 Md. at 703 (Raker, J. dissenting).

[13] We note that the appellant in *Conover v. Conover* is a transgender man, "Michael Conover," formerly "Michelle." Mr. Conover transitioned after the merits hearing. Appellant stated in his brief that he would refer to himself using feminine pronouns for consistency with the record.

J. *Id.*

The circuit court held an evidentiary hearing and concluded that Michelle lacked parental standing. *Id.* at 55-57. The court reasoned that Michelle, as a third-party, needed to establish "that Brittany was unfit or that exceptional circumstances existed to overcome the biological mother's constitutionally protected interest in the care and control of her child." *Id.* at 58. The court found that Brittany was a fit parent, identified no exceptional circumstances, and subsequently denied Michelle's request for custody or visitation due to her lack of parental standing. *Conover*, 450 Md. at 58. Michelle appealed, and the Appellate Court of Maryland affirmed, stating that even if Michelle qualified as a "father" under Maryland Code (1974, 2011 Repl. Vol.), Estates & Trusts ("ET"), § 1-208(b), she would not hold the legal status of a parent under *Janice M.* because she could not establish that Brittany was an unfit parent, nor could she show exceptional circumstances. *Conover*, 450 Md. at 59.

On certiorari, the Supreme Court of Maryland reversed in a 4-3 decision, thereby overruling the controlling case, *Janice M.*, as "clearly wrong" and "obsolete" due to "the passage of time and evolving events."[14] *Id.* at 77, 85 (citing *Janice M. v. Margaret K.*, 404 Md. 661 (2008); other citations omitted). The Court distinguished between "pure third parties" and *de facto* parents, holding "*de facto* parents have standing to contest custody or visitation and need not show parental unfitness or exceptional circumstances before a trial

[14] The Court noted the passage of Maryland's Civil Marriage Protection Act, which recognized same-sex marriage and "undermine[d] the precedential value of *Janice M.*" *Conover*, 450 Md. at 77.

court can apply a best interests of the child analysis." *Id.* at 85. The *Conover* Court adopted the test used by Wisconsin courts (hereinafter, the "*Conover* test"), establishing criteria for determining *de facto* parenthood:

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

Id. at 74 (quoting *In Re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995), but with altered formatting and omitting footnotes). The Court emphasized that this test was "narrowly tailored to avoid infringing upon the parental autonomy of a legal parent." *Id.* at 74. The Court explained:

> [T]he first factor [in the hereby adopted test] is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. This factor recognizes that when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced.

Id. at 75 (first alteration supplied by *Conover*) (quoting *Marquez v. Caudill*, 656 S.E.2d 737, 744 (S.C. 2008)). The Court emphasized, however, that *de facto* parenthood status "cannot be achieved without *knowing participation* by the biological parent" and the test

would "preclude such potential third-party parents as mere neighbors, caretakers, babysitters, nannies, au pairs, *nonparental relatives*, and family friends from satisfying these standards." *Conover*, 450 Md. at 74-75 (emphasis added) (citation and quotation omitted).

In *E.N. v. T.R.,* 474 Md. 346 (2021), our Supreme Court followed *Conover* and applied its holding to a situation where the child had two legal parents, only one of whom had consented to the development of a *de facto* parental relationship between the child and a third party. *E.N.*, 474 Md. at 354. There, two children lived with their father and his fiancée, in the home they jointly owned, with their mother's consent. *Id.* at 354. The mother sought to recover the children after the father was incarcerated in a federal prison out of state, and the father's fiancée sought custody. *Id.* The circuit court found that the mother "did not consent to or foster the children's relationship with [father's fiancée] or even know [her]," but determined that father's fiancée was a *de facto* parent under the *Conover* test based on the father's consent to the relationship; thus, the court awarded custody to the fiancée. *Id.* at 354-55. Our opinion, affirming the decision of the trial court, was reversed. *Id.* at 413.

The Maryland Supreme Court examined the fiancée's rights relative to those of the mother and held that a *de facto* parent relationship between the children and father's fiancée had not been established in the absence of mother's knowledge and consent. *Id.* at 355. The Court held that, to satisfy the first factor of the *Conover* test:

> where there are two legal parents, both parents must knowingly participate in consenting to and fostering the third party's formation of a parent-like relationship

> with a child. Otherwise, we create the incomprehensible situation in which a *de facto* parentship may be created by the knowing participation of only one legal parent while an equally fit legal parent is denied the same knowing participation in the process and denied the meaningful input that we deemed so critical for a parent to have in creating *de facto* parent status for a third party.

E.N., 474 Md. at 401. Elsewhere in the opinion, the Court qualified its statement that "where there are two legal (biological or adoptive) parents, a prospective *de facto* parent must demonstrate that both legal parents consented to and fostered such a relationship **or** that a non-consenting legal parent is unfit or exceptional circumstances exist." *Id.* at 394-95, 398 (bold emphasis added). This alternative path—of showing a second non-consenting parent is unfit or exceptional circumstances exist—is only available once the petitioner has already demonstrated that one legal parent *did* consent to and foster the parent-like relationship.[15]

The Supreme Court further instructed that the requirement of "a legal parent's actual knowledge of and participation in the formation of a third party's parent-like relationship with a child" could be satisfied "either through the parent's express or implied consent[.]" *Id.* at 401. The Court noted that while implied consent "may be inferred by a party's conduct," when it "would be understood by a reasonable person as indicating consent[,]"

[15] In *E.N.*, the Court explained that, where there are two existing parents and only one has consented to and fostered the establishment of a parent-like relationship between their child and a third party, then *de facto* parentage may obtain where "a non-consenting legal parent is unfit or exceptional circumstances exist." *E.N.* 474 Md. at 395. In a footnote, Judge Watts, writing for the majority, explained that where a parent's actions evince a settled purpose to relinquish all parental claims, "such abandonment may demonstrate an exceptional circumstance sufficient to permit a trial court to determine *de facto* parentship." *Id.* at 403 n.22.

id. at 402 (citations omitted), a court must make "a fact-specific inquiry to be determined on a case-by-case basis" to establish its existence. *Id.* at 403.

Returning to the case of E.N., the Court explained that mother's "permission for the children to live with [father], the other legal parent, . . . which is not an uncommon occurrence among parents who live separately[,]" did not equate to "leav[ing] her children for a long period of time in the care of a third party[.]" *Id.* at 406. The Court expounded, "[mother] did not object to the children moving in with [father], but that lack of objection did not extend to a lack of objection to the children forming a parental relationship with [father's fiancée], a person whom [mother] lacked knowledge of and her role in the children's lives." *E.N.*, 474 Md. at 406. The Court noted that after father was incarcerated, mother "did not abdicate all parental responsibility for her children" but rather, she "sought to have her children returned to her after they were no longer able to live with their father[.]" *Id.* Ultimately, the Court reversed the trial court's finding that father's fiancée was a *de facto* parent to the children, because "[n]othing in the record supports a determination that [the mother], through knowing and voluntary action or inaction, impliedly consented to and fostered [father's fiancée]'s formation of a parent-like relationship with the children." *Id.* at 407.

In *Basciano v. Foster*, 256 Md. App. 107, 143-46 (2022), a case factually closer to the present case, we emphasized the priority of parental consent to the formation of a *de facto* parent relationship and distinguished the *de facto* parentage analysis from the analysis for third-party custody on account of parental unfitness or exceptional circumstances. We

clarified that "where a child's existing legal parents both do not consent to the formation of a parent-like relationship between the child and a third party, the third party has failed, under the first factor of the *H.S.H.-K.* test, to establish a *de facto* parent relationship." *Basciano*, 256 Md. App. at 143. We determined that the circuit court misapplied *Conover* to find "exceptional circumstances" to justify *de facto* parenthood status for the maternal grandparents ("the Fosters"). *Id.* at 146. Ultimately, however, we did affirm the court's award of third-party custody to the Fosters under the exceptional circumstances factors as articulated in our leading third-party standing cases: *Ross v. Hoffman*, 280 Md. 172 (1977), and *Burak v. Burak*, 455 Md. 564 (2017). *Id.* at 115.

Basciano concerned a father's appeal from a circuit court order establishing the Fosters as the *de facto* parents of his only child.[16] *Id.* at 114-15. The child, C., was six-months old and in Father's and Mother's care when they overdosed on heroin, leading the Department of Social Services to place C. in the Fosters' home. *Id.* at 116. The Fosters filed a complaint for custody and moved for emergency and *ex parte* relief, and a magistrate found that extraordinary circumstances existed and granted them temporary custody. *Id.* at 116-17. After a one-day merits trial in circuit court, the judge delivered a bench ruling and found that:

> [*De facto*] parenthood of [C.] **was established by the Fosters through exceptional circumstances, therefore they were able to meet the first prong**. Having found that the first prong has been met, I will make my findings regarding the remaining prongs, although I will note that they were

[16] At the time of the decision, both parents were still alive; however, Mother was unable to be located.

largely uncontested.

Basciano, 256 Md. App. at 125 (second alteration in original) (emphasis added). Father appealed the decision to grant the Fosters *de facto* parenthood status. *Id.* at 115.

We held that "the circuit court conflated the third-party 'exceptional circumstances' analysis with the first factor of the *de facto* parentage test, when they are, in fact, separate constructs." *Id.* at 144. We parsed the distinction between *de facto* parenthood and third-party custody complaints. *Id.* The requirements of *de facto* parentage concern "the *relationship* between a *third party* 'with a non-biological, non-adopted child' which the parent consents to and nurtures." *Id.* (quoting *Conover*, 450 Md. at 62). By contrast, a third-party seeking custody on the grounds of unfitness or exceptional circumstances relies "on the *parents'* inability to continue to have custody of their child because the continuation of custody is against the child's best interests." *Id.* (quoting *McDermott*, 385 Md. at 325). *See also Caldwell v. Sutton*, 256 Md. App. 230, 265-67 (2022). We emphasized that these paths are "not the same," because *de facto* parents are "presumptive equals" of biological or adoptive parents, holding the same constitutional rights, whereas third parties do not have equal standing with fit parents. *Basciano*, 256 Md. App. at 144 (citation omitted). We held that, under the circumstances of the case, the Fosters had not formed a *de facto* parent relationship with C. because they never had the father's consent,[17] *id.* at 146-47, and we affirmed the award of custody to the Fosters under a third-party

[17] There was also no evidence that Mother consented to the formation of the *de facto* parent relationship. *Basciano*, 256 Md. App. at 147, 154.

posture. *Id.* at 154.

Similarly, in *B. O. v. S. O.*, we affirmed the trial court's determination that the child's aunt failed to gain standing as a *de facto* parent because mother did not "consent[ ] to ... the [aunt]'s formation and establishment of a parent-like relationship with the child." 252 Md. App. 486, 509 (2021) (alteration in original) (quoting *Conover*, 450 Md. at 74). The child in that case had lived with his Aunt since he was a few months old after he was removed from mother's custody due to neglect and domestic violence. *Id.* at 498, 503. After two years, the child began spending overnights with mother, and mother demanded more time with her child. *Id.* at 498-99. After mother and the child's aunt filed a series of protective orders against each other, the aunt filed for emergency custody in the Circuit Court for Montgomery County. *Id.* at 499. Following an evidentiary hearing, the trial court found that the aunt did not meet her burden of proving she was a *de facto* parent or that mother was unfit, and the court determined mother should have custody of her child. *Id.* at 501.

On appeal, mother asserted, among other things, that in denying mother's motion for judgment at the conclusion of aunt's case, the trial court found that the first factor of *Conover* had been met, but then the court "totally changed its mind" in its final ruling. *Id.* at 506. We observed that the court specifically noted that it only "found that *at this point*[,]" and that, upon considering all of the evidence, the court reached a different conclusion. *Id.* at 506-08. We observed that Mother testified to the "numerous instances where she attempted to see [the child] or regain custody and Aunt refused" and that the

court found credible Mother's testimony regarding her attempts to gain access to her child. *Id.* at 509. We concluded that the trial court's decision was based on "sound legal principles" and its factual findings were "not clearly erroneous." *Id.* (citations omitted).

D. *Analysis*

On the single issue before this Court, we hold that the circuit court correctly applied Maryland's four-factor *de facto* parentage test in determining that Grandmother failed to establish that she had standing as *de facto* parent to request sole physical and legal custody of H.

The Supreme Court and this Court have repeatedly emphasized that the first prong of the *de facto* parentage test, as articulated in *Conover* and its progeny, is "critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child." *Conover v. Conover*, 450 Md. 51, 75 (2016) (quotation omitted); *see also E.N. v. T.R.*, 474 Md. 346, 401 (2021); *Caldwell v. Sutton*, 256 Md. App. 230, 277 (2022); *Basciano v. Foster*, 256 Md. App. 107, 135-36 (2022); *B. O. v. S. O.*, 252 Md. App. 486, 505 (2021); *accord Kpetigo v. Kpetigo*, 238 Md. App. 561, 574 (2018) ("Conover's *de facto* parenthood test measures the relationship between the putative *de facto* parent and the child—a relationship formed with the biological parent's knowledge and consent—without reference to the parent's characteristics or the relationship's origins."). Under the first factor of the test, a third party cannot establish standing as a *de facto* parent where there is no evidence that Mother or Father expressly or

implicitly consented to the formation of the parent-like relationship. *See Conover*, 450 Md. at 74, 146; *Basciano*, 256 Md. App. at 143**.**

It is undisputed in the instant case that Grandmother did not present any evidence that Father or Mother ever expressly consented to the formation of a parent-like relationship between her and H. Grandmother argues that the circuit court erred in failing to find that Father had impliedly consented to a parent-like relationship because he: 1) "knowingly and voluntarily chose to leave [H.] in the primary care and custody of the child's grandmother for nearly one year"; 2) "knew that he had the primary rights as H.'s only living parent[,]" but "did not file for custody" after Mother died; and 3) only filed for custody "after being served with [Grandmother]'s custody complaint." She alleges, in sum, that Father "consented to this arrangement by his own inaction[,]" while "knowing full well that she was acting as [H.]'s primary parent."[18]

Grandmother's contentions are unavailing. Addressing her contentions in reverse order, we start with the basic principle that natural parents have a constitutional right to the custody of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (stating that under the Due Process Clause of the Fourteenth Amendment, "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court"). Father in this case was under no duty to file for

[18] On appeal, Grandmother does not reassert the contention on which she based her complaint; namely, that *she* consented to parent-like relationship between herself and H.

custody after Mother died, but he did fully and appropriately contest her complaint for custody.

As in *E.N. v. T.R.*, Father's "lack of objection" to H. living with Mother and Grandmother "did not extend to a lack of objection to [H.] forming a parental relationship with" Grandmother. 474 Md. at 406. In *Basciano*, we held that the grandparents failed to establish standing as *de facto* parents, even though they held temporary primary physical custody of the child, because neither Father nor Mother consented to the development of a parent-like relationship. *Basciano*, 256 Md. App. at 146-47. We specified that we were "unpersuaded by the [grandparents'] alternative argument that Father provided implied consent to the [grandparents] while he was recovering from heroin addiction." *Id.* at 147. Here, as in *E.N.* and in *Basciano*, Father consented to H. living with Mother and Grandmother. And while the facts also demonstrate that Father consented to H. having a relationship with Grandmother, as Father urges, the trial court found that those facts did not establish that he consented to anything more than a child/grandparent relationship. We fail to see how the trial court was clearly erroneous in its determination. *B. O. v. S. O.*, 252 Md. App. at 509.

In sum, the trial court correctly found *first*, that "there is no testimony or evidence to suggest that [Father] expressly consented or encouraged a parent-like relationship between [Grandmother] and [H.]"; and *second*, that Father had not impliedly consented to a parent-like relationship because he had "continued to act in a parental role and did not relinquish that role" during the time that H. lived primarily with Grandmother. We find no

error in these second-level conclusions of fact and hold that Grandmother failed to satisfy the first factor of the *Conover* test.

Given that Grandmother does not challenge the trial court's findings with regard to exceptional circumstances and Father's fitness as a parent, and that our cases direct that under the four-factor *de facto* parentage test, the issue of consent is dispositive—we need not reach the remaining factors to sustain the trial court's decision. However, we believe it is worth noting that the trial court's determinations under the remaining factors was also based on sound legal principles and factual findings that were not clearly erroneous.

We observe that there is no magic number or amount of time required to satisfy the fourth factor of the test requiring 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 74 (quotation omitted). Application of this factor is fact dependent and case specific. *See, e.g.*, *Caldwell*, 256 Md. App. at 280 & n.17 (holding that grandmother took on parental responsibilities for a sufficient period of time during the *seven years* that Mother was incarcerated to establish a parent-like relationship). But we note that in the cases discussed in our analysis above, the periods of time that the children resided with the third parties exceeded two years or more. Consequently, we hold that the trial court in the underlying case was not clearly erroneous in finding that "not enough time passed for [Grandmother] to establish the parental role with the minor child." Significantly also, the trial court found that Father had continued to be a parental presence in H.'s life, during and after Mother's lifetime. Accordingly, we affirm the circuit court's

determination, on motion for directed verdict, that Grandmother failed to establish that she had standing as *de facto* parent to request sole physical and legal custody of H.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.