Circuit Court for Charles County
Case No. C-08-FM-19-001825

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1512

September Term, 2021

K. J.

v.

T. J.

Berger,
Reed,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: June 29, 2022

*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.

In December 2019, appellee T.J. ("Grandmother") filed for custody of her grandson, S.C., who was at that time in the sole custody of his mother (Grandmother's daughter), appellant K.J. ("Mother").[1] After a hearing on October 26 and 27, 2021, the Circuit Court for Charles County found that Grandmother was a *de facto* parent and granted her primary physical custody of S.C., with visitation to Mother. The court further granted the parties joint legal custody, with Grandmother having tie-breaking decision-making authority. We reduce Mother's appellate issues to a single question:

> In determining that Grandmother qualified as S.C.'s *de facto* parent, did the trial court properly apply the "knowing and voluntary" component of the requirement "that the biological or adoptive parent consented to, and fostered, the formation and establishment of a parent-like relationship with the child?"

Because it is unclear whether the trial court fully appreciated the test governing a parent's "knowing and voluntary" consent to the formation of a parent-like relationship, we shall remand this case to the circuit court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In light of our disposition of this appeal, we shall set forth an abbreviated recitation of facts. S.C. was born in July 2007. The parties had significantly different views concerning where S.C. lived and who cared for him throughout his life. They do agree, however, that Mother and S.C. lived with Grandmother immediately after S.C. was born, after which Mother and S.C. moved to Washington, D.C. to live with S.C.'s father.[2]

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[1] We use the parties' initials in order to protect their privacy.

[2] S.C.'s father is not a party to this case.

Several months later, Mother and S.C. returned to live with Grandmother. In 2011, Mother was granted sole legal and primary physical custody of S.C., but the court declined to grant Father visitation until he completed a psychological examination and provided other pertinent information to the court. S.C.'s father apparently did not seek further access with S.C.

Mother and S.C. then continued to, either consistently (according to Grandmother) or sporadically (according to Mother), live with Grandmother until October 2013. During this time, Mother enrolled S.C. in a public elementary school, listing Grandmother's address as her place of residence. In October 2013, Mother moved into an apartment, taking S.C. with her. Grandmother testified that S.C. moved back in with her a few months later, while Mother continued to live in her own apartment. Grandmother testified that S.C. continued living with her until September 2019, but Mother disputed that claim.

The genesis of the present controversy can be traced to September 2019 when Grandmother and Mother disagreed about Grandmother facilitating a meeting between S.C. and his paternal grandmother. At that point, Mother stopped all contact between Grandmother and S.C. Both parties agree that, from September 2019 to January 2020, S.C. lived with Mother. On December 27, 2019, Grandmother filed an emergency complaint for custody of S.C. While Grandmother testified that S.C. lived with her for approximately one month in January and February 2020, Mother testified that S.C. lived with Grandmother for only ten days in January 2020.

After a hearing on February 19, 2020, the court entered a *pendente lite* consent order granting Grandmother visitation with S.C. every other weekend from Saturday morning to

Sunday evening. According to Grandmother, she returned S.C. to Mother's custody on the day of the hearing.

The court appointed a Best Interest Attorney for S.C. in June 2020. A second *pendente lite* hearing was held on September 30, 2020, resulting in an order that S.C. would "participate in virtual learning under the supervision and with the assistance of [Grandmother] every Monday" and any day the Mother was unavailable to supervise S.C.'s schooling.[3] Another hearing was held on April 14, 2021, resulting in another *pendente lite* consent order providing that Mother would submit to a psychological examination and that Grandmother would have visitation with S.C. every other weekend from Saturday morning until Monday after school, and on any school day when Mother was not available to supervise S.C. The consent order also provided that Grandmother would have "equal access" to S.C.'s medical and school records. After a hearing on June 23, 2021, the court issued a summer visitation order that further provided Grandmother alternating weekend visitation beginning on August 20, 2021, "until a subsequent custody order is entered."

A merits hearing was held on October 26 and 27, 2021. In addition to the parties' testimony, the court heard testimony from two extended family members and Dr. Michael Gombatz, who conducted Mother's psychological evaluation.

Both parties agree that S.C. has spent a substantial portion of his life living with Grandmother. According to Mother, S.C. lived with Grandmother for approximately five

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[3] After this hearing, S.C. began staying with Grandmother every weekday. Grandmother testified that "eventually it became a full week. I would pick him up [from Mother's apartment] every day."

years prior to December 2019, when the custody dispute began. Mother testified that S.C. never lived with Grandmother without Mother also being a resident of the household. Grandmother, on the other hand, testified that S.C. lived with her for approximately ten years prior to the custody dispute, including approximately six years when Mother lived elsewhere. Mother testified that she had always been responsible for the day-to-day care of S.C. and that she made all decisions concerning education, medical care, and discipline of S.C. Mother stated that Grandmother either acted in a limited capacity in caring for S.C. or, when Grandmother did take on a greater role, she did so without Mother's permission. Grandmother, in turn, testified that she provided most of S.C.'s day-to-day care, participated extensively in making educational decisions, attended nearly all of S.C.'s doctor appointments, sometimes took S.C. to the doctor without Mother, and disciplined S.C. appropriately when S.C. lived with her. Grandmother testified that, for much of S.C.'s life, Mother was either not present in the household or was unable to assist with S.C.'s basic care.

For her part, the Best Interest Attorney recommended that the court find Grandmother to be a *de facto* parent, and that S.C. live "with his grandmother primarily through the school year, that there be liberal and reasonable access with [Mother] on weekends or holidays . . . and summer."

After considering the four factors necessary to establish *de facto* parenthood as enumerated in *Conover v. Conover*, 450 Md. 51, 74 (2016), the court concluded that Grandmother met the definition of a *de facto* parent. The court proceeded to consider S.C.'s best interests, concluding that they would be served by granting primary physical

custody to Grandmother, and joint legal custody with Grandmother having tie-breaking decision-making authority. Mother appeals that order.

STANDARD OF REVIEW

Maryland Rule 8-131(c) provides that, "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence." "If any competent material evidence exists in support of the trial court's factual findings, those findings cannot be held to be clearly erroneous." *Figgins v. Cochrane*, 403 Md. 392, 409 (2008) (quoting *Schade v. Md. St. Bd. of Elections*, 401 Md. 1, 33 (2007)). "When a trial court decides legal questions or makes legal conclusions based on its factual findings, we review these determinations without deference to the trial court." *E.N. v. T.R.*, 474 Md. 346, 370 (2021) (quoting *Plank v. Cherneski*, 469 Md. 548, 569 (2020)).

DISCUSSION

Before we examine Mother's principal appellate argument, it is first necessary to review the law of *de facto* parenthood in Maryland. In *Conover*, the Court of Appeals recognized *de facto* parenthood and, in doing so, adopted a test enunciated by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). Under the *H.S.H.-K.* test, a third party seeking *de facto* parenthood status must prove:

> (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
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> (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 74 (quoting *H.S.H.-K.*, 533 N.W.2d at 435–36). The Court of Appeals explained, "these factors set forth a high bar for establishing *de facto* parent status, which cannot be achieved without knowing participation by the biological parent." *Id.* The Court held that recognition of *de facto* parenthood does not interfere with parents' "fundamental right to direct and govern the care, custody, and control of their children because a legal parent does not have a right to voluntarily cultivate their child's parental-type relationship with a third party and then seek to extinguish it." *Id.* at 75.

In a recent case, *E.N. v. T.R.*, 474 Md. 346 (2021), the Court of Appeals revisited *Conover.* There, the Court held that, where a child has two biological or adoptive parents, *de facto* parenthood generally cannot be established unless both parents consent to and foster the formation of the third party's parent-like relationship with the child. *Id.* at 402. Further, the Court stated that "a legal parent's actual knowledge of and participation in the formation of a third party's parent-like relationship with a child may occur either through the parent's express or implied consent to and fostering of the relationship." *Id.* at 401. The Court continued,

> [W]e conclude that so long as the consent is knowing and voluntary and would be understood by a reasonable person as indicating consent to the formation of a parent-like relationship between a third party and a child, the first factor of the *de facto* parent test may be satisfied by a legal parent's express or implied consent. As we stated in *Conover*, 450 Md. at 74, *de facto* parenthood requires the knowing participation of the legal parent. Requiring

> that the necessary consent be knowing and voluntary imposes no greater burden on either legal parent than already exists under the first factor of the *de facto* parent test.

Id. at 401–02. In the next paragraph of the opinion, the Court reiterated that, "Implied consent may be shown through action or inaction, so long as the action or inaction is knowing and voluntary and is reasonably understood to be intended as that parent's consent to and fostering of the third party's formation of a parent-like relationship with the child." *Id.* at 402.[4]

Mother argues that because the court here acknowledged that it was unaware of *E.N. v. T.R.*, it could not properly apply the "new guidance" provided by that case concerning *H.S.H.-K.*'s first factor related to parental consent.[5] She bases her argument on the following statements made by the court in the course of its bench opinion:

> The first factor being that the biological parent consented to and fostered the petitioner's formation and establishment of a parent-like relationship with the child.
>
> And, [Mother's Counsel], *you argued that it has to be knowing and voluntary. I hadn't seen that, but I am going to go with that, anyway*. But . . . and everybody has already said things, some of which I am going to say, as well.
>
> Over the years, from the time that [S.C.] was born, my impression, and I heard you argue that, "Oh, no, it was just a few years that he lived with his grandmother." My impression was that he lived with his grandmother an awful lot.

[4] Grandmother makes no argument on appeal that Mother expressly consented to create a *de facto* parent relationship.

[5] Mother does not challenge the court's findings as to the second, third, and fourth factors of the *H.S.H.-K.* test.

> That when he was a baby . . . I mean, I didn't add up all the time, but it was certainly . . . and there were breaks, there were times when he lived elsewhere, or he lived with his mother elsewhere.
>
> But if I had to guess and go back and count, I think what I would find is probably at least seventy-five percent of the time he lived with his grandmother, mostly with his mother, sometimes not with his mother.
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> And of course, [Mother] knew that, she voluntarily went along with that. She allowed it, she didn't object to it, she took advantage of it.
>
> And there is nothing wrong with that. I mean, when a grandparent is willing to step up and be that kind of help, it's great. It is not only helpful to Mom, it is wonderful for the family, in general, and children in general.
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> *So I do think that factor clearly established, that there was, even knowing and voluntary, if you need to have those words, though I don't know that you do*, but she consented, she fostered it, she worked with it, she took advantage of it, and rightly so. There is no reason why she shouldn't have.

(Ellipses in original) (emphasis added).

After rendering its bench opinion, the following colloquy ensued:

[MOTHER'S COUNSEL]: Your Honor, I have a knowing and involuntary [sic] if you want it . . . it comes from a case this July.

THE COURT: Okay, alright, well I covered that.

[MOTHER'S COUNSEL]: Yes, if Your Honor is (inaudible).

THE COURT: All I said was, *I didn't see that, I didn't see this case, but that is fine.* But I still find it is knowing and voluntary.

[MOTHER'S COUNSEL]: Okay, and that is just for your own record.

THE COURT: Okay, thank you. *What is the name of the case?*

[MOTHER'S COUNSEL]: *It is E.N. v. T.R.*

THE COURT:	Okay--
[MOTHER'S COUNSEL]:	I have the cite here. That's what (inaudible), sorry, just a minute?
THE COURT:	Okay, can I have this?
[MOTHER'S COUNSEL]:	Yes.
THE COURT:	Okay, thank you. Good to know.
[MOTHER'S COUNSEL]:	(Inaudible.)
THE COURT:	*It's the E.N. v. T.R.*?
[MOTHER'S COUNSEL]:	*Yeah, and that's the one where they go over knowing and voluntary.*
THE COURT:	*Okay, well that's good to know.*

(Emphasis added).

In light of the filing of the Court of Appeals's opinion in *E.N. v. T.R.*, shortly before the merits hearing, the trial court may not have fully appreciated the test to establish the parental consent element of *de facto* parenthood. *E.N.* makes clear that the phrase "knowing and voluntary" by itself does not capture what is required to prove consent to a parent-like relationship. The *E.N.* Court stated at least three times that implied consent may be shown by action or inaction as long as it is "knowing and voluntary and *would be understood by a reasonable person as indicating consent to the formation of a parent-like relationship between a third party and a child*." *Id.* at 401–02 (emphasis added). Although the court here was not aware of *E.N.*, it stated that it found that the formation of the parent-like relationship between Grandmother and S.C. was "knowing and voluntary," but added, "if you need to have those words, though I don't know that you do[.]"

We see two problems here. First, *E.N. does* require that the parent knowingly and voluntarily consent to the formation of the parent-like relationship. The court's suggestion to the contrary heightens our concern. Second, the court never addressed whether a reasonable person would have understood Mother's conduct as indicating consent to the formation of a parent-like relationship. This "reasonable understanding" concept is particularly significant where the parent's relationship with the third party is one that is typically amiable rather than adversarial (such as a parent-grandparent relationship). In other words, the requirement that the parent's consent must be knowing and voluntary and understood by a reasonable person as indicating consent to formation of a parent-like relationship provides protection against a parent unwittingly relinquishing a fundamental right by encouraging the child to develop a close relationship with a grandparent (or other relative involved in the child's life). Indeed, the court here found that it was "great" that Grandmother was "willing to step up and be that kind of help," noting that it was "wonderful for the family, in general, and children in general." We unequivocally agree with the trial court's observation that, as a matter of public policy, children should generally be encouraged to develop close relationships with their grandparents and other relatives. Nevertheless, parents should not be forced to harbor concern that allowing a child to spend substantial time (including overnights) with a grandparent might convert a normal, healthy grandchild and grandparent relationship into a *de facto* parent relationship. The requirement that the parent's conduct "would be understood by a reasonable person as indicating consent" to the formation of a parent-like relationship provides the appropriate barrier to that unintended consequence. Because we see no mention of this requirement in

the court's analysis, we are compelled to remand this matter to the circuit court for further consideration.[6] *Cf. Woodson v. Saldana*, 165 Md. App. 480, 489 (2005) (holding that court's failure to mention statutory factors governing monetary award, when viewed in conjunction with court's statements that husband would be "entitled to" half of marital portion of wife's retirement benefits, "creates an intolerable possibility that the statutory factors were not considered because the court believed that it was **required** to make such an award"); *Freese v. Freese*, 89 Md. App. 144, 152 (1991) (stating that because court "may not have fully appreciated the substantial discrepancy" in the parties' marital property, remand for further proceedings was warranted).

For the reasons stated, we shall vacate the circuit court's judgment and remand the case for the trial judge to decide the matter using the proper standard for the consent factor of the *H.S.H.-K.* test. *In re Adoption/Guardianship No. 10935*, 342 Md. 615, 630 (1996) ("Ordinarily when a trial court's judgment is grounded upon an erroneous standard, we vacate the order and remand the case for the trial judge to decide the matter using the proper standard.)" On remand, the court may, in its discretion, hold an evidentiary hearing to

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[6] Our concern that the court did not fully comprehend the requirement that the parent's knowing and voluntary conduct must be understood by a reasonable person as indicating consent to the formation of a parent-like relationship is supported by the court's comment that "[t]here is no reason why [Mother] shouldn't have" taken advantage of Grandmother's assistance with regard to S.C.'s care. As this case demonstrates, in order to avoid the creation of a *de facto* parent relationship, a parent may have good reason to carefully limit or curb the cultivation of the grandparent-grandchild relationship.

further inform *H.S.H.-K.*'s first factor concerning *de facto* parenthood. [7, 8]

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY VACATED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE TO PAY COSTS.

[7] Should the court ultimately conclude that Mother did not consent to the formation of a parent-like relationship, the court should then consider whether exceptional circumstances exist to justify third-party custody. The parties argued this issue before the trial court, but because the trial court found *de facto* parent status, it did not reach the exceptional circumstances issue.

[8] We reject Mother's contention that the trial court improperly conflated the first and second *H.S.H.-K.* factors. Evidence that the third party and the child lived together in the same household—*H.S.H.-K.*'s second factor—could also inform the parental consent requirement of *H.S.H.-K.*'s first factor.