Circuit Court for Baltimore County
Case No. 03-C-15-001694

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1498

September Term, 2016

CAROLYN LESCALLEET

v.

MIRIAM JOAN GARRITY

Arthur,
Leahy,
Reed,
JJ.

Opinion by Reed, J.

Filed: July 10, 2017

This appeal arises from a dispute over custody of S.G., the minor daughter of Carolyn Lescalleet, appellant, and granddaughter of Miriam Joan Garrity, appellee. After appellee was awarded guardianship of S.G., she filed a Complaint for Custody against appellant and S.G.'s father, who is appellee's son.[1] A three-day trial began on August 2, 2016. Ultimately, the Circuit Court for Baltimore County granted appellee sole legal and physical custody of S.G., and articulated appellant's visitation schedule. Appellant noted this timely appeal and presents two questions for our review:

1. Did the trial court err in finding Appellee established extraordinary circumstances sufficient to make a best interest determination?

2. Did the trial court err in determining that Appellee was entitled to de facto parent status?

For the reasons that follow, we answer the first question in the negative and affirm the judgment of the circuit court. We answer the second question in the affirmative and reverse the court's award of de facto parent status.

FACTUAL AND PROCEDURAL BACKGROUND

S.G. was born on April 30, 2010. From that time until April 2013, she was in the physical custody of her parents, who lived together intermittently and struggled with addiction. During that time, however, S.G. also had a bedroom in appellee's home and stayed there, with some regularity, from overnight stays to weeks at a time. In April of 2013, appellant asked appellee to keep S.G. for the weekend while she travelled out of state. While appellant was away, S.G.'s father called and stated that he had been to her

[1] S.G.'s father is not a party to this appeal.

home, was concerned that she was using, and was taking S.G. to stay with him at appellee's home "while you go get some help." Since that weekend in April 2013, S.G. has lived with appellee and her husband, Collin Chow, full-time.

Appellant entered rehab on August 8, 2013, where she remained for nineteen days, followed by four months at a halfway house. S.G.'s father brought S.G. to visit appellant during her time at both facilities. Appellant did not contact appellee about S.G. until April 25, 2014, after she learned that S.G.'s father was in a rehabilitation program. Appellant and appellee then communicated, primarily through email, regarding S.G.'s well-being, and ultimately about S.G. "transitioning" back into appellant's full-time care.

Appellee filed a Complaint for Guardianship of a Minor on June 20, 2014, arguing that appellant did not possess the ability to parent S.G. on a full-time basis. A hearing was held on July 3, 2014. The Honorable Colleen Cavanaugh signed an Order granting appellee guardianship and awarding appellant visitation pending further order of the court. Appellant filed a Complaint for Custody on February 11, 2015, making an identical argument.

After two postponements, the three-day trial before Judge Cavanaugh began on August 2, 2016. On August 5, 2016, the circuit court granted appellee sole legal and physical custody of the minor child. The court found that appellee was a de facto parent, and, alternatively, that extraordinary circumstances existed for S.G. to remain in appellee's custody. The court clerk entered the Custody Order on the docket on August 11, 2016. An Amended Order, which incorporated the original order and included a change in visitation,

was filed on August 17, 2016. Appellant then filed this notice of appeal on September 16, 2016.

We shall include additional facts as necessary in our discussion.

DISCUSSION

A. Parties' Contentions

Appellant contends that the trial court erred in determining that there were extraordinary circumstances present in this case to warrant S.G. remaining in appellee's custody. Citing *Ross v. Hoffman*, 280 Md. 172 (1977), and addressing each factor enumerated therein, appellant asserts that there are no exceptional circumstances "that would make parental custody detrimental to the best interest of the child." Appellant argues that appellee did not meet the burden in overcoming appellant's fundamental right to parent.

Appellant also argues that the trial court erred in finding that appellee was entitled to de facto parent status because appellant did not "consent to or foster appellee's formation and establishment of a parent-like relationship with the child." *See Conover v. Conover*, 450 Md. 51 (2016). Therefore, appellant concludes, appellee does not meet the requirements to be considered a de facto parent.

Appellee first moves to dismiss this appeal, arguing that the notice of appeal was untimely. Appellee argues that the 30 days for appellant to file the notice of appeal should be calculated from the original Custody Order's entry date, not the Amended Order's entry date. Alternatively, appellee addresses the *Ross v. Hoffman* factors and argues that there

are "substantial and considerable" facts in this case proving it to be in S.G.'s best interest to remain in appellee's custody.

B. Standard of Review

"Our standard of review as to factual findings is the 'clearly erroneous' rule, and the trial court's decision as to custody will not be disturbed absent a clear abuse of discretion." *Burrows v. Sanders*, 99 Md. App. 69, 74 (1994), *cert. denied*, 335 Md. 228 (1994) (citing *Ross v. Hoffman*, 280 Md. 172, 185–86 (1977)). "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002), *cert. denied*, 372 Md. 430 (2002).

"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) (citations and internal quotation marks omitted). "An abuse of discretion may also be found where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court, or when the ruling is violative of fact and logic[.]" *Id.*

However, where the order involves an interpretation and application of statutory and case law, the appellate court must determine whether the circuit court's conclusions are "legally correct" under a *de novo* standard of review. *See Walter v. Gunter*, 367 Md. 386, 391–92 (2002).

C. Analysis

1. Timely Appeal

Maryland Rule 8-202 provides that a notice of appeal "shall be filed within 30 days after the entry of the judgment or order from which the appeal is taken." It further explains that "'entry' as used in this Rule occurs on the day when the clerk of the lower court first makes a record in writing of the judgment, notice, or order on the file jacket, on a docket within the file . . . and records the actual date of entry." Md. Rule 8-202(f).

These 30 days are tolled, however, upon the proper filing of a Rule 2-534 motion. Under Rule 2-534, a party may file a motion to alter or amend a judgment within 10 days after entry of judgment. "When, as here, a motion to alter or amend is filed within 10 days after entry of judgment, the filing of the motion stays the time for filing an appeal until thirty days after the court rules on the revisory motion." *White v. Prince George's County*, 163 Md. App. 129, 139 (2005). Furthermore, as we explained in *Sieck v. Sieck*, 66 Md. App. 37, 44-45, 502 A.2d 528 (1986), a motion to revise a court's judgment, "however labeled, filed within ten days after the entry of judgment will be treated as a Rule 2-534 motion . . ."

The Custody Order was entered on August 11, 2016. Appellee's counsel sent a letter to Judge Cavanaugh on August 15, 2016, four days after entry of judgment. The letter requested a clarification in the judgment because of inconsistencies between the ruling from the bench and the written Order regarding appellant's visitation schedule. Specifically, appellee's counsel wrote: "[Best interest attorney] and I agree that the ruling

from the bench should control and that the written Court Order should be modified to reflect this." Two days later, on August 17, 2016, Judge Cavanaugh issued an Amended Order reflecting the modification appellee requested.[2] The Amended Order changed the dates pertaining to appellant's visitation, specified the best interest attorney who was to receive the attorney's fees she previously awarded, and incorporated the initial Custody Order. We will treat this letter as a motion to amend or alter the judgment under Rule 2-534. It was filed within 10 days of the entry of judgment, and, therefore, extended the appeal deadline from September 12, 2016 to September 16, 2016. Appellant's notice of appeal was timely filed on September 16, 2016.

2. Extraordinary Circumstances

A third party seeking custody of a child must overcome the legal preference favoring the child's parents. *In re Rahshawn H.*, 402 Md. 477, 498 (2007). This presumption may be rebutted by a determination that exceptional circumstances exist which has been defined as those circumstances, "that would make parental custody detrimental to the best interest of the child." *Id*. In *Ross v. Hoffman*, 280 Md. 172 (1977), the Court of Appeals articulated the broad range of individualized factors the trial court must analyze:

> (1) The length of time the child has been away from the biological parent, (2) the age of the child when care was assumed by the third party, (3) the possible emotional effect on the child of a change of custody, (4) the period of time which elapsed before the parent sought to reclaim the child, (5) the nature and strength of ties between the child and the third party custodian, (6) the intensity and genuineness of the parent's

[2] Appellant contends that the Amended Order was filed on August 17, 2016 and recorded on August 19, 2016. The docket entry, however, lists the Amended Order as being filed and entered on August 17, 2016.

> desire to have the child, (7) the stability and certainty as to the child's future in the custody of the parent.

Id. at 174-75. At the conclusion of all testimony in the case before us, the trial court considered each of these factors and stated:

> When considering the extraordinary circumstances, I think it is Ross versus Hoffman or Hoffman versus Ross – I'm sorry. Let's see. Ross versus Hoffman. So the length of time the child has been away from the biological parent. Regardless of who wanted it, [S.G] has been in the Garritys home, Mrs. Garrity's home since April of 2013. She has been in Miss Garrity's home against Miss Lescalleet's objection since I believe Memorial Day of 2014. But she has been there.
>
> The length of time the child has been away from the biological parent, in this case Miss Lescalleet, since Mr. Garrity has withdrawn his complaint. Again, she was away from her mother from April of 2013 custodial wise until today.
>
> The age of the child when care was assumed by the third party. Well, it was either three or four depending on whether you pick the April '13 date or the April '14 date.
>
> The possible emotional effect on the child of a change in custody. We heard from Miss Wasserman this morning that, you know, [S.G] might be resilient enough to manage a move if there were no other changes. In this case the other changes would be living with Mom for the first time full-time since 2013 and changing schools, changing neighborhood, changing homes, if the change in custody were granted – I'm sorry, if Miss Garrity's custody complaint were denied.
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> The period of time that elapsed before the parent sought to regain custody of the child, here with Miss Lescalleet. I mean, you tell me that in April 2014 you found out Gabe were into rehabilitation. There are e-mails to Miss Garrity that have been admitted into evidence in April and even early May of 2014 where you say I'm not ready to take her back but then you start by Memorial day of 2014, it is clear you wanted her back.

> The nature and strength of ties between the child and the third party. I think everyone recognizes [S.G.] has a very close bond. I know Collin isn't a party but I think you deserve credit too, sir. This is your step grandchild and you have treated her as any fabulous grandfather would. And Miss Garrity, you and [S.G.] obviously have a very close bond. That has been confirmed by the therapists, by everyone basically that I have heard testify. I think even Miss Lescalleet has grudgingly acknowledged that.
>
> The intensity and genuineness of the parent's desire to have the child. Miss Lescalleet is very genuine I believe in her desire to have [S.G.] and the intensity is great. By Miss Lescalleet's own words, you know, it is what fuels the intensity of her dislike for Mrs. Garrity. It is intense.
>
> And the stability and certainty as to the child's future in the custody of the parent. Here again, I know there are good reasons for moving and I'm sure there are good reasons for moving before, but you have moved three times since our last hearing. You moved multiple times before that. And [S.G.'s] longest residence has been with Mrs. Garrity. And I know that is not going to change. So all those factors considered, and there are seven, I think weigh in the favor of finding extraordinary circumstances which then also gets me to the best interests analysis.

The circuit court carefully considered each of the seven factors. "If there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002). There is ample evidence to support the court's decision to find extraordinary circumstances exist here, and the court spelled out the evidence it considered. We find no error or abuse of discretion in the court's decision.

3. De Facto Parent Status

Determining de facto parent status requires the interpretation and application of Maryland case law. Therefore, we must determine whether the circuit court's conclusion, awarding appellee de facto parent status, is legally correct. We do so under a *de novo* standard of review and find legal error.

The Court of Appeals recently addressed the issue of de facto parenthood in *Conover v. Conover*, 450 Md. 51 (2016). *Conover* expressly overruled *Janice M. v. Margaret K.*, 404 Md. 661 (2008), which held that de facto parent status was not recognized in Maryland. The *Conover* Court adopted a four-part test originally articulated by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 193 Wis.2d 649 (1995). Under this test, a third party seeking de facto parent status bears the burden of proving the following when petitioning for access to a minor 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;
> (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.

Conover, 450 Md. at 74. The parties contest only the first prong of this four-part test. Appellant argues that she did not consent to or foster the formation and establishment of a

parent-like relationship between appellee and S.G. We agree. Appellant's conduct demonstrates some indicia of consent but not enough to satisfy the requirements of *Conover*.

S.G. regularly stayed at appellee's home for the first three years of her life. The undisputed testimony is that S.G. would stay for periods of time ranging from overnight to weeks at a time. In fact, S.G. stayed with appellee so often that she had her own bedroom in appellee's home. Appellant knew S.G. was staying at appellee's home and allowed her to stay there voluntarily. In April of 2013, S.G. went to stay at appellee's home full-time. Appellee certainly took on some parent-like tasks – feeding, bathing, playing, taking to school, etc. – and formed a relationship with S.G. over the years. These actions simply deepened appellee's relationship with S.G. as her grandmother. They did not create a de facto parental relationship. Appellant specifically asked appellee if she was "okay with [S.G.] staying with [her] while [S.G.'s father] is in rehab." Even at this point, appellant did not consent to the parent-like relationship.

Appellant did not consent to and foster the parent-like relationship between her daughter and appellee. The first prong of the *Conover* test has not been met,[3] therefore the circuit court concluded that appellee is a de facto parent in error. The court had the power

[3] The facts pertaining to the remaining prongs are undisputed. Prong two is clearly satisfied as S.G. has been living in appellee's home on a full-time basis since April 2013. Under prong three, it is undisputed that appellee, along with her husband, take S.G. to school, the doctor, extracurricular activities, therapy, and provide her food and shelter without the expectation of financial compensation. Under prong four, again, S.G. has been living with appellee full-time since April 2013 and the record provides testimony from several witnesses stating that appellee and S.G. have a close bond.

to grant custody to appellee based on extraordinary circumstances and S.G.'s best interest, but not by awarding de facto parent status to appellee.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND REVERSED IN PART; ORDER AWARDING SOLE PHYSICAL AND LEGAL CUSTODY TO APPELLEE AFFIRMED. COSTS TO BE PAID BY APPELLANT.