Circuit Court for Baltimore County
Case No.: 03-C-15-14262

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 00685

September Term, 2017

LORETTA SMITH

v.

TAVAHN RUCKER

Nazarian,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Shaw Geter, J.

Filed: January 8, 2018

INTRODUCTION

This case arises from a dispute over custody of J.S., the minor child of Tavahn Rucker ("Appellee") and Shakeera Smith ("Mother"). In 2015, while residing in North Carolina with her children and grandmother, Loretta Smith ("Appellant"), Mother unfortunately died shortly after giving birth to her fifth child. Appellee travelled to North Carolina to attend the funeral services and afterward attempted to bring four of the children back to Maryland with him. He was in possession of a court order that granted him joint custody of the three older children, but he lacked an order for J.S. Appellant would not release the children and local law enforcement officials were called for assistance. They allowed appellee to take only the children listed on the custody order. Thereafter, appellee petitioned for custody of J.S. in the Circuit Court for Baltimore County.

Appellant filed an answer to the petition, alleging appellee was unfit to have custody and requesting custody be awarded to her, or alternatively, that she be granted court ordered visitation. At the conclusion of a hearing on the matter, the circuit court granted appellee's petition and denied appellant's visitation request. She brought this timely appeal and presents us with the following questions, which we have renumbered and rephrased[1]:

1. Did the circuit court err in granting custody of J.S. to appellee?

2. Did the circuit court err in denying visitation rights to appellant?

[1] Appellant originally presented us with the following four questions: "1. Whether the trial court erred in its findings that the Appellee was a fit and proper person to have custody?; 2. Whether [the] trial court erred in its findings that exceptional and/or extraordinary circumstances did not exist in this custody dispute?; 3. Whether the trial court erred in its decision regarding custody, after stating that whether a third party has greater rights is an issue for the Legislature or appellate courts?; 4. Whether the trial court erred in its refusal to consider the Appellant's requests for visitation?"

For the following reasons, we answer these questions in the negative and affirm the judgment of the circuit court.

BACKGROUND

Appellee and Mother were the parents of four children: T.R., age 7; A.R., age 6; J.R., age 5; and J.S., age 4. They shared joint legal and physical custody of the three older children; however, when custody was awarded by the circuit court in 2013, the paternity of the youngest daughter had not been established. Mother claimed appellee was not J.S.'s father and he was not listed on the child's birth certificate.

In 2015, Mother, who was pregnant[2], moved to North Carolina with the four children. She stayed at the home of her grandmother, Loretta Smith, appellant, until she tragically died shortly after childbirth, in September. Appellee, accompanied by the children's paternal and maternal grandmothers, travelled to North Carolina to attend Mother's funeral. After the services, appellee attempted to retrieve the children to return with him to Maryland. Appellant refused and the police were called. The responding officer ordered appellant to release the three older children, after he was shown a court order that granted appellant joint custody. The youngest child, J.S., whose name was not on the custody order, remained with appellant.

On December 30, 2015, appellee filed a complaint in the Circuit Court for Baltimore County, petitioning for custody of J.S., after appellant refused to release her to him. Appellant filed an answer asserting that appellee was unfit and that custody should be

[2] Appellee was not the father of this child.

granted to her, or alternatively, she be granted court ordered visitation. The case was postponed several times and ultimately heard on May 2, 2017. Both parties testified and presented evidence, including a DNA report establishing that J.S. was appellee's biological daughter[3] by a 99.99% probability. The court, in a written order dated May 9, 2017, granted appellee full legal and physical custody of J.S. and denied appellant's request for court ordered visitation. She brought this timely appeal.

STANDARD OF REVIEW

Because the trial judge "sees the witnesses and the parties, hears the testimony, and has the opportunity to speak with the child; [he] is in a far better position than is an appellate court, which has only a cold record before it, to weigh the evidence and determine what disposition will best promote the welfare of the minor." *Burak v. Burak,* 455 Md. 564, 617 (2017) (quoting *In re Yve S.,* 373 Md. 551, 585–86 (2003)). Thus, when an appellate court "views the ultimate conclusion of the [circuit court as being] 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." *Id.* at 616–17 (internal citations omitted).

ANALYSIS

1. Did the circuit court err in granting custody of J.S. to appellee?

The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents "to make decisions concerning the care, custody, and control of their

[3] Additionally, the record shows that both parties stipulated to appellee's paternity of J.S.

children." *McDermott v. Dougherty*, 385 Md. 320, 423 (2005) (*quoting Troxel v. Granville*, 530 U.S. 57, 66 (2000)). In a custody dispute between a biological parent and a third party, such as a great-grandmother, it is presumed "that the child's best interest is [served] by custody in the parent." *McDermott*, 385 Md. at 423 (quoting *Ross v. Hoffman*, 280 Md. 172, 178–79 (1977)). This presumption may be rebutted by "a *prima facie* showing that the parents are either unfit or that exceptional circumstances exist and that the child's best interests would be served in the custody of the third-party." *Burak*, 455 Md. at 623. In determining whether a parent is unfit, a court uses the following factors as a guide:

> (1) the parent has neglected the child by manifesting such indifference to the child's welfare that it reflects a lack of intent or an inability to discharge his or her parental duties;
>
> (2) the parent has abandoned the child;
>
> (3) there is evidence that the parent inflicted or allowed another person to inflict physical or mental injury on the child, including, but not limited to physical, sexual, or emotional abuse;
>
> (4) the parent suffers from an emotional or mental illness that has a detrimental impact on the parent's ability to care and provide for the child;
>
> (5) the parent otherwise demonstrates a renunciation of his or her duties to care and provide for the child; and
>
> (6) the parent has engaged in behavior or conduct that is detrimental to the child's welfare.

Id. at 648.

When considering whether exceptional circumstances exist that would make parental custody detrimental to the best interests of the child, the court may examine:

(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 the ties between the child and the third party custodian;

(6) the intensity and genuineness of the parent's desire to have the child; and

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

Sider v. Sider, 334 Md. 512, 532 (1994) (quoting *Ross v. Hoffman*, 280 Md. 172, 191 (1977)).

Appellant asserts the court erred in finding appellee was a "fit and proper parent" and that there were no exceptional circumstances warranting a denial of custody. She points to the following facts, alleged in her pleading: he "never lived with [J.S.]"; he "never had custody or any type of relationship," nor took any steps to seek custody of her; "he had repeatedly abandoned her and stated that she was not his child"; he "[inflicted] untold emotional distress upon her" by taking away her siblings following their mother's funeral; the parents had "severe parenting troubles through the years"; he had a "tumultuous relationship when the mother was alive"; "at points in time [the] children were removed from [the parent's] custody and placed in the care of [appellant]"; he had not provided any child support for J.S. while she was living with appellant; he didn't get her a birthday card; and he never presented any evidence on the details of how he would care for J.S.. Appellant further contends the court failed to "make specific findings on the record in regard to the fitness of Plaintiff, as set forth in *Burak*." Finally, she avers that the court "erred in its

determination that [a] third party's rights, [are] an issue for, the Legislature or appellate courts, rather than the trial court."

Appellee responds that there "are no facts in the record" to support the proposition that he is not a fit and proper parent. He contends that he did not abandon J.S.; rather, "there was a period of separation between [himself] and [J.S.] predicated upon the fact that the appellant kept the minor child from him after her mother died." He maintains that he always treated J.S. as his biological daughter and visited her when she lived in Maryland. Moreover, appellant explains that he did not pay child support because he felt "no obligation to provide the person who was wrongfully withholding his daughter from him with funds."

At the hearing, the children's grandmothers testified that appellee was a caring and supportive father who was actively involved with his children. He was described as a parent who frequented the children's schools and worked with teachers to assist in their success. Both grandmothers opined that he was a fit parent and an excellent father. Appellee testified that he was financially able, stably employed, and had adequate housing. He pointed to that fact that the court granted him joint custody of the three older children in 2013. Since the children have been with him, appellee testified that, "They're, actually, doing excellent. They're doing better now than what they were doing before I had them…They're doing excellent in school…they haven't missed any days of school…they're on the regular routine schedule…as well as Students of the Months for the last couple months." He stated, they get along "pretty good…[J.S.'s] the, the center of attention to them so, without her, they just, like, that's all they talk about…"

Appellant's testimony and that of her witnesses centered primarily on the September 2015 incident where appellee left J.S. in her care after law enforcement officials would not release her. She testified that appellee denied being the father of J.S. and argued that his actions, which caused emotional distress on J.S., exemplified his unfitness. She also testified about the tumultuous relationship between appellee and mother but could not point to any specifics regarding abuse of the mother or children. When asked whether she was "aware of any trouble or problems between [mother] and [appellee]," she responded:

> **[Appellant]:** Just the argument not picking up the kids.
>
> **[Appellant's Counsel]:** Just argument?
>
> **[Appellant]:** Mm-hmm.
>
> **[Appellant's Counsel]:** Okay. But was it anything other than not taking --- not picking up the kids?
>
> **[Appellant]:** That's all I knew at that time. That's all I knew about, was that.
>
> * * *
>
> **[Appellant's Counsel]:**…were you aware of any, any incidents that occurred between the two in 2013?
>
> **[Appellant]:** I just know they argue a lot. They always just arguing.

At the conclusion of the evidence and argument of counsel, the court expressly acknowledged the presumption that a child's best interest is served in the custody of the parent and further detailed the standards for third party custody determinations. It stated:

> If the Court does not find either unfitness or exceptional circumstances, the presumption remains that custody must be awarded to the biological parents or parent. If the Court makes either such finding, parental unfitness or exceptional circumstances, the presumption is rebutted, and the Court, then, must resolve the custody dispute by applying the best interests of the child standard.

> Thus where a child custody dispute is between a parent and a nonparent, although the best interests of the child standard is a factor in the resolution [it] is, typically, not addressed until the parent is found unfit.

The court further provided factual findings and explained:

> I don't find sufficient evidence presented in this case that [appellee] is unfit. I mean, that the record is, is clear that he is getting joint custody of the three older children. He was fit in that. He's, he's found to be fit there.
>
> There may have been times when the children have been out of his care and custody, out of the mother's care and custody, where [appellant] stepped up to the plate and helped out and did – you know, stepped in her loving role as a great-grandmother. But there's – I don't find that the evidence shows [appellee's] unfit, whatsoever.

Next, the court addressed exceptional circumstances:

> So, the next step that the Court [has] to determine is whether there are exceptional circumstances, or extraordinary circumstances, I should say, extraordinary circumstances which are significantly detrimental to the child, if I give custody to the biological parent.
>
> So, I don't find anything under these circumstances to be extraordinary. And, even if I do, I don't find any evidence that granting this natural parent custody of, of [J.S.] in this case would be significantly detrimental to her. There's no medical testimony that it would have adverse psychological impact on her. The closet thing that we – I heard was when [appellant] testified that she would experience some sort of, I guess, mental, or – mental trauma, if you will, by being placed in the care of a, quote, stranger.
>
> But he doesn't really know her. She doesn't know him. He doesn't know her. And I certainly understand that sentiment by [appellant], but it's not, it's not corroborated by anything else. There's nothing to show that any of his other children are at significantly – at significant risks, or risk, or anything detrimental is going to occur to them, because they're in his custody. All right. There's no evidence of that. It's totally lacking.
>
> And, I mean, one might argue that the, the third party should have greater rights than the natural parent. At least that's a, that's an issue for, I guess, the Legislature – I mean, for the appellate courts, but right now the Court – the law is that the natural parent has rights unless the, unless the opposing

> party, the third party, can show unfitness, which I don't think has been shown here at all, or exceptional circumstances – I mean, extraordinary circumstances which are significantly detrimental to the child. There's nothing here to show that [J.S.] would be a significant risk, or be to her detriment to be in the custody of dad.
>
> And, in addition, I think it could be detrimental to [J.S.] to keep things as it is, as they are, because she's being separated from her siblings. I mean, [J.S. is] four, [J.R. is] five, [A.R. is] six, [T.R.] is seven. I mean, the bond between these children is very important, in the Court's view. And I think even, I think even [appellant] was very candid with the Court saying, yes, these kids need their siblings to be together. I, I believe it's really important to keep the kids together.
>
> So, not only do I find a lack of proof by [appellant] that it's significantly detrimental to the child being in the custody of the biological parent, I find there's – it is significantly detrimental to the child right now because she's not with the – with her siblings to continue to reside in a separate environment away from her siblings.

As stated above, we view the trial judge as in a far better position than an appellate court "to weigh the evidence, and determine what disposition will best promote the welfare of the minor." *Burak*, 455 Md. at 617 (quoting *In re Yve S.*, 373 Md. 551, 585–86 (2003)). Deference is, thus, given to its factual findings and credibility determinations.

In the case at bar, the court's stated assessment of the law was legally correct and comported with the dictates of *Burak*. The court properly applied the law to the facts of the case and found that appellee was not unfit, nor did exceptional circumstances exist that would make parental custody detrimental to the best interests of the child. Significantly, the court stated that it would be detrimental to J.S. not to reside with her siblings. We hold the court's conclusion was not error. It was fully supported by the evidence and was not an abuse of discretion.

The court's commentary, "one might argue that the, the third party should have greater rights than the natural parent" and acknowledgement "that's an issue for, I guess, the Legislature – I mean, for the appellate courts" was merely that, commentary, and played no role in the court's ultimate determinations.

II. Did the trial court err in denying visitation rights to appellant?

Appellant argues the circuit court erred in ruling "that it could not determine visitation" unless appellant was found unfit or that exceptional circumstances exist. She adds that appellee was already allowing another grandmother to visit the children every weekend. Therefore, the court should have considered her request for visitation. Appellee, on the other hand, asserts that the court "correctly set forth the Maryland law as it relates to visitation rights of a third party," stating that "[t]here must be a finding of either unfitness or exceptional circumstances for grandparent visitation not authorized by the parent."

We agree with appellee. Family Law Article, Section 9-102 provides that a court may "consider a petition for reasonable visitation of a grandchild by a grandparent" and grant such visitation rights "if the court finds it to be in the best interests of the child[.]" Family Law Article, § 9-102. However, in considering such a petition, the court must first recognize the presumption that "a parent's decision regarding the custody or visitation of [his] child with third parties is in the child's best interest." *Koshko v. Haining*, 398 Md. 404, 423 (2007) (internal citations omitted). A third party may only rebut this presumption through a showing of "either parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child, absent visitation from [her] grandparents[.]" *Id.* at 444–45. This strong protection of parental rights is necessary

because of the intrusive nature of visitation proceedings, by which a court may "[mandate] that a parent's children spend time with a third party, outside of the parent's supervision and against the parent's wishes[.]" *Id.* at 439.

In the case *sub judice*, after finding that appellee was a fit parent and that no exceptional circumstances existed, the court denied appellant visitation rights, stating, "under the law, again, unless dad is proven to be unfit or there's exceptional circumstances, I can't even order visitation to a third party." We hold that this decision was also fully supported by the evidence and was not an abuse of discretion. Absent a finding of unfitness or exceptional circumstances, a parent has a constitutional right to determine the best interests of their children, including visitation with third parties. *Koshko,* 398 Md. at 441-42.

Finally, this is not a case where the parent is attempting to deny grandparent visitation entirely. Appellee's counsel made clear, after the ruling, that "it's [appellee's] intention that after, you know, things calm down and everything, that he would contact, or try to set up some kind of visitation." Here, the father is merely exercising his right to determine his child's best interests and the parameters of potential interaction and future visitation.

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