Circuit Court for Montgomery County
Case No. 172881FL

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 2100

September Term, 2022

SONIA DAVIS

v.

SONG GUO, ET AL.,

Wells, C.J.,
Beachley,
McDonald, Robert N.
(Senior Judge,
Specially Assigned),

JJ.

Opinion by McDonald, J.

Filed: August 3, 2023

*Prior to the initiation of this appeal in February 2023, the Appellate Court of Maryland was known as the Court of Special Appeals of Maryland. The name change was effective December 14, 2022, after voter approval of a constitutional amendment.

This is an unreported opinion. Under Maryland Rule 1-104, it may not be cited in this Court or any other Maryland court as precedent within the rule of *stare decisis*. It may be cited for persuasive value if the citation conforms to Rule 1-104(a)(2)(B).

This child custody case presented the Circuit Court for Montgomery County with the question of who should have custody of a young child ("Child").[1] Child's parents ("Parents" or, individually, "Mother" and "Father") admitted that neither was currently capable of caring for Child. As relevant to this appeal, the court's choice was between Child's maternal grandparents ("Grandparents"), who petitioned for custody, and her paternal aunt ("Aunt"), who intervened in that case. The court was thus required to apply the Maryland law on "third-party custody" – the award of custody to someone other than a child's parents. The court also was called upon to consider the possibility of "*de facto* parenthood" – an award of parenthood status to someone who is not a child's biological or adoptive parent but who, if four criteria are satisfied, is deemed to effectively be the child's parent.

Child was born in mid-September 2020. The proceedings in this case[2] began in late December 2020, when Child was less than four months old and living with her Parents in Grandparents' household. During that month, Grandparents filed an emergency petition in

[1] As is not uncommon in family law cases, some of the parties are referred to in the record by similar or identical names, which occasionally created confusion and required clarification by the trial court and counsel. For clarity, in this opinion, we refer to the child as "Child" and to the adult parties by reference to their status in relation to Child – *i.e.*, "Parents," "Mother," "Father," "Grandparents," "Grandfather," "Grandmother," and "Aunt."

[2] There were several related proceedings in the District Court sitting in Montgomery County which, at the request of Grandparents, issued protective and peace orders against Father with respect to Child and Grandfather. There was also a related proceeding in Colorado in January 2022. None of those proceedings is at issue on this appeal; they are described below briefly for context.

the Circuit Court for custody over Child on the basis of allegations that Parents were incapable of caring for her. At that time, Mother agreed; she stated in writing that she wanted Grandparents to have custody of Child. After Grandparents' petition was dismissed on procedural grounds in June 2021 for failing to include Father, Grandparents filed the amended petition for custody that resulted in this appeal. At that time, both Mother and Father stated in writing that they wished to share their "custody/guardianship rights" with Grandparents. Child and Parents continued to live in Grandparents' household.

In early 2022, the Circuit Court granted temporary physical and legal custody to Grandparents. Meanwhile, Parents changed their minds as to who should have custody of Child and stated that Father's older half-sister – Aunt, a resident of Colorado – should have custody. Aunt then successfully moved to intervene in Grandparents' custody action.

The Circuit Court tried the case on the merits in early November 2022. Grandparents were represented by counsel, as was Aunt. Mother and Father each appeared *pro se* and both took the position at that time that Aunt should have custody of Child and that Grandparents should not. At the conclusion of the evidence, the Circuit Court took the matter under advisement.

In early January 2023, the Circuit Court rendered a detailed ruling from the bench. The court first determined that neither Grandparents nor Aunt satisfied all of the criteria required to be a *de facto* parent of Child. Turning to the law governing third-party custody, the court further determined that Mother and Father were unfit to fulfill their parental responsibilities and that it was in the best interests of Child to award primary physical and legal custody to Grandparents as well as custody to Aunt on weekends. The court also

granted Mother and Father weekly video or telephone access to Child and visitation with Child under supervision of Aunt.

Aunt then appealed the court's award of custody to Grandparents. Neither Mother nor Father noted an appeal.[3]

The questions that Aunt presents fall into three broad categories: whether Aunt is a *de facto* parent of Child; whether the Circuit Court violated Parents' constitutional rights by not acceding to their stated desire at trial for Aunt to have custody of Child; and whether the Circuit Court erred when it deemed Grandparents fit to have custody of Child.

As explained below, we hold as follows:

(1) The record supports the Circuit Court's determination that Aunt was not Child's *de facto* parent, and Aunt was not entitled to the presumption of custody applicable to a child's parents.

(2) Assuming, for purposes of argument, that Aunt had standing to assert that the Circuit Court's custody decision violated the constitutional rights of Mother and Father as parents, the award of custody to Grandparents did not violate those rights.

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[3] Some months after the trial and notice of this appeal, Mother "switched sides" and endorsed continuing custody of Child by Grandparents and opposed custody by Aunt. Mother has appeared as an Appellee in this appeal and filed a brief expressing those views. After she filed that brief, Father also filed a "Brief of Appellee" in which he continued to support an award of custody to his half-sister and adopted the arguments made in Aunt's Appellant's brief. See Part II.F of this opinion below.

(3) The Circuit Court neither erred nor abused its discretion in its determination that Child's interests would be best served by granting primary custody to Grandmother and Grandfather.

We therefore affirm the judgment of the Circuit Court.

I

Maryland Law on Awarding Child Custody to Third Parties

This case concerns competing claims for custody of a child by third parties. In this context, "third party" refers to an individual who is not the child's biological or adoptive parent. This Court has recently had occasion to analyze such a claim, both as asserted under longstanding Maryland law and under the latest developments in the case law. *See Caldwell v. Sutton*, 256 Md. App. 230 (2022); *Basciano v. Foster*, 256 Md. 107 (2022). To provide context to the description of the facts and proceedings in this case, we briefly describe that law.

The starting point is based on the following well-known principles: that the right of parents to "direct and govern the care, custody, and control of their children is a fundamental right protected by the Fourteenth Amendment of the United States Constitution," *Conover v. Conover*, 450 Md. 51, 60 (2016); that, nonetheless, the parents' right is not absolute but instead must be balanced against the State's fundamental responsibility to protect the child, *In re Adoption/Guardianship of Rashawn H.*, 402 Md. 477, 496-97 (2007); that, while a parent who is claiming custody is "asserting a fundamental constitutional right," a "third party [seeking custody over the child] is not," *McDermott v. Dougherty*, 385 Md. 320, 353 (2005); that "[t]he primary goal of access

determinations in Maryland is to serve the best interests of the child," *Conover*, 450 Md. at 60; and that, to assure that the parents' constitutional rights are protected, a third party seeking custody must overcome the presumption that parental custody is in the child's best interests, *see Rashawn H.*, 402 Md. at 495.

In light of those principles, there are essentially two approaches under which one who is not a biological or adoptive parent may seek custody. *See Caldwell*, 256 Md. App. at 266 (explaining the two "avenue[s] for a third party to obtain custody"). Under the first approach, long-established in the case law, the third party must defeat the presumption favoring parental custody by demonstrating that the child's parents are "unfit" or that there are "exceptional circumstances" that make their continued custody of the child detrimental to the child's best interests. If so, the third party must then establish that the child's best interests would be served by awarding custody to that third party. *Caldwell*, 256 Md. App. at 266. Under the second approach, adopted in recent cases, the third party must establish that the third party bears a relationship to the child equivalent to that of a biological or adoptive parent – in other words, that the third party qualifies as the child's "*de facto* parent." *Id.* We shall refer to these two approaches as the unfitness/exceptional circumstances approach and the *de facto* parenthood approach.

A. The Unfitness/Exceptional Circumstances Approach

The unfitness/exceptional circumstances approach has two stages. At the first stage, a third-party claimant must overcome the presumption that the child's best interests are served by parental custody. To do that, the third party must prove either that the parents

are unfit to have custody of the child or that there are "exceptional circumstances" that make the parents' custody detrimental to the child's best interests. *Caldwell*, 256 Md. App. at 266 (citing, *inter alia*, *Conover*, 460 Md. at 61). Only then may the trial court proceed to the second stage, at which the court must consider whether granting custody to that third party serves the best interests of the child. *Conover*, 450 Md. at 61; *see also E.N. v. T.R.*, 474 Md. 346, 396 (2021); *Caldwell*, 256 Md. at 266 (citing *Basciano*, 256 Md. App. at 132).

As noted above, the Circuit Court in this case concluded – and Parents agreed at the trial – that Parents are currently unfit. No party has contested that conclusion[4] and this appeal thus involves only the Circuit Court's application of the law at the "best interests" stage. Thus, we shall focus on the law governing that stage of the unfitness/exceptional circumstances approach.

This Court has characterized the best interests standard as "an amorphous notion, varying with each individual case" and emphasized that "there is no litmus paper test that provides a quick and relatively easy answer to custody matters." *Montgomery Cnty. Dep't of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419–20 (1978). *Sanders* involved the question of whether the custody of a child with his mother, as opposed to foster parents, served his best interests. In reviewing the trial court's restoration of custody to the mother, this Court

[4] Although Aunt appears to question the Circuit Court's finding that Parents were unfit, she has only appealed the court's decision at the second stage that an award of custody to Grandparents, instead of to her, would serve Child's best interests.

listed 10 factors that it and other courts had used to "weigh[] the advantages and disadvantages of the alternative environments" proposed for the child. *Id*. at 420.

Additional considerations have been added to the *Sanders* list in subsequent years. In *Taylor v. Taylor*, 306 Md. 290 (1986), a custody modification case in which the child's father sought to have physical custody jointly with the child's mother, the Court of Appeals, now known as the Supreme Court of Maryland, recognized the *Sanders* factors as ones that "trial judges ordinarily consider," and looked to a list of 13 factors to apply in the case before it. *Id.* at 303-04; *see also Jose v. Jose*, 237 Md. App. 588, 599–600 (2018) (discussing *Sanders* and *Taylor*).

Later cases have identified additional factors. A well-known family law treatise has compiled a non-exhaustive list of considerations based on *Sanders*, *Taylor* and subsequent case law that includes 21 factors in one list that focuses mainly on disputes between parents and nine more in a second list mostly couched in terms of disputes between "parties." Cynthia Callahan & Thomas C. Ries, Fader's Maryland Family Law §5-3(a)-(b), at 5-11 to 5-13 (7th ed. 2021); *see Azizova v. Suleymanov*, 243 Md. App. 340, 345–47 (2019), *cert. denied*, 467 Md. 693 (2020) (quoting treatise as to applicable considerations).[5]

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[5] The authors of the treatise derived the first list from case law; each factor bears a footnote with a case citation. Those factors are:

(1) The fitness of the parents;

(2) The character and reputation of the parties;

(3) The requests of each parent and the sincerity of the requests;

(4) Any agreements between the parties;

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(5) Willingness of the parents to share custody;

(6) Each parent's ability to maintain the child's relationships with the other parent, siblings, relatives, and any other person who may psychologically affect the child's best interest;

(7) The age and number of children each parent has in the household;

(8) The preference of the child, when the child is of sufficient age and capacity to form a rational judgment;

(9) The capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;

(10) The geographic proximity of the parents' residences and opportunities for time with each parent;

(11) The ability of each parent to maintain a stable and appropriate home for the child;

(12) Financial status of the parents;

(13) The demands of parental employment and opportunities for time with the child;

(14) The age, health, and sex of the child;

(15) The relationship established between the child and each parent;

(16) The length of the separation of the parents;

(17) Whether there was a prior voluntary abandonment or surrender of custody of the child;

(18) The potential disruption of the child's social and school life;

(19) Any impact on state or federal assistance;

(20) The benefit a parent may receive from an award of joint physical custody, and how that will enable the parent to bestow more benefit upon the child;

(21) Any other consideration the court determines is relevant to the best interest of the child.

Cynthia Callahan, et al., Fader's Maryland Family Law §5-3(a), at 5-11 to 5-13.

The second list ("Other Factors to Consider") in the treatise comprises nine factors that the authors paraphrased from legislation proposed by a statutorily-created commission on custody decision-making. *See id.* (citing Final Report, Maryland Commission of Child

Many of the factors obviously overlap; each factor does not necessarily apply in all cases; and a catch-all factor for "any other consideration" the court finds relevant indicates that the list of specific factors is not exclusive. *See Sanders*, 38 Md. App. at 419–20. The Supreme Court of Maryland has stressed that "in all cases where the interests of a child are

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Custody Decision-Making, December 2014, at 19-20). Those factors are couched more in terms of the "parties" who seek custody and are less focused on the parents. They are:

> (1) the ability of each of the parties to meet the child's developmental needs, including ensuring physical safety; supporting emotional security and positive self-image; promoting interpersonal skills; and promoting intellectual and cognitive growth;
>
> (2) the ability of each party to meet the child's needs regarding, inter alia, education, socialization, culture and religion, and mental and physical health;
>
> (3) the ability of each party to consider and act on the needs of the child, as opposed to the needs or desires of the party, and protect the child from the adverse effects of any conflict between the parties;
>
> (4) the history of any efforts by one or the other parent to alienate or interfere with the child's relationship with the other parent;
>
> (5) any evidence of exposure of the child to domestic violence and by whom;
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> (6) the parental responsibilities and the particular parenting tasks customarily performed by each party, including tasks and responsibilities performed before the initiation of litigation, tasks and responsibilities performed during the pending litigation, tasks and responsibilities performed after the issuance of orders of court, and the extent to which the tasks have or will be undertaken by third parties;
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> (7) the ability of each party to co-parent the child without disruption to the child's social and school life;
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> (8) the extent to which either party has initiated or engaged in frivolous or vexatious litigation, as defined in the Maryland Rules; and
>
> (9) the child's possible susceptibility to manipulation by a party or by others in terms of preferences stated by the child."

Id. §5-3(b), at 5-13.

in jeopardy the paramount consideration is what will best promote the child's welfare, a standard that is of 'transcendent importance.'" *In re Adoption/Guardianship No. 10941 in Cir. Ct. for Montgomery Cnty.*, 335 Md. 99, 112–14 (1994) (quoting *In re: Adoption/Guardianship No. A91–71A*, 334 Md. 538, 560 (1994)). Thus, "the controlling factor, or guiding principle, in adoption and custody cases is not the natural parent's interest in raising the child, but rather what best serves the interest of the child." *Adoption/Guardianship No. A91–71A*, 334 Md. at 560.

B. The **De Facto** *Parenthood Approach*

Under the *de facto* parenthood approach, a third party may assert a right to custody of a child by demonstrating that the relationship between the third party and the child is such that the third party effectively is the child's parent. *See Conover*, 450 Md. at 62. The determination of *de facto* parent status focuses on both "the party's relationship, in fact, with a non-biological, non-adopted child" and the extent to which the child's parents have consented to that relationship. *Conover*, 450 Md. at 74-75.

An individual claiming *de facto* parent status must satisfy four criteria:

> (1) the biological or adoptive parent consented to, and fostered, the individual's formation and establishment of a parent-like relationship with the child;
>
> (2) the individual and the child lived together in the same household;
>
> (3) the individual 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) the individual 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.

Caldwell, 256 Md. App. at 266–67 (citing and quoting *Conover*, 450 Md. at 74). When a child has two biological or adoptive parents, both of those parents must consent to or foster the child's relationship with the putative *de facto* parent. *E.N. v. T.R.*, 474 Md. 376 (2021).

Deeming a third party to be a child's *de facto* parent "does not contravene the principle that legal parents have a 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." *Conover*, 450 Md. at 62 (quoting *Janice M. v. Margaret K.*, 404 Md. 661, at 680–81 (2008)).[6]

A third party who has proven a *de facto* parenthood relationship is "accorded the same constitutional rights as a biological or adoptive parent, and, with that, the presumption that the child's best interests are to be with [the *de facto* parent]." *Basciano*, 256 Md. App. at 144; *see also David A. v. Karen S.*, 242 Md. App. 1, 27–28, *cert. denied*, 466 Md. 219 (2019). In other words, in contrast to other third parties, a claimant who establishes *de facto* parenthood status is "deemed to have status equal to a biological or adoptive parent in custody determinations." *Caldwell*, 256 Md. App. at 267; *McDermott*, 385 Md. at 353

[6] In *Janice M.*, the then-Court of Appeals rejected *de facto* parenthood as a theory for claiming custody. In *Conover*, the Court expressly overruled *Janice M.* and adopted the theory. *Conover*, 450 Md. at 85; *see also Basciano*, 256 Md. App. 107, 133–42 (detailing the history of the Court's adoption of the concept of *de facto* parent).

("Generally, a private third party has no rights, constitutional or otherwise, to raise someone else's child.").

II

Facts and Proceedings

At trial, the salient events during Child's first two years leading up to the custody decision were largely undisputed, although the parties argued about the inferences that could be drawn and presented varying perspectives on why those events occurred. This summary recounts the relevant events and then sets forth the findings that the trial court reached. It does not include all of the parties' various communications among, and accusations about, each other. Further, the portions of the Parents' medical and criminal histories that appear in the record are described only generally and as needed to provide context.

A. The Parties

The testimony and other evidence at trial supported the following brief portraits of the parties:

Grandparents: Both now in their late 50s, Grandparents are highly educated immigrants to the United States with doctorate degrees in scientific fields. They both have responsible positions as contractors to a federal government agency and generally work remotely from their home in Montgomery County, Maryland. They have been married for 33 years. Mother is their only child, and Child is their only grandchild. Child has lived with them, sometimes together with Mother and Father, virtually the entire time since Child's birth more than two and a half years ago.

Mother: Now 31 years old, Mother immigrated to the United States as a child with Grandparents. For some time, she has suffered from mental health issues for which she takes medications and receives SSI disability benefits.[7] The record does not indicate that she has had steady employment; at the time of trial, she was enrolled in graduate school in Baltimore. She first met Father in March 2019 while living in South Dakota when both had court appearances in the same local court. Child is her only child.

Father: Now in his late 30s, Father grew up initially in Tennessee and later in the western United States. After his own father abandoned the family and his mother entered treatment for alcoholism, he moved in with his older half-sister (Aunt), who raised him. Over the years, he has had some encounters with the criminal justice system and some issues with substance abuse, although the record contains differing perspectives on how extensive those issues are. He declined to allow the Circuit Court's custody evaluator to contact his treatment providers. Child is his only child.

Aunt: Aunt, now in her late 40s, endured a difficult childhood with the same mother as Father and a different father, who was absent. When Aunt grew up, she worked in the field of commercial real estate in the western United States with such success that she was able to retire in her 40s, move with her husband to a home in an upscale neighborhood in western Colorado, and fund her husband's business. Aunt has been married for 25 years.

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[7] Mother declined to provide her medical records to either the custody evaluator or the court. However, it was undisputed that she suffers from mental health issues and the Circuit Court record includes frequent references to her medical condition and certain medical records that were submitted to the court.

Aunt has no biological or adoptive children of her own, but is currently fostering two teenagers at her home in Colorado. Aunt first met Child when Child was approximately 14 months old. It is not clear from the record whether Aunt's husband has met Child and what, if any, role he plays in caring for the foster children.[8]

B. Prologue to Custody Litigation

Child is Born – September 2020

Shortly after they met in South Dakota in early 2019, Mother and Father entered into an intimate relationship. A few months later, in August 2019, they moved to Maryland and into Grandparents' house in Montgomery County. While they were living there, Mother became pregnant and gave birth to Child, a girl, in September 2020. After the birth, Mother, Father, and Child continued to live in Grandparents' household.

A Strained Relationship Between Parents and Grandparents – October 2020

The relationship between Parents and Grandparents – particularly between Father and Grandfather – became difficult. In October 2020, when Child was about three weeks old, Grandfather sought a protective order on Child's behalf, and a peace order on his own behalf, against Father. The District Court sitting in Montgomery County, after first issuing temporary orders and conducting further proceedings, issued a final protective order and a final peace order on October 21, 2020. The final protective order, effective for one year until October 21, 2021, was based on the District Court's finding that Father had left "an infant unattended on bed" and "was unconscious in bathroom under the influence of

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[8] Aunt's husband is not a party in this case and did not testify at trial.

alcohol." In that order, the District Court awarded custody of Child to Grandparents and forbade Father to contact Child. The final peace order, effective until mid-April 2021, was based on the District Court's finding that Father had assaulted Grandfather and was "likely to commit a prohibited act against [Grandfather] in the future." Father was ordered, among other things, to stay away from Grandparents' residence.

Both Mother and Father then moved out of Grandparents' home, leaving Child with Grandparents. About one week later, Mother contacted Grandparents, told them that she and Father had no place to live, and asked to return to Grandparents' house. Grandparents consented on the condition that Mother and Father not use drugs in the house. Parents, who had been sleeping outside, moved back in.

C. The Custody Litigation – Prior to Trial

Grandparents' Petition for Custody – December 2020 to September 2021

In late December 2020, Grandparents filed a *pro se* petition in the Circuit Court for Montgomery County for joint custody of Child. They attached copies of Mother's medical records and a letter from Mother to the court. In the letter, Mother stated: "Due to my mental illness and disability, I agree to grant my daughter[]'s Guardianship/Custody right to my parents…, and my parent agree to grant me back the Guardianship/Custody right of [Child] if I can take good care of my daughter independently and financially support her growup." About five months later, the Circuit Court dismissed that petition for failure to include Father as a party but granted Grandparents leave to file an amended petition.

On June 9, 2021, Grandparents filed an amended petition that included a document addressed to the court signed by both Mother and Father under the heading "Agreement

of Custody/Guardianship for our Daughter [ ].” In it, Parents stated: “We agree to share our custody/guardianship rights of our daughter [ ] with [Grandparents] ... without any condition for the best interest of our daughter [ ].”[9] Grandparents also attached a letter in which they stated that Mother had ongoing mental health issues and, when not taking her medicine, could be a danger to Child, and that Father had ongoing substance abuse problems and a criminal history. Grandparents further stated, as a “new development,” that Mother and Father had left “a few days ago and we don’t know where they are, leaving our granddaughter [ ] in our care.”

On September 28, 2021, Grandparents reported to the court that, although “we think it will be in my granddaughter’s best interest to grant her custody right to us,” “after careful negotiation with my daughter and boyfriend, we can agree to share the joint custody of [Child] to provide her a safe and healthy environment.” Attached to Grandparents’ letter to the court was another “Agreement of Custody/Guardianship” signed by Mother and Father, now dated September 15, 2021 but otherwise identical to the one that Grandparents had submitted to the Circuit Court in June. By October 2021, Parents had moved back in with Grandparents and Child.

[9] The document bears a date of “3/7/2017,” which was more than two years before Child was born. It begins “Dear Your Honor” and thus presumably Parents signed it sometime between December 28, 2020, when the custody petition was first filed with the court, and June 9, 2021, when the letter was submitted with Grandparents’ amended petition.

Grandparents Contact Aunt concerning Father – November 2021

In October 2021, the peace order against Father with respect to Child expired. In November 2021, Grandparents contacted Aunt, apparently for the first time, to express concerns that Father needed help with substance abuse problems.[10] Aunt then traveled from Colorado to Maryland to persuade Father to enter treatment. Aunt met Child and Mother for the first time during that November visit and stayed for four nights at Grandparents' home with Grandparents, Parents, and Child. Child was then about 14 months old.

Parents Flee to Colorado with Child – January 2022

In January 2022, a physical altercation occurred between Grandfather and Father. On January 17, 2022, Grandfather again sought a peace order against Father. That same day, Mother and Father left Grandparents' home with Child and, without telling Grandparents, began driving to Colorado.

Two days later, on January 19, 2022, the District Court granted a temporary peace order against Father with respect to Grandfather's petition. The order required Father to refrain from contacting Grandfather and entering Grandparents' residence. That same

[10] At some point during that time, Grandfather had gone into Parents' bedroom, gathered multiple vodka bottles, beer cans, and packets of kratom, placed them on a dresser, and photographed them. (Kratom is a largely unregulated herbal substance with opioid-like and stimulant-like effects that is the subject of an FDA warning, see https://www.fda.gov/news-events/public-health-focus/fda-and-kratom, and research sponsored by the National Institute of Drug Abuse, see https://nida.nih.gov/research-topics/kratom#advancing-research). The responsibility for the presence of those items in the home was the subject of disputed testimony at trial.

day, Mother and Father, together with Child, arrived at Aunt's house in Colorado. Shortly after they arrived, Aunt began receiving messages about the filing of an emergency order in Maryland. Aunt told Parents that they had to leave right away. Taking Child with them, Parents left Aunt's home and stayed in a rented room paid for by a friend of Aunt's. They did not stay with Aunt, who later estimated that Child had been in her house for about 10 minutes on that trip.

On January 21, 2022, Grandparents filed an emergency petition in the Circuit Court for physical and legal custody of Child. That day, the Circuit Court granted the petition on a temporary basis. The Circuit Court determined that Maryland was Child's home state, awarded Grandparents temporary emergency sole physical and legal custody of Child, and ordered law enforcement officers to use "all and any reasonable force" to return her to Grandparents.[11]

A few days later, on January 26, 2022, Mother and Father, still in Colorado, each signed forms entitled "Delegation of Power by Parent or Guardian Pursuant to § 15-14-105 [of the Colorado Revised Statutes]." On their respective forms, each designated Aunt as Child's attorney in fact under Colorado law with "full authority to act in my place …[t]o perform all acts necessary for the day-to-day care, [and] custody" of Child. Each form

[11] The order was apparently issued under the Uniform Child Custody Jurisdiction and Enforcement Act, which both Maryland and Colorado have adopted. *See* Maryland Code, Family Law Article, §9.5-101 *et seq*.; Colorado Revised Statutes, §14-13-101 *et seq*.

stated that the power of attorney would expire nearly a year later, on January 23, 2023, unless the parent or guardian revoked it in writing before then.

At some point during this time period, Colorado law enforcement officers came to Aunt's house to ask her for information about Child's location. Aunt told them that she did not know where Parents and Child were.

Child Returned to Maryland; Aunt Intervenes in Custody Case – March 2022

On January 30, 2022, Aunt filed a motion in the Circuit Court for Montgomery County to intervene in the pending custody case that Grandparents had filed in that court.

In the meantime, Grandparents filed a petition in a Colorado court for a Writ in Aid of Enforcement for return of Child. Aunt and Grandparents appeared, apparently virtually, for a hearing in the Colorado court that day. Finding Child to be "in imminent danger," the Colorado court issued a writ directing peace officers to take physical custody of Child. Aunt informed the court that she could locate Child and would bring her to the county social services department in Colorado that day. Child spent one night in foster care while Grandparents flew to Colorado. They brought Child back to Maryland on February 1.

On March 1, 2022, the Circuit Court granted Aunt's previously-filed motion to intervene in the Maryland custody proceeding. On March 2, Aunt also filed a third-party complaint to obtain custody of Child. In that filing, Aunt alleged that "it is in [Child's] best interest to be placed in the sole legal and primary physical custody of [Aunt]" and that "it is in the best interest of [Child] for her to reside with her Aunt, intervenor." Aunt alleged that Mother and Father had delegated custody to her and that she had "the relationship with [Child], resources, and wherewithal to have custody[.]" Aunt did not

explicitly allege that she was Child's *de facto* parent under Maryland law. Also on March 2, Aunt filed an "Emergency Petition for Custody" in which she sought the modification of the court's temporary grant of custody to Grandparents. In that petition, Aunt claimed that Grandfather had abused Child and was unfit to have custody, that Parents had delegated custody to her in Colorado on January 26, and that Aunt should have custody. The Circuit Court deferred ruling on Aunt's emergency petition.

Custody Evaluator Report – April 2022

In the meantime, the Circuit Court had appointed a custody evaluator to help the court ascertain Child's best interests. The custody evaluator interviewed the parties, observed Grandparents, Parents, and Aunt separately with Child during March 2022, and conducted additional interviews and investigation.

On April 15, 2022, the custody evaluator issued a detailed report. In it, she described the information obtained during her investigation, her observations of Child with the parties, and her recommendations. The custody evaluator expressed concerns about the ability of Mother and Father to care for Child. She noted that both Parents conceded that they were not able to do so and were not contending that they should have custody of Child at that time.

The custody evaluator also noted that, while Parents had expressed concerns about Child's wellbeing with Grandparents, Child appeared to be cared for "appropriately" while in Grandparents' custody. The custody evaluator stated that she "[did] not have any evidence to suggest [Grandparents] are unfit or unable to care for [Child]" and further stated that "[Child] is attached to her grandparents. There is nothing to suggest it would

be in [her] best interest to be removed from her primary caregivers and the only home she has known and move across the country to live with people who are essentially strangers to her."

As to Aunt, the custody evaluator stated in her report that Aunt, while fit and able to care for Child and a good person for Child to develop a relationship with, had spent little time with Child and that Child was not yet comfortable with Aunt.

The custody evaluator recommended that Grandparents be given primary residential and sole legal custody; that Aunt be given regular access to Child on weekends; and that, as Child grew older, an increase in visits to Aunt, including time in Colorado, be considered. The custody evaluator also made a number of other recommendations, including that Father participate in substance abuse and mental health treatment; that Mother follow recommendations provided by her psychiatrist (and if Mother believed that psychiatrist to be unduly influenced by Grandfather, obtain a new psychiatrist and follow that provider's recommendations); and that the other parties participate in various forms of therapy to assist them in caring for Child.

Pendente Lite *Hearing and Order – April 2022*

After receiving the custody evaluator's report, the Circuit Court held a *pendente lite* hearing on April 20, 2022, and issued an order "pending further Order of the Court." In that order, the court granted primary physical and legal custody of Child to Grandparents. The court granted Aunt unsupervised access with Child in Maryland on stated dates in April 2022 and then, beginning in May 2022, from noon on every Wednesday to noon on every Saturday. The court also ordered that Mother and Father were to have supervised

access to Child while she was in Aunt's custody. Father was ordered to abstain from alcohol and drug use while the order was pending.

During April and May 2022, Child stayed with Aunt and Parents as scheduled, but, as of the date of the trial in November 2022, Aunt had not visited Child again.

On August 9, 2022, while Grandparents had temporary legal custody of Child under the *pendente lite* order, Mother and Father signed another document in which they purported to delegate custody of Child to Aunt.

D. Custody Litigation – Trial and Ruling

The custody case was tried during three days in early November 2022. At the trial, Grandparents were represented together by counsel, were denominated as Plaintiffs, and were generally treated as a single party. Aunt was identified as Intervenor and participated fully in the trial through counsel. Mother and Father, who appeared without counsel and participated *pro se*, were identified as Defendants and were treated as separate parties, although Mother often adopted the positions taken by Father. The Circuit Court explained the proceedings to Mother and Father, provided each with the opportunity to examine the witnesses, assert objections, and testify, and elicited testimony from each. As the Circuit Court noted, during the trial, Mother and Father were generally aligned with Aunt in opposing an award of custody to Grandparents. In eliciting testimony and in argument, Aunt's counsel made points in support of Mother and Father and of their endorsement of an award of custody to Aunt.

Trial Testimony – November 2022

Grandparents both testified. They also called the custody evaluator as a witness and presented a brief character witness on their behalf. Aunt testified on her own behalf. Mother and Father also testified, largely in response to questions posed by the Circuit Court.

Custody Evaluator

The Circuit Court accepted the custody evaluator as an expert in the field of custody evaluations. In her testimony, the custody evaluator discussed the observations and recommendations that she had made in her report, which was admitted as an exhibit. She said that the dynamic that she had observed between Mother and Father during her meeting with them and Child was "very concerning" and "potentially detrimental to the child." She noted that both Mother and Father had agreed that they were "not in a position to care for [Child]" and that they were not fit to care for Child. When asked whether Parents were capable of deciding that Aunt should have custody, the custody evaluator responded that "it's a problematic position to put two people that are not able to care for the child to determine what should happen, especially considering some of the other concerns that I had, based on my observations during the course of the evaluation." She elaborated "I don't think they're capable of considering all the circumstances and information that would be important to consider when making a decision of that magnitude, involving this very young child."

As to Grandparents, the custody evaluator testified that Grandparents had bonded with Child, who had lived with them since birth; that Child appeared to be happy in their

household and was "very distressed" at being separated from Grandmother when Grandmother took her to the courthouse for the custody evaluator's observation of Aunt's interactions with Child; and that Grandparents were fit to have custody. As to Aunt, the custody evaluator testified that it was important to a child to have a primary caregiver and that it had not been in Child's best interest for Parents to take her to Colorado to "drop her off" with Aunt.

Grandparents

Grandfather testified about his concerns as to his daughter's mental wellbeing and her inability to care for Child. Grandfather described various confrontations with Father that had led Grandfather to file his petitions for peace orders and protective orders; the times when Parents left Grandparents' household, leaving Child in Grandparents' care; and his observations concerning Father's use of drugs and alcohol. Grandmother testified that she was Child's primary caregiver and described her own activities with Child.

Aunt

Aunt testified that she had met Child for the first time when Aunt came to Maryland in November 2021 to take Father to a substance abuse treatment center; that she had told Parents in January 2022 that they could stay with her in Colorado but then immediately advised them to leave her house with Child; and that, in April and May 2022, Aunt had exercised the access rights granted to her by the court's *pendente lite* order. She said that she had not sought to visit with Child since that time because she believed that the order

had expired.[12] Aunt further testified that she had bought Parents a house in Baltimore so that Mother could be close to the graduate school she was attending.

All told, Aunt had seen Child for three or four days in Grandparents' home, at unquantified times during the three weeks that Parents stayed in a rented room in Colorado, at the courthouse for the custody evaluator's observation of her interactions with Child, and for the periods of access time in April and May 2022, partly spent in a hotel in Baltimore.

Mother and Father

Both Mother and Father disputed some of Grandparents' testimony about Parents' personal conduct. Each admitted to an inability to care for Child and a desire for Aunt to have custody.

Father wanted Aunt to have custody because she, as his older half-sister, had partly raised him and he trusted her; in his view, Child would be part of a family with Aunt. Father expressed a wish to resume parental duties regarding Child when he became able to do so. On cross-examination, he agreed that, as of the date of the trial, Aunt had had little direct involvement with Child apart from a few days in November 2021 and the Spring of 2022. He also conceded that Child had "probably" bonded with Grandmother.

Mother testified that she had first met Aunt in November 2021, when Aunt came to Grandparents' home. Mother said that she wanted Aunt to have custody because Aunt

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[12] Trial on the merits of the custody case had been originally scheduled for May 31, 2022, but was postponed at Aunt's request while her attorney was on maternity leave.

had taken care of Mother during the Spring of 2022 when Mother had a broken leg and because Aunt was kind and compassionate. Asked to explain why she had signed one delegation of custody to Grandparents in 2020 and another to Aunt in late January 2022, Mother stated that she had delegated custody to Grandparents under "duress," because she wanted them to continue to pay the tuition for her graduate school in Baltimore. On cross-examination, Mother admitted that Grandparents actually had not been paying her tuition and that she had financed graduate school by taking out a student loan. She admitted that she lies when she feels anxious, and that she had lied to the custody evaluator. Mother testified that she hoped to regain custody of Child after she had finished graduate school and after Father had either gotten a good job or started and finished his own schooling.

Circuit Court Ruling – January 2023

The case returned to court in early January 2023, when the Circuit Court stated detailed findings of fact and conclusions of law on the record from the bench. At the outset, the court accepted that all of the parties sincerely desired to further the best interests of Child. In the course of its opinion, the court found reason to credit and discredit each party's perspective on the events that had resulted in the custody dispute.

In its opinion, the Circuit Court first determined that Parents were unfit. The court also concluded that neither Aunt nor Grandparents could satisfy the criteria necessary to qualify as *de facto* parents.[13] Guided by this Court's then-recent decision in *Basciano*, the

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[13] In particular, the court found that Grandparents could not satisfy the consent element of the *de facto* parent test in light of Mother's and Father's evolving preferences – most recently, at the time of trial, for Aunt to have custody of Child. While Aunt arguably could satisfy the consent criterion at the time of trial, the court found that she could not

court then stated that its remaining task was to assign custody to a third party in the best interests of the child by reference to the considerations for such a decision set forth in case law and statute.

In the course of its analysis of the relevant considerations, the court explicitly applied 28 factors, including "[t]he request of each parent and the sincerity of the request," "[a]ny agreements between the parties" and a "catchall factor" for any other considerations the court deemed relevant.[14] The court then held that, in light of Aunt's location in Colorado and the fact that Child had spent comparatively little time with Aunt, custody with the Grandparents served Child's best interests. Finally, the court conferred with Grandparents, Aunt, and Father about logistics and their preferences concerning Aunt's and Parents' access to Child.

In a written order dated the same day, the court awarded sole legal custody and primary physical custody to Grandparents; gave Aunt custody for one weekend per month or at other times by agreement of the parties; provided that Parents could have supervised visitation with Child while she was in Aunt's custody, as well as video or phone access at

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satisfy any of the other factors, as she and Child had not lived together in the same household and had not developed a bonded relationship.

[14] The court appeared to follow a list and order of factors derived largely from case law as set forth in a treatise on family law. See footnote 5 above.

Of the 21 factors on the first list in the treatise, the Circuit Court addressed 20. It did not address factor (8) – "[t]he preference of the child, when the child is of sufficient age and capacity to form a judgment." Of the nine factors on the second list in the treatise, the court only omitted factor (9) – "the child's possible susceptibility to manipulation ... in terms of preferences stated by the child." The Circuit Court reasonably omitted these factors, as Child was slightly more than two years old at the time of the trial.

least twice weekly; apportioned custody between Grandparents and Aunt for holiday weekends; ordered Grandparents to enroll in individual therapy and take parenting classes; ordered Grandfather to take anger management classes; ordered Parents to take parenting classes; ordered Mother to continue to participate in mental health treatment; and ordered Father to undergo a substance abuse evaluation and to follow recommendations for treatment.

In response to a question from Father as to whether he and Mother could obtain custody of Child "if we become fit parents," the court explained that "custody is always modifiable," that Father could seek to modify the order, and that Father should go to the self-help desk in the courthouse for information on that subject. The court also explained that, if the court had found either Aunt or the Grandparents to be *de facto* parents, the hurdle for modifying custody would have been "greater" for Father.

E. Aunt Appeals

Aunt noted a timely appeal of the custody order on February 3, 2003. Neither Mother nor Father noted an appeal.

F. Post-Trial Filings of Mother and Father

On May 2, 2023, Mother filed with the Circuit Court an "Emergency Petition to Modify the Custody Visitation." In that document, she stated that she had obtained a protective order against Father and that Aunt had mistreated Child and should not have the access to Child that the court had ordered. Further, Mother stated that she now "fully support[ed]" the award of custody to Grandparents. Grandparents filed a response that day

in which they sought the same relief. On May 3, the Circuit Court deferred ruling on the petition and directed the case to be "set … in the normal course."

Two days later, on May 5, 2023, Mother filed with this Court, in the same vein, an "Affidavit to Support the [Grandparents] and Oppose [Aunt] to get Custody Right of [Child]."[15] In an order dated May 18, 2023, this Court informed Mother that she could act as an appellee with respect to Aunt's appeal and submit a response to Aunt's brief within 30 days after Aunt's brief was filed. The Court denied the motion "to the extent that any relief is requested." Mother subsequently filed a *pro se* brief in this Court in which she supported the award of custody to Grandparents and opposed Aunt's effort to obtain custody of Child. Approximately one week later, Father, now represented by counsel, filed in this Court a "Brief of Appellee," in which he adopted the arguments made by Aunt in her Appellant's Brief.

Additional details concerning the evidence and proceedings will be provided as necessary in the following discussion.

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[15] In that document Mother stated that she was now separated from Father, that she had obtained a final protective order against him in the District Court sitting in Baltimore City based on a finding that he had assaulted her, and that the District Court had denied Father's petition for a protective order against her. Attached to that document were copies of those orders. According to Case Search, Father has appealed the protective order entered against him.

Obviously, these events were not before the Circuit Court when it rendered its custody decision and we do not consider them in assessing whether that court erred or abused its discretion other than to note that Mother's apparent withdrawal of her previous consent to custody of Child by Aunt – regardless of the merits of the events that resulted in the withdrawal of that consent – further supports the Circuit Court's determination of the *de facto* parent issue with respect to Aunt.

III

Discussion

The gist of Aunt's appeal is that the Circuit Court erred by not granting custody to her. She makes arguments under both approaches outlined in Part I of this opinion. In questions that we have re-ordered and condensed,[16] Aunt raises the following issues:

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[16] In her brief, Aunt stated the questions presented in her appeal as follows:

I. Whether the Court erred as a matter of law by revoking the legal rights of the parents, [Father] and [Mother] to [Child].

   a. Whether the Circuit Court abused its discretion by usurping the constitutional rights of the parents to delegate custody of their child to the Intervenor, [Aunt].

   b. Whether the biological parents should lose parental rights because they were found unfit under the *Burak* factors.

II. Whether the Court's findings were clearly erroneous that Appellee [Grandfather] was fit to have third party custody.

   a. Whether the Circuit Court's findings were clearly erroneous as the Court did not give adequate weight to the legal significance of [Grandfather's] intentional interference and obstructive actions, which went against the best interest of the child.

   b. Whether the Circuit Court's findings were clearly erroneous as the Court did not give any legal significance to [Grandfather's] witness tampering, which went against the best interest of the child.

III. Whether the Court erred as a matter of law given that [Aunt] met the elements of the *de facto* parent test and no party demonstrated unfitness or exceptional circumstances regarding her involvement; whether the Grandparents have standing for child custody.

   a. Whether it was clearly erroneous for the Court to determine that [Aunt] does not meet the *de facto* parenthood test.

> 1. Whether the Circuit Court erred in concluding that Aunt did not meet the elements of the *de facto* parent test and, consequently, in not giving her priority for custody of Child.
>
> 2. Whether the Circuit Court interfered with Parents' constitutional rights regarding the upbringing of Child when, contrary to the stated choice of Parents at trial, it awarded custody of Child to Grandparents instead of to Aunt.
>
> 3. Whether the Circuit Court was clearly erroneous when it found that Grandparents were fit and abused its discretion when it awarded them custody of Child.

A. Standard of Review

Because a merits hearing in a child custody dispute is an action tried without a jury, an appellate court reviews a Circuit Court custody decision on both the law and the evidence. Maryland Rule 8-131(c). The Circuit Court's fact findings are accepted unless clearly erroneous, given that court's opportunity to view the demeanor and credibility of parties and witnesses. The determination of legal issues by the Circuit Court is reviewed without deference. *See Caldwell*, 256 Md. App. at 263. As explained earlier, the ultimate question for a trial court in a custody dispute, based on the court's fact findings and legal conclusions, is the best interests of the child. *Basciano*, 256 Md. App. at 128-29. If the Circuit Court's custody determination is based on fact findings that are not clearly erroneous and "founded upon sound legal principles," its decision will be overturned on

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> b. Whether it was clear error for the Court to grant the Grandparents standing for third party custody when they did not rebut the presumption of [Aunt's] fitness as a *de facto* parent, nor did they demonstrate exceptional circumstances.

appeal only if it reflects "a clear abuse of discretion." *In re Yves*, 373 Md. 551, 586 (2003) (citation omitted).

B. Whether Aunt Qualified as a **De Facto** *Parent of Child*

An individual who claims *de facto* parent status as to a child must establish all four elements of the *Conover* test. As outlined earlier, those elements are, in brief: (1) consent of the child's biological or adoptive parents; (2) past residence with the child in the same household; (3) assumption of significant responsibility for the child's care, education, and development, including contributing towards the child's support; and (4) development over time of a bonded, parental relationship with the child.

The Circuit Court concluded that Aunt failed to satisfy elements 2, 3, and 4[17] – that is, Aunt and Child had not lived in the same household for any significant length of time; despite the best of intentions, Aunt had not taken significant responsibility for the upbringing of Child as of the time of trial; and Aunt was not in "a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."[18]

With respect to element 2, Aunt asserts that she and Child "lived together in the same household in January 2022." The Circuit Court, apparently giving the Aunt the benefit of any doubt and assuming that Child had lived with Aunt "for a couple of weeks"

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[17] As to the first element of the *Conover* test, the Circuit Court concluded that Aunt "arguably" satisfied the consent element, given the written delegations of custody by Parents to her.

[18] *Conover*, 450 Md. at 74.

while in Colorado,[19] found that that such a stay did not suffice to establish that Aunt satisfied the second element of the *Conover* test.

With respect to elements 3 and 4, Aunt argues that she has been "an attentive and supportive family member in [Child's] life since she was barely one year old." Aunt cites the facts that she bought Parents a house so that they could live independently of Grandparents and that she intended to arrange in the future for Child's education and speech therapy. However, the Circuit Court noted the lack of evidence that Aunt had, as of the time of trial, "assumed obligations of parenthood by taking significant responsibility for the child's care." Similarly, the Circuit Court found that, in light of Aunt's limited interactions with Child, there "[wasn't] any evidence ... [that Aunt] has been in a parental role for a length of time sufficient to establish ... a bonded[,] dependent relationship parental in nature."

From our review of the record, it is evident that the Circuit Court did not err in reaching these conclusions. The facts adduced by Aunt may evidence her strong affection for Child and a relationship such as one between a child and a family friend or relative, but we agree with the Circuit Court that they do not meet the high bar that the *Conover* test sets for establishing the fact of a bonded parent-child relationship. We also agree with the Circuit Court's application of element 3 to require that an individual demonstrate that the

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[19] As noted above, at trial Aunt estimated that Child was in Aunt's house in Colorado for no more than 10 minutes. To the same effect, Mother testified that Parents and Child did not live at Aunt's house while they were in Colorado. The Circuit Court may have been crediting Aunt with interactions with Child outside of the home during the two weeks that Parents and Child spent in Colorado in January 2022.

individual has *already* taken significant responsibility for the child's care, and that evidence of a person's future intentions, however sincere and generous, and the provision of housing to the child's family do not establish that part of the element.[20]

Thus, although Parents may have been willing to delegate custody of Child at various times to Aunt and encouraged her to assume a parental-type relationship with Child – which is certainly relevant to the consent element of *Conover* – the record does not establish that such a relationship was actually formed. Given the brevity of Child's stay with Aunt and their relatively limited past interactions, the Circuit Court did not err legally or otherwise abuse its discretion when it concluded that she had not established elements 2, 3, and 4 of the *Conover* test.

Because Aunt did not establish that she was the child's *de facto* parent, she did not possess the rights of a biological or adoptive parent. It follows that the Circuit Court, in determining custody, appropriately accorded to her the same third-party status that it accorded to Grandparents.

C. Whether Parents' Stated Preference at Trial that Aunt Have Custody Should Have Been Dispositive

Aunt's primary argument is that the Circuit Court erred legally by not honoring the stated preference of Mother and Father at trial that she have custody of Child. The Circuit

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[20] In discussing the concept of *de facto* parenting generally, the Circuit Court observed: "[T]he idea of *de facto* parenting is not that there is a family member who is heavily involved in the raising of a child. We live in, our 21st century society, it's very common that extended family help raise children ... [T]he purpose behind the [*de facto* parenthood] rulings is not to create a situation where extended family who are involved in raising the children can then sort of take away custody from parents."

Court's disregard of that choice, Aunt asserts, violated Parents' constitutional right to direct the care of their child, contrary to the holding of *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Acknowledging that the Circuit Court found Parents to be unfit, Aunt quotes *In re Adoption/Guardianship of H.W.*, 460 Md. 201, 217 (2018), for the proposition that "unfitness means an unfitness to have custody of the child, not an unfitness to remain the child's parents." Aunt asserts that the Circuit Court "usurped the constitutional rights of [Parents] to delegate custody of their child to [her]."[21]

As a third party who is not a *de facto* parent, Aunt's only route to obtaining custody of Child was through the unfitness/exceptional circumstances approach. Understandably, she has not contested the Circuit Court's threshold determination that Parents were unfit to have custody of Child; without that determination, or else a threshold finding of exceptional circumstances, she would have no case under the unfitness/exceptional

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[21] As she herself is not Child's parent, *de facto* or otherwise, she thus makes this argument as a third party without the constitutional rights that she claims to have been violated. Notably, Parents themselves did not appeal the custody order. Moreover, subsequent to the trial, in filings in both the Circuit Court and this Court, Mother has essentially attempted to revoke her delegation to Aunt.

Whether Aunt has standing to assert a violation of Parents' constitutional rights is unclear at best, especially when neither parent filed a timely appeal on that basis and Mother now explicitly opposes custody by Aunt. As a general rule, a litigant may not assert the constitutional rights of another person. In considering a litigant's standing to do so, courts will consider whether the other person's "enjoyment of the right is inexplicably bound up with the activity the litigant wishes to pursue" and whether "there is a genuine obstacle preventing [that person] from asserting their own right." *In re Special Investigation Misc. 1064*, 478 Md. 528, 572–73 (2021) (internal quotation marks and citation omitted). The issue of Aunt's standing to assert Parents' constitutional rights has not been briefed and we do not decide it. Instead, in the interest of full and prompt disposition of this custody matter, we address Aunt's argument on the merits.

circumstances approach.[22] Instead, Aunt's constitutional challenge pertains to the second step – the award of custody in the child's best interests. Aunt asserts that the Circuit Court erred by "ignor[ing]" Parents' stated preference at trial to give Aunt custody of Child and argues that the court erred by not implementing that preference.

Aunt's argument that the preference of unfit parents as to alternative custody of their child must be dispositive in order to protect their constitutional rights is implicitly conflicts with the unfitness/exceptional circumstances approach to resolving custody disputes. That approach strikes an appropriate balance between the parents' rights and the State's *parens patriae* obligation to protect children. It does so at the first stage of the analysis, when the third party must prove parental unfitness or exceptional circumstances. *See, e.g., Rashawn H.*, 402 Md. at 497. The approach itself thus does not violate parents' fundamental constitutional rights.

Then, at the second stage, not even the longest list of best-interests factors contains a factor that defers to the parents' choice among potential third-party custodians, let alone treats such a preference as a constitutionally-mandated factor. The omission of such a dispositive factor makes sense: the purpose of the factors is to help the court determine the child's best interests, not the parents' goals. In the abstract, a parental preference might bear on the child's best interests if the parents' testimony contained facts relevant to the

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[22] This is not to suggest that Aunt would have succeeded with an argument that the Circuit Court erred in finding Parents unfit. The threshold inquiry into unfitness and exceptional circumstances focuses not on the parents' wishes, but rather "on the parents' inability to continue to have custody of their child because the continuation of custody is against the child's best interests." *Basciano*, 256 Md. App. at 144.

child's interests – for example, facts bearing on whether the child had bonded with one individual as opposed to another – but a parental preference for a particular potential third-party custodian, without more, is not probative at the best interests stage of a custody proceeding. Put another way, once a custody case has reached that second stage, Maryland law assigns the determination of the child's best interests to the trial court and grants that court, not the parents whose custody has been deemed detrimental to the child's best interests, broad discretion to consider and weigh the evidence on where best to place the child.

In any event, Aunt's argument overlooks the important fact that the Circuit Court here did not ignore the evidence about Parents' preferences. As described in Part II.D of this opinion, the Circuit Court assessed Child's best interests by analyzing 28 factors developed in the case law and compiled in a well-known treatise on family law. Pertinent to Aunt's argument, among the factors that the court considered were factors (3) and (4), both drawn from the first list, for "[t]he request of each parent and the sincerity of the request" and "[a]ny agreements between the parties." As to factor (3), the Circuit Court found: "Frankly, I find the requests of everyone to be sincere, very sincere. I think everybody really wants what's best for [Child]. There are different opinions as to what those things are." Regarding factor (4), the trial judge stated that he had addressed it already in his discussions of the consents and delegations that Mother and Father had signed. Earlier, in discussing whether Parents had consented to a parent-like relationship for purposes of the *de facto* parenthood analysis, the trial judge had referred to the "evolving" nature of the consents, from Mother's conditional consent for Grandparents to

have custody in late 2020, to both Parents' unconditional consent to Grandparents' custody in September 2021, to Parents' January 2022 written delegations of custody to Aunt. Regarding Mother's signature on the delegation to Aunt, the Circuit Court stated, "she signed over custody to a person she hardly knew. She didn't even read the document. The evidence was that she didn't know when it expired, she didn't know what it said."

Thus, the Circuit Court did not "ignore" Parents' preference for Aunt. Instead, the court acknowledged the evidence and then gave greater weight to evidence that the court deemed more probative of Child's best interests. Referring to the "catchall" factor for "any other consideration the Court considers relevant in the best interests of the child," the court stated that "one of the things that weighed into the Court's decision was (1) [Aunt] was halfway across the country, (2) the Court has little to no information about her husband as a parent." Further, the court stated: "There was very little about the [foster children in Aunt's house] and the minor child has never lived with [Aunt]." The court phrased the question posed by this catchall factor as whether the court "should take this 2-year-old and move her ... halfway across the country in a place where she's never really lived and a person she's never really lived with." Finally, the court looked to "how [Child] is doing absent this conflict that was omnipresent in the household while [Grandparents] and [Parents] were living together." The court found "the answer to that question [to be] that she's probably doing well."

The Circuit Court did not violate Parents' constitutional rights when, in assessing Child's best interests, it gave weight to the wellbeing of Child in Grandparents' household, the effect of sending Child to a distant place where she had never lived before, and the

paucity of information about the other people in Aunt's household. In this case, Parents' stated preference at trial that Aunt have custody of Child was probative of one of the elements of the *de facto* parenthood path for Aunt to obtain custody, but it was not dispositive of Child's best interests for purposes of the unfitness/exceptional circumstances path to third-party custody.

D. Whether the Circuit Court was Clearly Erroneous in Finding Grandparents Fit and Abused its Discretion in Awarding Custody to Them Rather than to Aunt

Aunt argues that the Circuit Court abused its discretion in awarding custody to Grandparents. She presents two arguments in support of that proposition.

First, Aunt asserts that the court was clearly erroneous in finding Grandparents to be fit because it gave insufficient weight to multiple items of evidence. With regard to that evidence, Aunt states, "the trial judge flagrantly disregarded [Grandparents'] mistreatment of the [Parents, Child, Aunt], and the court system."

However, as indicated above, it is a trial court's role (that is, the Circuit Court here) and not an appellate court's role, to assess the credibility of witnesses, identify the pertinent best interest factors, find facts relevant to those factors, and give weight to those that the court deems most informative to its disposition of a custody dispute. *See Conover*, 450 Md. at 85; *In re Yve S.*, 373 Md. at 585-86. The Circuit Court's thorough recitation of its findings on 28 factors demonstrates that it fulfilled that role. With regard to Aunt's assertions about Grandfather's temper and conduct, the Circuit Court found that the relationship between Father and Grandfather was "combustible." The court noted that violence between the two men "[is] less of a concern and probably not much of a concern

for [either], because Father had moved out of Grandparents' house." The court directed in its custody order that Grandfather take anger management classes and that Father also obtain therapy. The court thus considered the evidence about the conflict between Grandfather and Father and accounted for it in its decision.[23]

Aunt's second argument is that the Circuit Court "did not give any legal significance" to what she characterizes as Grandfather's "witness tampering." During Grandmother's testimony at trial, Aunt's counsel brought to the court's attention a concern

[23] Aunt cites multiple other items of evidence that she believes that the Circuit Court discounted in reaching its decision: that Grandfather had not told the truth when applying for peace orders and protective orders; that Grandparents had not let the Parents bathe the child and had kept control over Child's documents; that Grandparents had used Child's SSI benefits; that they had "actively prevented" Aunt from raising Child, screamed at Aunt, and threatened her; that Grandmother "beat and banged on [Aunt's] car door, crawled in and out of [Aunt's] rental car"; that Grandparents pinched Child, "made her throw up," and upset her.

Many of Aunt's assertions do not withstand close scrutiny of the record. For the proposition that Grandmother pinched Child, Aunt relies partly on her own testimony, to which Grandparents successfully objected, in which she speculated on the cause of a bruise she said she saw in a photograph of Child. Aunt also cites her own testimony, given without any supporting facts, that Grandmother would upset Child, pinch her, and make her throw up. The custody evaluator observed that Child cried and vomited when she was separated from Grandmother in order for the evaluator to observe Child's interaction with Aunt, but the evaluator attributed Child's distress to separation from Grandmother, not to misconduct by Grandmother. In asserting that Grandparents used Mother's and Child's SSI benefits for their own gain, Aunt relied on Mother's testimony, but the Circuit Court, in summarizing its observations of the parties, stated that it found Mother's testimony on that score and others "totally incredible."

Regarding Aunt's testimony, the Circuit Court observed, "[Aunt] seems to believe everything that [Father] tells her and maybe even that [Mother] tells her and that's concerning because although people can be blinded by love, it's important particularly in her situation where she's parachuting in to be the savior as it were, it's important to use critical thinking and figure out what's going on in these situations."

that "[Grandfather] and [Grandmother] are signaling each other ... a lot." The court responded, "All right. I'll pay closer attention to it ... because I saw him do it yesterday." Aunt's counsel stated, "And he's definitely doing it today. Apparently, every time he does this, he's signaling her to talk about the drugs and alcohol." After Aunt's counsel noted that Aunt was "concerned about it," the court stated, "I appreciate that concern. I will look for it." Grandparents' counsel stated that he would talk to his client.

Aunt argues that the "judge's choice not to include this in his verdict is clearly erroneous as witness tampering affects the credibility of [Grandmother] as well as the individual coaching the witness, [Grandfather]." One problem with Aunt's argument is her assumption that the Circuit Court disregarded the signaling that she characterizes as "tampering." The record suggests otherwise. In stating its findings of fact, the Circuit Court explained to the parties its approach to assessing credibility: "[T]hroughout every trial I take the opportunity to watch people not just as they testify and while they're testifying, but throughout the whole trial. I watch people as they're sitting at counsel table, while they're speaking with one another, while they're looking at the exhibits, and I do that because it helps me take a stock of each of the individuals before me because sometimes in those unguarded moments there's information." Especially in light of this statement, it is clear that the Circuit Court did not disregard the signaling; the judge had seen it before counsel objected to it and, whether or not he gave it weight, he discounted Grandfather's credibility in certain respects.[24] Another problem with Aunt's argument is

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[24] The Circuit Court made a somewhat parallel observation of Father's behavior during the trial, noting that Father appeared to "dominate" Mother: "I saw [Father's]

that she does not specify how Grandmother's testimony about Father's substance abuse prejudiced Aunt's request for custody. Aunt herself testified that she flew to Maryland in November 2021 to have Father admitted to a treatment facility, and Father conceded to the custody evaluator that he had a substance abuse problem. In any event, under the unfitness/exceptional circumstances approach, that information was most relevant to the threshold determination whether Father was unfit to have custody himself – an issue that was essentially undisputed.

To the extent that Aunt's argument is directed to the Circuit Court's management of the trial, we note that a trial judge has wide discretion regarding the conduct of a trial. *See, e.g., Crawford v. State*, 285 Md. 431, 451 (1979). From our review of the record, there can be no serious contention that this trial judge abused that discretion.

As explained in Part I of this opinion, the choice among potential third-party custodians of a child lies within the broad discretion of a trial court. We defer to the Circuit Court's findings of fact concerning what weight to give to evidence and to its weighing of those factors that bear on Child's best interests. Here, the record shows that the Circuit Court considered Aunt's arguments concerning Grandparents' fitness and tailored its custody order to address those arguments to the extent that it found merit in them.

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dominating personality, that he dominated [Mother], that he would snatch exhibits from her, … and she would defer to him, and that was really some of the same observation that the Custody Evaluator made."

IV

Conclusion

For the reasons explained above, we hold that the Circuit Court did not err when it concluded that Aunt was not Child's *de facto* parent and thus was not entitled to a parent's presumptive right to custody of Child. Whether or not Aunt had standing to assert Mother's and Father's constitutional rights as parents, the Circuit Court did not violate those rights in declining to grant primary custody to Aunt, contrary to the preference that Mother and Father expressed at the time of trial. Finally, the Circuit Court was not clearly erroneous when it found that Grandparents were fit custodians, and it did not abuse its discretion when it granted legal and primary physical custody of Child to them.

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