UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2188

September Term, 2014

RUSSELL R. CHIN

v.

ERIN K. FIESER

Meredith,
Leahy,
Reed,

JJ.

Opinion by Reed, J.
Dissenting Opinion by Meredith, J.

Filed: August 3, 2015

This appeal arises from a dispute over custody of Mason Fieser ("Mason"), the minor son of Russell Chin, appellant, and Erin Fieser, appellee. Appellee engaged in conduct to prevent appellant from developing a relationship with Mason. After numerous court proceedings and despite its expression of hesitations, the circuit court awarded primary physical custody to appellee and joint legal custody with unsupervised visitation to appellant. Following this decision, appellee prevented appellant from seeing Mason, going as far as filing a restraining order against appellant. Appellant filed a Motion to Alter or Amend the Judgment or, in the Alternative, for Reconsideration, seeking an award of physical custody and other relief. Appellee was required to bring Mason to a subsequent hearing, but she failed to comply. The circuit court held a recess to give appellee time to bring Mason to the court. But she failed to return and efforts to contact her were unsuccessful. A body attachment was issued. Appellee was apprehended and arrested, and Mason was released to appellant. Both appellant and Mason's maternal grandmother, Donna Murphy ("Mrs. Murphy"), filed an emergency motion for temporary custody. The circuit court issued an emergency temporary order imposing a 50/50 joint physical custody schedule between appellant and Mrs. Murphy.

Appellant then filed a supplement to his Motion to Alter or Amend the Judgment seeking sole physical and legal custody of Mason with reasonable and liberal visitation to Mrs. Murphy. The circuit court held a hearing on the motion on October 22, 2014, and issued an opinion and order on November 19, 2014. The court found appellant was a fit parent, but found appellee was not. It held that extraordinary circumstances existed based

on its finding that Mrs. Murphy was "the only constant in this young child's life," thus justifying an award of joint physical and legal custody to appellant and Mrs. Murphy. Appellant timely appealed that decision,[1] and presents one question for our review:

> Did the trial court err in awarding joint legal and physical custody to the maternal grandmother despite finding that [appellant] is a fit and proper person to have custody?

For the following reasons, we answer this question in the affirmative, and reverse the circuit court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The current custody dispute arose after Mason's birth on January 1, 2013. Erin Fieser, appellee, is Mason's biological mother. She informed Russell Chin, appellant, that he was Mason's father. Appellant filed a Complaint for Paternity on or about February 20, 2013, but because appellee refused to submit to the paternity test, the case was dismissed. Appellant was permitted to see Mason. Shortly thereafter, appellant filed a Petition to Establish Paternity and to Determine Custody and Visitation. Appellant sought shared physical and joint legal custody. The circuit court issued an order holding appellee in constructive civil contempt for failing to submit herself and Mason to genetic testing. Appellee failed to comply with the custody evaluation, and was found in civil contempt. The circuit court issued a purging provision and appellee ultimately purged the contempt by submitting to genetic testing.

[1] Appellee has not filed a response brief. Mrs. Murphy also has not filed a response.

The circuit court issued an order on February 11, 2014, which required appellee to bring Mason to a visitation center for supervised visitations with appellant. Appellee defied that order and was found in civil contempt. Appellee continued a pattern of this behavior by failing to show up for court hearings, appear for depositions, submit to interrogatories, and respond to requests for production. The circuit court issued orders to compel and orders of sanction for her conduct.

At a hearing on May 23, 2014, the circuit court issued a purge provision requiring appellee to report to the Family Services Division to enter into a supervised visitation program that would allow appellant to have supervised visitations with Mason at least four times over the next month.

Appellee refused to bring Mason to the visitation center for visits with appellant. On June 3, 2014, appellant filed an Amended Motion for Custody and Child Support seeking primary physical custody and sole legal custody of Mason. On June 6, 2014, the circuit court, again, found appellee in contempt for failing to comply with its order for supervised visitation.

The case proceeded to trial on the merits on June 23, 24, 26, 2014. At the conclusion of the hearing, the circuit court made numerous findings, which the circuit court summarized in a subsequent decision:

> [I]n an effort to prevent such a relationship from forming, on a number of occasions [] [appellee] had gone so far as to defy order issued by this Court. . . . [s]he had instituted a number of Court proceedings against [] [appellant] alleging that he assaulted her and, on one occasion, raped her. Despite the fact that each of these complaints had been dismissed, dropped, or

resulted in finding in favor of [] [appellant], [] [appellee] continued to insist they were all true.

[] [Appellee] also insisted that [] [appellant] was a drug dealer. Evidence was presented that [] [appellant] had dealt drugs in the past. He had been convicted of distribution of CDS and is currently on probation for that offense. However, evidence was also presented that he has successfully completed a drug treatment program and was then drug free. Corroborating that claim to some extent, [] [appellant's] performance on his supervised probation to date had been successful. In light of this, the Court concluded that while at one point the Plaintiff had been involved in drugs, he was no longer involved in that lifestyle.

Given [] [appellee's] strongly held beliefs and her previous contumacious conduct, the Court had grave reservations about whether [] [appellee] would follow an order of Court that permitted [] [appellant] to begin to form a relationship with his son through unsupervised visitation. Inasmuch as the Court found no competent evidence that [] [appellant] posed any threat to Mason, and in fact found much evidence to the contrary, the Court saw no need for supervised visitation. Because of the substantial doubt that [] [appellee] would abide by any order of Court that allowed for such visitation, the Court questioned the wisdom of allowing [] [appellee] to retain primary physical and legal custody of Mason.

However, the Court faced an equally compelling concern. As of the June hearing, Mason was only 18 months old. [] [Appellee] was not only his primary caregiver, except for Donna Murphy, the only caregiver Mason had ever known. Up until that time, despite some efforts on [] [appellant]'s part, he had been permitted almost no contact with his son.

. . . .

[T]he Court announced its decision to allow [] [appellee] to retain primary physical and legal custody of Mason. The Court further ordered that [] [appellant] shall have unsupervised visitation that would gradually increase over time. . . .

> To emphasize how important it was she obey the Court's order, the Court stated on the record that if she did not ". . . there is a substantial risk that [she] would lose the legal as well as the physical custody of [Mason]."
>
> . . . .

Following the circuit court's decision awarding primary physical custody to appellee, and joint legal custody and unsupervised visitation of Mason to appellant, appellant filed a supplement to his Motion to Alter or Amend the Judgment or in the Alternative, for Reconsideration. Appellant sought sole physical and legal custody of Mason with reasonable and liberal visitation to Mrs. Murphy. On October 22, 2014, the circuit court held a hearing on that motion. The circuit court issued an opinion on November 19, 2014, which discussed its findings:

> [T]he evidence presented at the hearing in October and as set forth in [] [appellant]'s motion and supplemental motion was that [] [appellee] immediately resumed her prior course of conduct in direct disobedience of the Court's Order. Among other, things, in advance of the first order unsupervised visit, [] [appellee] obtained a protective order against [] [appellant] barring him from having any contact with the child. The protective order was issued based on the same allegations that she had made previously that had resulted in dismissals and/or denials of the complaint. When the new petition came on for a hearing before another member of this bench, not only was it denied because the issues raised therein had previously been adjudicated adverse to [] [appellee], but [she was] also . . . enjoined from bringing further complaints against [] [appellant] based upon those same allegations.

The circuit court also discussed an incident that occurred at a hearing on appellant's Motion to Alter or Amend the Judgment or in the Alternative for Reconsideration. Appellee was previously ordered to bring Mason to that hearing. Appellee failed to follow that order,

and she insisted that Mason was nearby, so she could bring him. The circuit court held a recess to give her time to bring Mason. But appellee never returned, and efforts to contact her were unsuccessful. As a result, the circuit court issued a body attachment, and "issued an interim emergency order appointing Mrs. Murphy as the primary physical and joint legal custodian of Mason, subject to [] [appellant]'s rights of visitation. Mrs. Murphy agreed to subject herself to the jurisdiction of the Court and to abide by the Court's Order." After ten days, appellee and Mason were finally located by the authorities in Virginia. She was taken into custody, and Mason was released to appellant.

Appellant and Mrs. Murphy sought emergency custody orders. The circuit court split physical custody between Mrs. Murphy and appellant, and ordered that appellee could have no contact with Mason until a further hearing. At the next hearing, the circuit court extended the Order but modified it to allow Appellee to have visitation with Mason provided that it was supervised through this Court or the Armand Center. But appellee failed to cooperate with the Center's efforts to arrange supervised visitation. Appellee had no visitation with Mason following her arrest.

The circuit court found that appellant "is a fit and proper person to have shared physical and legal custody of Mason." Mrs. Murphy testified that Mason's development "regressed significantly" immediately following the kidnapping, but "[a]s time ha[d] passed, she observed that Mason seems to be have rebounded and currently seem[ed] to be again the happy, well-adjusted child [she believed] he once was." She testified that it appears appellant and Mason have bonded, and that it "seems like [appellant] . . . loves

him. Wants to take care of him. He seems happy with him." When asked whether she was comfortable with appellant's parenting skills, Mrs. Murphy responded that "[Y]es, I think he's doing fine." She further testified that she trusted appellant to take care of Mason and has never witnessed appellant yell at Mason. She also testified that Mason was with appellant for more than the allotted time (two days on, two days off), and had him for five days when Ms. Murphy had to attend a funeral in Florida.

Appellant testified that he rearranged his work schedule so that he could care for Mason during his time with Mason, and that his relationship with Mason was developing "very well." He testified that he made playdates for Mason, fed him, changed his diapers, colored with him, had taken him to doctor's visits, and worked on his vocabulary and motor skills with him.

Mrs. Murphy testified that, following Mason's kidnapping, "[Mason]'s doing very well now" and that he is "beyond where he was originally. He's babbling all the time, trying to speak, learning words every day, you know, running, playing more, being very, very silly. He just seems very at ease and at ease right now." This testimony indicates that Mason has been doing well during the time both appellant and Mrs. Murphy have been sharing legal and physical custody of Mason.

The circuit court concluded that appellee "is not currently a fit and proper person to have custody of or unsupervised visitation with Mason." The circuit court found that "there are extraordinary circumstances in this case which require that [Mrs.] Murphy be granted joint legal and physical custody of Mason." In reaching this finding, the court relied on

Mrs. Murphy's own testimony that "she has been the only constant in this young child's life. The court also stated, "Particularly given that the child's heretofore primary caregiver, his mother, has been so abruptly removed from his life, it is critical to Mason that Mrs. Murphy remain as a strong presence in his life."

We shall include additional facts as necessary to our discussion.

DISCUSSION

A. Parties' Contentions

Appellant contends that the circuit court's holding that extraordinary circumstances existed to justify an award of joint legal and physical custody to Mrs. Murphy was legally unsound and an abuse of discretion. Appellant argues that the circuit court failed to apply the correct standard by failing to find some kind of harm or serious detriment to Mason if appellant was given primary legal and physical custody. Appellant argues that the circuit court's reasoning that Mrs. Murphy had "been the only constant in [] [Mason's] life" and that "her strong presence in his life" is "critical to Mason" is not legally sufficient to award joint legal and physical custody to Mrs. Murphy.

B. Standard of Review

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

support the factual findings below, those findings cannot be held to be clearly erroneous." *Fuge v. Fuge*, 146 Md. App. 142, 180 (2002), *cert. denied*, 372 Md. 430 (2002).

"There is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court, or when the court acts without reference to any guiding rules or principles. An abuse of discretion may also be found where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court, or when the ruling is violative of fact and logic[.]" *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997) (citations and internal quotation marks omitted).

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

C. Analysis

The circuit court erred as a matter of law in concluding that exceptional circumstances existed to overcome appellant's right to control access to Mason. The circuit court's reliance on a maternal grandparent's own belief that her presence in her grandchild's life is "critical" is not an exceptional circumstance, given that appellant is a fit parent, and at no fault of his own, was prevented from seeing Mason and developing a relationship with him. There was no evidence of current or future detriment to Mason, absent visitation from his grandparents.

Appellant, as the undisputed fit parent of Mason, "[is] invested with the fundamental right of parents generally to direct and control the upbringing of [his] [child]." *Koshko v. Haining*, 398 Md. 404, 423 (2007). In *McDermott v. Dougherty*, 385 Md. 320 (2005), the Court of Appeals explained that parents and grandparents "do not begin on equal footing in respect to rights to care, custody, and control of the children. The parent is asserting a fundamental constitutional right. The third party is not. A private third party has no fundamental constitutional right to raise the children of others." *Id.* at 353 (internal quotation marks omitted).[2]

Incidental to this fundamental liberty interest, appellant is "entitled to the long-settled presumption that a parent's decision regarding the custody or visitation of his or her child with third parties is in the child's best interest. *Koshko*, 398 Md. at 423 (citations omitted). Where the custody dispute is between a fit parent and a third party, as in this case, only after such a threshold finding, will the "best interest of the child" standard apply. *See McDermott*, 385 Md. at 418 (explaining "only if the parents are unfit or extraordinary circumstances exist is the 'best interest of the child' test to be considered"); *Burrows v. Sanders*, 99 Md. App. 69, 74 (1994) (explaining that "long standing rebuttable preference of natural parents over third parties. . . . may be rebutted . . . by sufficient evidence to support a finding of either (1) parental unfitness or (2) the existence of exceptional

[2] In *McDermott*, the maternal grandparents petitioned for sole custody of the child. The grandparents were awarded sole legal custody of the child. The father appealed and the Court of Appeals, after parsing out the law of custody disputes between a fit parent and a private third party (grandparents), held that the father's absence from his son while out to sea for long periods, did not constitute exceptional circumstances.

circumstances, such that parental custody would be detrimental to the best interest of the child). The exceptional circumstances must "demonstrat[e] the current or future detriment to the child, absent visitation from his or her grandparents, as a prerequisite to application of the best interests analysis." *Koshko*, 398 Md. At 444-45.

The third party seeking custody has the burden of demonstrating exceptional circumstances. *See McDermott*, 385 Md. at 424.The factors used to determine the existence of exceptional circumstances are outlined in *Ross v. Hoffman*, 280 Md. 172 (1977), which are:

> [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, [7] the stability and certainty as to the child's future in the custody of the parent.

Id. at 191.

In the present case, the circuit court discussed its previous findings and actions for concluding that exceptional circumstances existed:

> In an effort to prevent such a relationship from forming, on a number of occasions [] [appellee] had gone so far as to defy order issued by this Court. . . . she had instituted a number of Court proceedings against [] [appellant] alleging that he assaulted her and, on one occasion, raped her. Despite the fact that each of these complaints had been dismissed, dropped, or resulted in finding in favor of [] [appellant], [] [appellee] continued to insist they were all true.

[] [appellee] also insisted that [] [appellant] was a drug dealer. Evidence was presented that [] [appellant] had dealt drugs in the past. He had been convicted of distribution of CDS and is currently on probation for that offense. However, evidence was also presented that he has successfully completed a drug treatment program and was then drug free. Corroborating that claim to some extent, [] [appellant's] performance on his supervised probation to date had been successful. In light of this, the Court concluded that while at one point the Plaintiff had been involved in drugs, he was no longer involved in that lifestyle.

Given [] [Appellee's] strongly held beliefs and her previous contumacious conduct, the Court had grave reservations about whether [] [Appellee] would follow an order of Court that permitted [] [appellant] to begin to form a relationship with his son through unsupervised visitation. Inasmuch as the Court found no competent evidence that [] [appellant] posed any threat to Mason, and in fact found much evidence to the contrary, the Court saw no need for supervised visitation. Because of the substantial doubt that [] [appellee] would abide by any order of Court that allowed for such visitation, the Court questioned the wisdom of allowing [] [appellee] to retain primary physical and legal custody of Mason.

However, the Court faced an equally compelling concern. As of the June hearing, Mason was only 18 months old. [] [Appellee] was not only his primary caregiver, except for Donna Murphy, the only caregiver Mason had ever known. Up until that time, despite some efforts on [] [appellant]'s part, he had been permitted almost no contact with his son.

. . . .

[T]he Court announced its decision to allow [] [appellee] to retain primary physical and legal custody of Mason. The Court further ordered that [] [appellant] shall have unsupervised visitation that would gradually increase over time. . . .

To emphasize how important it was she obey the Court's order, the Court stated on the record that if she did not ". . . there is a

> substantial risk that [she] would lose the legal as well as the physical custody of [Mason]."
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> . . . .
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> Despite this explanation and express warning by the Court, the evidence presented at the hearing in October and as set forth in [] [appellant]'s motion and supplemental motion was that [] [appellee] immediately resumed her prior course of conduct in direct disobedience of the Court's Order. Among other, things, in advance of the first order unsupervised visit, [] [appellee] obtained a protective order against [] [appellant] barring him from having any contact with the child. The protective order was issued based on the same allegations that she had made previously that had resulted in dismissals and/or denials of the complaint. When the new petition came on for a hearing before another member of this bench, not only was it denied because the issues raised therein had previously been adjudicated adverse to [] [appellee], but [she was] also . . . enjoined from bringing further complaints against [] [appellant] based upon those same allegations.

We hold that this factual finding and the court's reliance on Mrs. Murphy's testimony that "she was the only constant in this young child's life", without more, was clearly erroneous. A maternal grandparent's own belief that her presence in her grandchild's life is "critical" is not, standing alone, an exceptional circumstance rebutting the presumption that custody in a biological parent was in the best interest of the child. The Court of Appeals has previously recognized "that a psychological bond may form between a child and a third party, [but they] did not suggest that this bond alone necessarily will overcome the right of the legal parent to custody and control over visitation." *Janice M. v. Margaret K.*, 404 Md. 661, 691, 695 (2008) ("[W]hile the psychological bond between a child and a third party is a factor in finding exceptional circumstances, it is not

determinative." (emphasis deleted)). It is clear the circuit court considered the bond between Mrs. Murphy and Mason as determinative in reaching its decision.

When considering the "totality of the facts," we cannot hold that sufficient exceptional circumstances exist to rebut the presumption that custody should be awarded to appellant. *Janice M.*, 404 Md. 661 at 691-92 (explaining that the trial court must "consider the totality of the facts to determine whether exceptional circumstances existed").

Here, appellant was present in the delivery room when Mason was born. There was no dispute that he was the biological father of Mason. He continued to fight for visitation and custody of Mason. The circuit court found that "[Appellee, Mason's biological mother,] had done everything in her power to prevent [] [appellant] from having a relationship with Mason." The circuit court discussed Appellee's extensive efforts in keeping Mason away from appellant for the first nineteen months of Mason's life. At no fault of his own, appellant was prevented from seeing and forming a relationship with his son, and appellant should not be penalized for it. *See McDermott*, 385 Md. at 422, 425 (holding that "the circuit court inappropriately found that the absences inherent in Mr. McDermott's job requirements constituted 'exceptional circumstances'" and that "the circuit court improperly penalized a fit parent who desired custody of his son, and placed on the parent the burden of disproving that which is questionably not even a proper 'exceptional circumstances' consideration"). Following Mason's kidnapping, and at the

time of the circuit court's ruling, appellant was present in Mason's life on a 50/50 basis for three months.

Although it is unclear whether the court failed to consider both possible current and future detriment absent visitation from Mrs. Murphy, we nonetheless, conclude that the evidence was legally insufficient to show current or future harm, absent visitation from Mrs. Murphy.

As discussed, there is no indication on the record that Mason suffered harm during Mason's time with appellant and absence from Mrs. Murphy. The trial court relied on the fact that Mrs. Murphy "had been the only constant in this young child's life. Particularly given that the child's heretofore primary caregiver, his mother, has been so abruptly removed from his life, it is critical to Mason that Mrs. Murphy remain as a strong presence in his life." But there is no discussion of any harm current or future.

The only possible current or future detriment to the child was speculation from Mrs. Murphy that she and Mason have "a very special bond" and that she doesn't "think it would be very good for him at this young age to upheave him again and make any other changes." This, alone, is insufficient to overcome the high evidentiary burden. *See Brandenburg v. LaBarre*, 193 Md. App. 178, 192 (2010) ("The trial court was not permitted to draw an inference from the mere amount of time the children once had spent with the grandparents and the generally loving and bonded relationship they had had with them that the cessation of contact between the appellees and the children had harmed the children."); *McDermott*, 385 Md. at 424 ("Indeed, it is a weighty task (or should be) for a third party seeking custody

to demonstrate 'exceptional circumstances' which overcome the presumption that a parent acts in the best interest of his or her children and which overcome the constitutional right of a parent to raise his or her own children.").

We have previously held that speculative evidence of future harm that may occur from denying visitation is insufficient to constitute exceptional circumstances. *See Aumiller v. Aumiller*, 183 Md. App. 71, 82 (2008). We also, however, recognized that "if the grandchildren in a given case have a long and frequent history of visitation with the grandparents, lay and/or expert evidence of a detrimental physical or emotional effect on the children as a result of the cessation of visitation may be easier to obtain than in the absence of a prior relationship." *Id.* at 85; *see also Brandenburg*, 193 Md. App. at 191 (holding there was no evidence of harm to the children caused by the cessation or absence of visitation from grandparents where the grandparents "did not question any of their witnesses on the subject of the current condition of the children, nor did they cross-examine the [parents'] witnesses as to this subject. They also did not present any expert testimony with regard to the impact on the children of the cessation of contact with the [grandparents]").

But here, there was no long and frequent history of visitation, given that Mason was only nineteen months old, and that during that period appellant was prevented from seeing Mason by appellee. In addition, there was no lay or expert evidence of a detrimental or physical effect on Mason. Mrs. Murphy, who had the "ultimate burden of showing harm .

. . failed to present the court with facts from which it could draw a reasonable inference of significant deleterious effect." *See Brandenburg*, 193 Md. App. at 192.

Here, Mrs. Murphy was not a party in the original custody dispute, but was inserted as a result of her daughter's unwillingness to cooperate and follow the circuit court's order to allow appellant unsupervised visitation with appellant. Because appellant was prevented from having any contact with Mason during the first nineteen months of his life as a result of appellee's conduct, only appellee and Mrs. Murphy were able to have contact with Mason. This is not a case where Mrs. Murphy had solely raised Mason for a long period of time with no desire from appellant to be involved in Mason's life. Rather, appellant was excluded from Mason's life for a short period of time, nineteen months, and during that entire time appellant had been fighting for legal and physical custody of Mason. We, therefore, conclude that the circumstances do not rise to the level of cases in which "exceptional circumstances" exist. *Cf. McDermott*, 385 Md. at 425 n.44 ("upholding chancellor's finding of 'exceptional circumstances' in awarding custody of child, born to a sixteen-year-old mother, to paternal grandparents who had raised the child for four years, and observing that granting the mother substantial visitation was in recognition of her improved condition and potential to receive full custody in the future." (citing *Burrows v. Sanders*, 99 Md. App. 69, 77-78 (1994)); *see also Ross v. Hoffman*, 280 Md. 172, 181-82 (1977) (upholding chancellor's finding of "exceptional circumstances" in awarding custody to grandparents where the child lived with grandparents full time for over eight

years, the mother saw the child irregularly and sporadically (one week and a couple days out of eight years), and made no effort to reclaim custody of the child).

The testimonies from both appellant and Mrs. Murphy indicates that appellant is a caring and loving father, and that Mason has been doing well. Furthermore, appellant expresses that he does not oppose visitation, and his actions thus far indicate the same. There has been good communication between appellant and Mrs. Murphy regarding Mason, and the exchanges have also gone well. Mrs. Murphy also testified that appellant accommodated her by moving the exchange location for Mason to a location more convenient for her.

Accordingly, we hold that the circuit court erred as a matter of law in concluding that exceptional circumstances existed to overcome appellant's right to control access to Mason. We, therefore, vacate the circuit court's order and remand to the circuit court to conduct a hearing in accordance with this court's holding and the entry of a new order.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. COSTS TO BE PAID BY APPELLEE. REMANDED FOR A NEW HEARING BY THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

UNREPORTED

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OF MARYLAND

No. 2188

September Term, 2014

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v.

ERIN K. FIESER

Meredith,
Leahy,
Reed,

JJ.

Dissenting Opinion by Meredith, J.

Filed: August 3, 2015

Because I do not agree that the trial judge's finding of exceptional circumstances in this case was a clearly erroneous determination, I do not see an abuse of discretion in the custody ruling, and I would affirm the judgment of the circuit court.

This case is not an "ordinary" custody dispute. Here, the biological mother and father have never lived together during the child's life, and, despite the father's efforts to develop a parental relationship with the child, the mother has gone to great lengths to preclude the father from having contact. The mother was even willing to defy court orders rather than willingly allow the biological father to have access to the child. The mother's intransigence on this point caused the circuit court to conclude that the mother "is not currently a fit and proper person to have custody of or unsupervised visitation with [the child]." But the court's ruling that removed the child from the care of the mother presented the court with an extraordinary circumstance because the circuit court found that, apart from the mother, the maternal grandmother was "the only caregiver [the child] had ever known" during the entire 18 months of the child's life, and, the father "had been permitted almost no contact with his son." These findings are undisputed, and are not clearly erroneous.

Faced with these circumstances, the circuit court stated in its written opinion (entered November 19, 2014):

> The Court further finds that there are extraordinary circumstances in this case which require that Donna Murphy [the maternal grandmother] be granted joint legal and physical custody of [the child]. As Mrs. Murphy herself testified, she has been the only constant in this young child's life. Particularly given that the child's heretofore primary caregiver, his mother, has been so

> abruptly removed from his life, it is critical to [the child] that [the maternal grandmother] remain as a strong presence in his life.

Because the applicable standard of appellate review is deferential, *see Karen P. v. Christopher J.B.*, 163 Md. App. 250, 264 (2005), I would affirm the trial court's ruling.

Although there appears to be no appellate opinion in Maryland that is directly on point with the facts of this case, there have been cases that have affirmed a finding of exceptional circumstances that warranted granting custody to a party who was not the biological parent. *Karen P.*, *supra*, 163 Md. App. 250, bears several similarities to the present case. In *Karen P.*, the biological father had been totally excluded from the child's life by the mother, who treated another man as the *de facto* father until the child was four-and-one-half years old. *Id*. at 258. At that point, the mother moved out of the area to an undisclosed location, and refused to permit the *de facto* father to have further contact with the child. When the *de facto* father sued for custody, the circuit court "found that there were exceptional circumstances that rebutted the presumption that it would be in [the child's] best interest to be in the custody of [the mother], her only identified biological parent." *Id*. at 261. We affirmed that ruling because we concluded that it was neither clearly erroneous nor the product of an abusive exercise of judgment. *Id*. at 274.

In *Karen P.*, 163 Md. App. at 266, we noted that the Court of Appeals had provided a non-exclusive summary of factors for a trial court to consider when analyzing whether there are extraordinary circumstances, that is, "factors that may be relevant to the decision whether parental custody will be detrimental to a child's best interest" in *Ross v. Hoffman*, 280 Md. 172, 191 (1977). Consideration of the *Ross* factors — quoted in the majority

opinion — supports the circuit court's ruling in the present case. This is particularly so if the evidence is viewed in the light most favorable to the ruling of the circuit court. *Cf. Burrows v. Sanders*, 99 Md. App. 69, 77-78 (1994), where we held:

> Appellate courts may uphold findings of exceptional circumstances and an award of custody to third parties where the child has experienced some separation from the natural parent; where the third party has provided for the child's emotional and physical needs over a significant length of time; where the child has formed a strong attachment to the third party so that there is a possibility of emotional effect if custody is changed; and where the child is thriving under the current custody of the third party. *Hoffman*, 280 Md. at 187–93, 372 A.2d 582.

Burrows was cited with approval by the Court of Appeals in *McDermott v. Dougherty*, 385 Md. 320, 424 n.44 (2005), as an example of a case in which the existence of exceptional circumstances had been proved.

We concluded our opinion in *Karen P.* by stating, 163 Md. App. at 277-78:

> Custody decisions almost always are difficult, and are wrenching in a case like this one. The trial judge was confronted with a four-year-old girl who had known but one man as her father, and who loves him; a nonbiological father who loves the girl he thought he was father to, who wants the father/daughter relationship to continue, and who is willing to cooperate with the mother; and a mother who, while both the nurturing and biological mother of the girl, is not only unwilling to cooperate with the nonbiological father but had taken steps to alienate both children from him. Granting custody to [mother] made it likely that [the child] would lose the only father she had known, and suffer the pain that such loss would entail. Granting custody to [the *de facto* father] made it likely that [the child] would continue to have a mother and a father figure in her life, and would not suffer emotionally beyond that which a child ordinarily suffers when the family breaks up. The trial court's finding—that these were exceptional circumstances that would make granting custody of [the child] to [mother] detrimental to [the child]—was not clearly erroneous, and its decision to grant custody of [the child] to [the *de facto* father] was not an abuse of discretion.

Similarly, in the present case, the trial court was confronted with the exceptional problem of finding that the biological mother who had had nearly exclusive custody of an 18-month-old infant was unfit because she was not willing to share parental duties with the other biological parent. But, granting sole custody to the biological father in this case would have made it likely that the only other caregiver the child had known would be excluded from the child's life. In my view, the trial court's finding of exceptional circumstances was not clearly erroneous, and, consequently, the court's award of joint custody to the maternal grandmother at this particular point in the toddler's life was not an abuse of discretion.