Circuit Court for Baltimore City
Case No. 24-D-17-000673

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1367

September Term, 2021

SARA S., ET AL.

v.

MATTHEW W.

Wells, C.J.,
Kehoe,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: July 26, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland and the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

This is the second appeal in an ongoing child custody matter involving five parties: Sara S. ("Mother"); Matthew W. ("Father"); the maternal grandmother, Karen S. ("Ms. Karen S.); and the paternal grandparents, Jennifer A. ("Ms. A.) and David A. ("Mr. A.")[1] (collectively, "the A.s"). In May 2018, the Circuit Court for Baltimore City found Mother and Father to be unfit parents, due to their substance abuse issues. The court granted sole legal and primary physical custody of their then four-year-old child, A.W. ("Child"), to Ms. Karen S. The A.s, who had intervened in the custody matter, were granted overnight visitation, pursuant to a schedule.

In November 2018 and May 2019, Mother filed petitions to modify custody and visitation, asserting that she was fit to regain custody of Child. Mother further alleged that visitation with the A.s was no longer in the best interest of Child.

On October 7, 2021, the court issued an order (1) granting Mother sole legal custody and primary physical custody of Child; (2) denying Mother's request to terminate court-ordered visitation with the A.s; and (3) ordering the A.s to pay Ms. Karen S.'s attorney's fees.

Mother and Ms. Karen S. filed an appeal and present two questions for our review:

1. Did the court err when it found exceptional circumstances existed that would justify the denial of a fit parent[']s request to terminate third party visitation?

2. Did the [c]ourt err in denying [Ms. Karen S.'s] right to argue for fees and awarding only $750 in attorneys' fees without sufficient reasoning?

The A.s filed a cross-appeal and present two additional questions:

[1] Mr. A. is Father's step-father.

3. Should the appeal of [Ms. Karen S.] be dismissed for lack of standing?

4. Did the trial court err when it denied [the A.s'] motion to enforce summer vacation without a hearing and without any stated reason?

Father did not file an appeal.

For the reasons to be discussed, we shall answer yes to the first question, and no to the second and third questions. We find it unnecessary to address the remaining question. Accordingly, we shall affirm in part and reverse in part the court's order dated October 7, 2021, and remand for the entry of a new order consistent with this opinion.[2]

BACKGROUND

In the first appeal, we summarized the history of this case as follows:[3]

> Father initiated this litigation in February 2017 by filing a complaint for sole legal and physical custody of Child, naming as defendants Ms. Karen S. and Mother. Two days later, Ms. Karen S. brought an ex parte emergency custody proceeding in Harford County, through which that court granted her temporary custody of Child. *See* Case No. 12-C-17-000450 (Cir. Ct. Harford County). The two actions were later consolidated in the Circuit Court for Baltimore City.
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> In his complaint, Father alleged that Mother was a drug user who "deliberately committed various acts of destruction . . . in the presence of [Child]" and was unfit to have custody. Father also alleged that Ms. Karen

[2] On September 1, 2022, the court entered an order that corrected an inadvertent error in the order dated October 7, 2021. The September 2022 order provided that the October 2021 order was otherwise to remain unchanged. The correction is not relevant to the issues on appeal. To the extent that this opinion reverses in part the October 7, 2021 order, the September 1, 2022 order is reversed to the same extent.

[3] The issue in the first appeal was limited to the court's order for the A.s to pay attorney's fees to Ms. Karen S. This Court held that, under § 12-103(a)(1) of the Family Law Article (1984, 2012 Repl. Vol., 2018 Supp.), a *de facto* parent is eligible for an award of attorney's fees, and that an intervening non-parent can be ordered to pay such an award. *David A. v. Karen S.*, 242 Md. App. 1, 16 (2019).

S. had taken Child from his residence, which had deprived Father of his parental rights, and that she refused to allow him or the A.s access to Child.

On April 5, 2017, the A.s moved to intervene. In their motion and their cross-complaint for custody, visitation, and child support, the A.s alleged that they had participated in raising Child, that Child had a deep attachment to them, and that they had provided financial support to Child, Father, and Mother. The A.s . . . sought "full legal and full physical custody of [Child], in the event that [Father] is found by this Court to be unfit for custody." The A.s also alleged that Ms. Karen S.'s home was not fit for Child and that Ms. Karen S. herself "is not a fit and proper person to have custody or visitation" with Child.

In May 2018, the court held a four-day trial in which it heard testimony from, among others, Mother, Father, Ms. Karen S., Ms. A., and Mr. A. All parties except Mother were represented by counsel. Testimony revealed that Mother and Father had both abused drugs, had physical altercations with each other, relied on the A.s and Ms. Karen S. for financial support and childcare, and lacked steady employment. Mother testified that she had a drug addiction, but had been clean for 15 months. Father denied having a drug addiction.

* * *

In making her *pro se* closing argument, Mother admitted to her drug addiction and to her current unfitness to have custody over Child. She argued that the A.s should not have custody over Child because of their history of ignoring and enabling Father's ongoing drug addiction, which left Child in a "dangerous environment for three years," and she implored the court to "protect my son."

Ms. Karen S. argued that Mother and Father were both unfit and that it was in Child's best interest for her to have sole custody. Like Mother, Ms. Karen S. argued that the A.s had ignored signs of Father's addiction for years and continued to enable his addiction. . . . Ms. Karen S. asked for custody of Child "just until these parents can get on their feet."

* * *

[In] [t]he A.s' closing argument, . . . they admitted that Father was "unfit to have custody and there are a whole series of reasons why." Second, they admitted that Ms. Karen S. is fit. They also, however, asked the court

> not to penalize them for having missed the signs of their son's addiction and sought shared custody of Child.
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> * * *
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> The court reviewed all of the required statutory factors and then awarded Ms. Karen S. sole legal custody and primary physical custody of Child, with the A.s having visitation every other weekend and on certain holidays. The court allowed Mother to have unsupervised visitation with Child as long as she continues to seek treatment and have clean drug tests[.]

David A. v. Karen S., 242 Md. App. 1, 17-21 (2019) (footnote and heading omitted).

In addition, the court ordered Father to enroll in and successfully complete a minimum of 28 days at an in-patient substance abuse treatment facility. Upon submission to the court of documentation demonstrating completion of in-patient substance abuse treatment, Father would be entitled to supervised access with Child, to occur during the A.s' visitation and to be supervised by one or both of the A.s. Father was granted once-weekly telephone/video access with Child, and Ms. Karen S. was ordered to "make [Child] available" for same.

On August 3, 2018, the court issued an Amended Order for Custody which is essentially identical to the May 31, 2018 order, except that (1) Mr. and Ms. A. were granted one continuous week of access with Child in the summer, in addition to the previously ordered alternate-weekend and holiday visitation, and (2) the court clarified that Father was required to complete an in-patient substance abuse treatment program as a precondition to seeking additional access with Child.

The court held a status hearing on December 17, 2018, the purpose of which was to determine whether and to what extent the court should modify Mother's and/or Father's

access with Child. On December 19, 2018, the court ordered that Mother's unsupervised access with Child continue. The court declined to grant Father physical access with Child at that time.

Parties' Petitions for Modification

On November 9, 2018, Mother filed a petition to modify custody and visitation. Mother alleged that she was a fit parent, and she requested that she and Ms. Karen S. be awarded shared physical and legal custody. In addition, Mother requested that the court terminate overnight visitation with the A.s. Mother alleged that the A.s made "concerning" judgments regarding Child's welfare and demonstrated a "lack of responsibility toward [Child's] commitments and his safety[.]" Among other allegations, Mother asserted that Ms. A.'s daughter and her boyfriend, who, Mother alleged, both had pending "criminal and drug charges" against them, had moved into the A.s' home.

Ms. Karen S. filed a response to Mother's petition to modify, in which she requested that Mother's petition be granted. Alternatively, Ms. Karen S. requested that Child remain in her custody.

On May 28, 2019, before the court ruled on Mother's petition, Mother filed a second petition to modify custody and visitation. In her second petition, Mother requested that she be granted sole legal and physical custody of Child. In support of her request, Mother alleged that she had been "clean" for over two years, that she had submitted to six months of court-ordered drug tests, and that she was no longer unfit. Mother attached to her petition copies of drug test results as well as a financial statement and documentation of employment.

Mother also requested that the A.s' overnight and vacation access with Child be terminated. In support of that request, Mother alleged that Mr. and Ms. A. made "alarming choices around [Child,] including but not limited to having two active criminals living in their house for months[.]" Mother further alleged that the A.s had allowed Father to be present at their house when Child was there, in "direct violation of court order."

Father filed a cross-petition to modify custody. Father alleged that he had been drug-free for 12 months. Father requested joint custody and/or visitation with Child.

The A.s opposed Mother's request to terminate their access. Along with their opposition, the A.s filed a cross-claim for increased access in the form of an additional summer vacation time. They dismissed their cross-claim five weeks before the hearing on the merits.

Hearing before the Magistrate

A two-day custody hearing was held before a magistrate on November 2, 2020 and May 25, 2021.[4] Mother and Father appeared as self-represented litigants. Ms. Karen S. was represented by counsel. The A.s were represented by Mr. A., who is an attorney. Child was six years old when the hearing began and turned seven before it concluded.

Mother testified that she chose to give Ms. Karen S. temporary guardianship of Child so that she did not have to take Child to a "Mommy and Me" rehabilitation program, which, Mother believed, was "not appropriate" for a young child. Mother said that, since that time, she had "done a complete 180." She introduced documentation certifying that

[4] The hearing was originally set for November 2 and 3, 2020, but the second day of the hearing was postponed due to the exposure of one participant to COVID-19.

she had completed a detox program, as well as a "drugs and mental illness" program. Mother also introduced drug screen results from May 2018 to September 2020. Mother told the court:

> I really have changed who I am, and I know my past looks really bad. I know that. But I've been 100 percent honest about my past, about the behaviors I used to do in the past, and I have really . . . stuck to my word and completed programs. I've never fallen backwards. I'm going to continue. I'm a sponsor now.
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> * * *
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> I didn't [go through recovery] for court. I had this planned before court. I did this for me and [Child's] future. And with the help of friends, and my family, and the programs, I really have changed my life, and for once I'm actually genuinely happy.

The A.s disputed Mother's fitness for custody.[5]

On cross-examination by Mr. A., Mother agreed that she "hate[s]" the A.s. Mother stated, however, that, when Child is present, she is "cordial" and "pretend[s]" that the A.s are "great." Mr. A. asked Mother if she believed that terminating the A.s' visitation was "a good idea[.]" Mother responded that she thought that the A.s should have contact with Child but believed that it should not be court-ordered. She stated:

> I think that [the word] terminating is . . . very strong. Do I think that [visitation] should be court ordered? Absolutely not. Do I think that you should stay in contact with [Child]? Absolutely, as we did. We made a schedule work for the holiday this year. You gave me Christmas day, and I had no problem following what you asked, and I returned [Child] to you. You saw him on the holidays. I've never, ever said that I don't want [Child] to see you. I don't like you, but that doesn't mean [Child] doesn't like you. . . . I just don't think [visitation] should be court ordered and mandatory, if I have full custody, to share 50 percent of weekends with you[,] and my

[5] The magistrate's report states that the A.s withdrew their objection to Mother having custody during the first day of the hearing. We are unable to find that in the transcript.

> mother . . . get[s] none. [I] [d]on't think that's fair. I think grandparents should be grandparents.

In the A.s' case, Ms. A. testified that she and Mr. A. had moved so that they could be geographically closer to Child. She said that she and Child are "very close" and "very bonded[,]" and that Child would be "hurt" if the order for visitation was terminated. Ms. A. told the magistrate:

> I really would not like for [Child] not to see us. It would really hurt him so bad. We've seen him all his life. We play. We play dinosaurs. We play hide and seek. We do everything together. We draw. We make gifts for his family for Christmas, do crafts. We just do everything together, and it would really hurt him.

Mr. A. stated that he and Ms. A. had over seven years of "continual involvement in [Child's] life," and that "a very loving relationship . . . would be lost forever if access were denied."

During Ms. A.'s cross-examination, she was asked why she moved "two drug addicts" into their home. Ms. A. explained that her daughter, Ashley, and Ashley's boyfriend, Ben, "both got into trouble and got into drugs and things like that." She said that Ashley was "on and off of drugs, on and off. She'd get better and then she'd have a relapse." Ashley had been injured in a car accident and was not able to work. Ashley and Ben were evicted from their home, and they moved into the A.s' house in August 2018. Ms. A. said that she was not aware that Ashley and Ben "faced multiple prostitution and drug charges" prior to moving in with the A.s.

According to Ms. A., neither Ashley nor Ben were using drugs when they moved into the A.s' home. She said that Ashley and Ben had "a curfew[,]" but they were "usually

always home, because they just didn't have any money or anything. There was nothing for them to do."

Ms. A. testified that, while they were living with the A.s, Ben "strangled" Ashley and broke her nose. Mr. A. explained that he "asked" Ben to leave the house in February 2019. At the time of the hearing, neither Ashley nor Ben were living with the A.s.

On cross-examination, Mr. A. was asked if he was aware that Ben "tried to prostitute [Ashley] for drugs[.]" Mr. A. said that he was aware that there was "a charge against" Ben, but that it did not affect his decision to move Ashley and Ben into their home because "[t]hey were in a desperate situation."

According to Mr. A., when Child was visiting, Ashley and Ben were "out doing something else[,]" and were "rarely around" Child. Mr. A. was asked about a complaint made by Ms. Karen S. "because she found out that Ben was actually falling asleep with [Child] in the same bed[.]" Mr. A. responded, "It's not a bed. It was a sofa down in our family room." He then said, "that's not true."

Father testified that he would like to have visitation with Child, even if it was to take place only during the A.s' visitation. Father testified that he had "made a complete change from where [he] was" in 2018. He said that he was in a treatment program from May 2018 to August 2018. In October 2019, Father began treatment at a different treatment center. At the time of trial, Father was on methadone, and went to the treatment center three times a week to receive his medication. He explained that he "chose not to get weeks or months" of methadone at a time because he did not want "to have the temptation to overtake [his] medication."

Father testified that he submitted to a random urinalysis every month at the treatment center he attended, but he did not bring documentation of the test results to the hearing. The magistrate commented that it was difficult to understand why Father failed to bring the documentation that, according to the terms of the custody order, may have entitled him to supervised access.

Father testified that he talked to Child on the phone "at least every other weekend[,]" when Child was visiting the A.s. The magistrate expressed concern that the A.s had violated the court order by allowing that contact and questioned whether they might also have allowed Father to see Child. Father said that he had not seen Child in over two years.

In response to the magistrate's concern, Ms. A. testified that she did not understand that the existing order permitted Father to speak with Child on the telephone only when the call was initiated by Ms. Karen S. She said that she had allowed Father to speak with Child on the telephone three to five times "at most[.]" She insisted that Father had never been at their house when Child was visiting.

The second day of the hearing was postponed, due to the exposure of one of the participants to COVID-19. When the hearing resumed six months later, it was still Father's case. Father told the magistrate that he "should be able to see" Child and did not understand why he "can't get a second chance[,]" as had Mother. Father still did not submit documentation, however, to demonstrate that he had successfully completed and been discharged from a substance abuse treatment program, nor did he introduce any drug test results.

Ms. Karen S. testified that, from the time she was granted custody of Child, in May 2018, Mother had been "constantly involved" in Child's life and had either seen or spoken to Child on a daily basis. Ms. Karen S. stated that Mother participated in Child's medical and dental appointments, school conferences, and extracurricular activities, and that Mother took Child on outings to the park and the zoo. Mother paid for Child's preschool and daycare.

Ms. Karen S. said that she saw no indication that Mother had relapsed into addiction. She said that she was "proud" of Mother for maintaining her sobriety throughout the course of the contentious custody litigation.

To refute the A.s' claim that they were Child's only link to the paternal side of the family, Ms. Karen S. stated that Child's biological paternal grandfather, "Mr. W.,"[6] was "very involved" with Child. She said that she had "facilitate[d]" visits between Mr. W. and Child. Father's brother had also been to visit Child at Ms. Karen S.'s house and had attended events at Child's school.

Ms. Karen S. explained that she had expressed concern to the A.s about Child's exposure to the internet and "online gaming" while at the A.s' house. According to Mother, Child's "screen name"[7] was the A.s' address, which was visible to others online. In Ms. Karen S.'s words, the A.s responded that they "would not abide" her concerns because they

[6] As stated in footnote 1, Mr. A. is Father's step-father.

[7] "A username or a screen name is '[t]he name you use to identify yourself when logging into a computer system or online service.'" *Indep. Newspapers, Inc. v. Brodie*, 407 Md. 415, 422 (2009) (citation omitted).

thought that such exposure was "essential to" or "crucial to [Child's] well-being and learning and making lots of money one day." Eventually, however, the A.s "backed down."

Ms. Karen S. testified as to the difficulties she encountered trying to satisfy the court's order that she make Child available for telephone access with Father on a weekly basis. She stated that Father often changed his telephone number, and that she spent a good deal of time trying to track down each new number. On the occasions when she was able to connect with Father's phone, he usually did not answer. According to Ms. Karen S., Father had only answered the weekly phone call "five or less" times since 2018. Ms. Karen S. asked the court to relieve her of the responsibility of initiating phone access between Father and Child.

Parties' Closing Arguments

In closing argument, Mother asked the court to return Child to her custody. She stated that she had "continued to prove [her] sobriety" and that she had a stable home and could provide for all of Child's needs.

When the magistrate asked Mother what access the A.s should have, Mother responded, "[n]one court ordered." She asserted that the A.s' decisions had not been in Child's best interest, and that, as Child's mother, she should "be able to protect him from any danger, including the [A.s'] behavior." Mother stated that if the court were to order access, it should be supervised, and should not include overnight access.

The A.s argued that Mother had failed to prove that their visitation should be modified. They argued that Mother's alternate request for supervised visitation would be "unworkable[,]" and that the change would "create a lot of confusion in [Child's] mind[.]"

Ms. Karen S. asked that Mother's request for modification of custody and visitation be granted. Father requested only that the court consider what Child was "really missing in [his] life and how this whole situation has affected [Child.]"

Magistrate's Report and Recommendation

On June 4, 2021, the magistrate issued a report and recommendation. The magistrate found that Mother was fit to have custody and recommended that Mother's request for primary physical and sole legal custody be granted. The magistrate found that Mother had started her journey to sobriety prior to the entry of the initial custody order; that she had since remained sober; that she attended regular support meetings; and that she was a sponsor for other individuals who were addicted to drugs. The magistrate found that Mother had maintained suitable housing and steady employment and noted that Mother's employer had testified that she was a "valued employee[.]" The magistrate found it "important" that Mother had been "self-aware enough to ask [Ms. Karen S.] for help in getting treatment and in caring for her child[.]" The magistrate commented that Mother's actions provided "reassurance" that, in the event Mother relapsed, she would "see to [Child's] safety by turning to [Ms. Karen S.]"

The magistrate found that Father failed to present evidence that he had sought treatment or that he was actively working toward recovery. The magistrate expressed concern about Father's demeanor during the proceedings, stating that Father's "lethargy, slow speech, and inability to keep his [COVID] mask in place" may have been due to substance abuse. The magistrate recommended that Father be denied physical access with Child at that time.

The magistrate then turned to the remaining issue of Mother's request to terminate court-ordered visitation with the A.s. The magistrate noted that Child had spent every other weekend with the A.s since 2018, when he was four years old. The magistrate noted that Mother's request for visitation with the A.s to be supervised was "based on [the A.s'] continued state of denial with respect to the addiction issues[.]" The magistrate expressed that Mother was "quite rightly concerned that [the A.s] are enablers as to Father['s] and Father's sister's drug addiction."

The magistrate found, however, that there had not been a change in material circumstances since the date of the current order, and therefore recommended that there be no modification of the A.s' visitation. The magistrate stated:

> The parties had a bad relationship then and it has not worsened. The visitation to the [A.s] has been exercised for over three years and is very much a part of [Child's] routine. There was no evidence presented that it is an any way causing harm to [Child] and there was ample evidence that he enjoys his time with [the A.s] and has close friendships with other children in their neighborhoods, including the neighborhood of the [A.s'] beach home. Most important, the factor that is an explicit part of the grant of visitation to the [A.s] was that if and when Father established that he should have access with [Child], that access was to be during the [A.s'] visitation time and supervised by them. In effect, the award of visitation was going to help facilitate [Child's] reunification with Father if and when Father achieved sobriety. That need remains even if Father has not yet made progress in his recovery.

Mother and Ms. Karen S. filed timely exceptions to the magistrate's recommendation that the court deny Mother's petition to modify the A.s' visitation.

Hearing on Exceptions

The court held a hearing on exceptions on October 7, 2021. Ms. Karen S. and Mother argued that there was no dispute that Mother was fit to have custody, and there was

no evidence of exceptional circumstances that otherwise justified an award of visitation to the A.s.

The A.s argued that there was evidence of exceptional circumstances in that there is an "extraordinarily strong bond" between Child and the A.s. They urged the court to consider the fact that they had been "a continual presence in the life of [Child] since his birth" as an exceptional circumstance, and they argued that "[c]utting off the relationship" between Child and the A.s "would be very serious."

The A.s further asserted that the visitation ordered by the court "had a twin purpose" in that the court was "trying to facilitate a reunification between [Father] and [Child] once [Father] achieves sobriety." The court rejected that argument, stating that "[l]ogistical convenience is not a factor that the [c]ourt considers in making a determination" as to whether the A.s should have visitation.

Circuit Court's Ruling

At the conclusion of the hearing, the court announced its ruling on the record. The court found there was a material change in circumstances in that Mother was found to be fit to have custody. The court declined to modify visitation, however, based upon a finding of exceptional circumstances. The court stated:

> there already are exceptional circumstances in this matter because at one time . . . both parents were found not to be fit. . . . During the time between the parents being found . . . to be unfit, and [Mother] now found to be fit, . . . a significant amount of time has passed during that time in which certain things have occurred with [Child].
>
> [Child] has been visiting with the [A.s.] . . . [Child] enjoys spending time with the [A.s] . . . and has a routine that is established with the [A.s] that has been exercised . . . for over three years.

* * *

> The question in this matter is whether there [are] exceptional circumstances in this case. And exceptional circumstances is [sic] that it took three years for this situation to occur. And during that three years, there's been significant contact with the [A.s].
>
> The [c]ourt finds that those are exceptional circumstances in this matter. And because those are exceptional circumstances, the [c]ourt is also finding that this visitation order, including visitations during the summertime, at this point should not change.

On October 7, 2021, the court entered a written order consistent with its oral ruling. Mother was granted sole legal and primary physical custody of Child. Mother's request to terminate court-ordered visitation was denied. In addition, pursuant to Ms. Karen S.'s request, Father's telephone access was modified to occur during the A.s' visitation and at their discretion.

This timely appeal and cross-appeal followed. Additional facts will be included in the discussion.

DISCUSSION

I. Mother's Request to Modify Visitation

A. Third Party Visitation

"[C]ontained within the bounds of the federal Due Process Clause is a fundamental liberty interest bestowed upon parents concerning the 'care, custody, and control' of their children." *Koshko v. Haining*, 398 Md. 404, 421 (2007) (citing *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)); *accord Conover v. Conover*, 450 Md. 51, 60 (2016). "As a natural incident of possessing this fundamental liberty interest, [parents] are also 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."[8] *Koshko*, 398 Md. at 423; *accord Aumiller v. Aumiller*, 183 Md. App. 71, 84 (2008) ("[T]he law strongly favors the decisions of fit parents concerning the care of their children over the desire of third parties or the subjective judgment of courts.").

"Grandparents, on the other hand, do not enjoy a constitutionally recognized liberty interest in visitation with their grandchildren." *Koshko*, 398 Md. at 423. "Rather, whatever right they may have to such visitation is solely of statutory origin implemented through judicial order." *Id.*

Maryland Code (1984, 2019 Repl. Vol.), Family Law Article ("FL"), § 9-102, also known as the Grandparent Visitation Statute ("GVS"), "provides a means for grandparents to play a vital role in the development and happiness of a child's life when circumstances are such that court action is warranted and needed to enforce that role properly." *Koshko*, 398 Md. at 438. The statute provides that "[a]n equity court may: (1) consider a petition

[8] The A.s question what effect the decision of the United States Supreme Court in *Dobbs v. Jackson Women's Health Organization*,142 S. Ct. 2228 (2022) will have on *Troxel* and its progeny. They ask: "if the Supreme Court is willing to erase a liberty interest of a mother with regards to her child *before* birth, what prevents it from erasing a liberty interest of a mother with regards to her child *after* birth?" (Italics in original.) We need not concern ourselves with this hypothetical question. *See Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 666 (2015) ("Generally, appellate courts do not decide academic or moot questions[.]" (quotation marks and citation omitted)). The decisions of the Maryland Supreme Court (formerly the Court of Appeals) that follow *Troxel*, including *Koshko* and *Conover*, "remain[] the law of this State until and '[u]nless those decisions are either explained away or overruled by the [Maryland Supreme Court] itself.'" *Scarborough v. Altstatt*, 228 Md. App. 560, 577 (2016) (quoting *Loyola Fed. Sav. & Loan Ass'n v. Trenchcraft, Inc*., 17 Md. App. 646, 659, (1973)).

for reasonable visitation of a grandchild by a grandparent; and (2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparent." FL § 9-102.

"The chief safeguard in place to protect parental rights in a grandparental visitation dispute is the presumption favoring a parental decision, which first must be rebutted before any inquiry into the child's best interests." *Koshko*, 398 Md. at 439. To preserve fundamental parental liberty interests, "there must be a finding of either parental unfitness or exceptional circumstances demonstrating 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." *Id.* at 444-45. "Absent such a showing, the court must assume that the [parent's request for] modification is in the child's best interest." *Barrett v. Ayres*, 186 Md. App. 1, 17 (2009).

B. Parties' Contentions

Mother and Ms. Karen S. contend that the court erred as a matter of law in basing its legal conclusion that there were exceptional circumstances on the prior finding of parental unfitness and/or the length of time that the A.s had court-ordered visitation rights. They maintain that the A.s failed to meet their burden of proving that Child would be harmed if Mother's request to terminate court-ordered visitation with the A.s was granted.

The A.s assert that the court properly focused on evidence of the length of time and routine nature of their involvement in Child's life, as well as on evidence demonstrating that Child enjoys spending time with them. They argue that "the best interest of [Child] and the desirability of future reunification with [Father] are still well-served" by the prior

custody order, and that "[m]erely because [Father] has not yet done what he should do does not mean that [Child] should lose the connection with the paternal side of the family."

Father did not file a brief.

C. Standard of Review

"Orders related to visitation or custody are generally within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion." *Barrett*, 186 Md. App. at 10. "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." *Id.* Here, the order on appeal involves the application of the law of third-party visitation to the facts, therefore, we review the order *de novo*.

D. Analysis

A final custody order may be modified only if the court concludes that "there has been a material change in circumstances" since the prior custody determination. *McCready v. McCready*, 323 Md. 476, 481, 483 (1991). The rule that a custody award may not be modified absent a material change in circumstances is "intended to preserve stability for the child and to prevent relitigation of the same issues." *McMahon v. Piazze*, 162 Md. App. 588, 596 (2005). The party moving for modification bears the burden of showing "'that there has been a material change in circumstances since the entry of the [prior] custody order and that it is now in the best interest of the child for custody to be changed.'" *Gillespie v. Gillespie*, 206 Md. App. 146, 171-72 (2012) (quoting *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008)).

Here, the court based its finding of a material change in circumstances on the fact that, since the entry of the previous custody and visitation order, Mother had been found to be fit to have custody of Child. That finding is not challenged on appeal.

Once the court found that Mother was fit to have sole legal and primary physical custody of Child, there was a constitutional presumption that Mother's request to terminate court-ordered visitation with the A.s was in Child's best interest. The burden then shifted to the A.s to rebut that presumption by proving the existence of "exceptional circumstances" that demonstrated "the current or future detriment to the child, absent visitation[.]" *Koshko*, 398 Md. at 445.

"[T]he exceptional circumstances test is an inherently fact-specific analysis that defies a generic definition, regardless of whether the case concerns custody or visitation." *Aumiller*, 183 Md. App. at 81. "'[E]xceptional circumstances are not established through a rigid test, but rather by an analysis of all of the factors before the court in a particular case.'" *Id*. at 84 (quoting *Janice M. v. Margaret K.*, 404 Md. 661, 693 (2008), *overruled on other grounds by Conover*, 450 Md. 51).[9]

[9] In *Brandenburg v. LaBarre*, 193 Md. App. 178 (2010), we noted that "'[t]he factors used to determine the existence of exceptional circumstances' have been well established in the context of third-party custody disputes, although they are not always particularly relevant or helpful in the context of visitation disputes." *Id.* at 190 (internal citation omitted). Those factors, include

> the length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and

(continued…)

"'[I]t is a weighty task . . . for a third party . . . 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 children." *Aumiller*, 183 Md. App. at 82 (quoting *McDermott v. Dougherty*, 385 Md. 320, 412 (2005)) (further quotation marks omitted). Significantly, "[t]here must be evidence of harm that results or likely will result from [a] refusal to provide visitation." *Id.* at 85. "[T]he lack of visitation, without other evidence of future harm, does not support" a finding of exceptional circumstances. *Id.* at 84. As this Court has explained, "[i]f the lack of visitation, standing alone, constituted exceptional circumstances, the requirement would be meaningless." *Id.* at 85.

Moreover, "[w]hile it is possible for a trial court to find exceptional circumstances based on future detriment to the child, such a finding must be based on solid evidence in the record, and speculation will not suffice." *Id.* at 81-82. Otherwise, the threshold requirement of exceptional circumstances would be rendered "superfluous and [would] allow third parties to reach the best interest analysis in virtually every case." *Id.* at 82. To

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

Ross v. Hoffman, 280 Md. 172, 191 (1977). In *Burak v. Burak*, 455 Md. 564 (2017), the Supreme Court of Maryland held that a court "must first determine that the child at issue has spent a long period of time away from his or her biological parent before considering the other *Hoffman* factors." *Id.* at 662-63. That is not the case here. According to the undisputed evidence, except when Child was visiting the A.s, Mother continued to be a daily presence in Child's life during the time that Ms. Karen S. had custody.

prove current or future harm to a child as a result of lack of third party visitation, "[e]xpert testimony may be desirable and, frequently, may be necessary." *Id.* at 85.

Here, in explaining its ruling that there were exceptional circumstances that rebutted the presumption that Mother's request to terminate court-ordered grandparental visitation was in Child's best interest, the court commented that (1) both parents were previously found unfit; (2) Mother was now fit; (3) in the three years that Mother was unfit, Child had "routine" and "significant" contact with the A.s; and (4) Child enjoys spending time with the A.s. Although these findings are not clearly erroneous, the court erred as a matter of law in concluding that such findings constitute exceptional circumstances.

Mother and Ms. Karen S. assert that a prior finding of parental unfitness is not "an automatic exceptional circumstance to trump the presumption that a fit parent can decide what visitation is best for their child." They argue that "[s]uch a holding would dismantle the foster care system and prevent parents from seeking help when needed."

As an initial matter, it is not clear that the court made a specific finding that the prior history of unfitness was, in itself, an exceptional circumstance. Read in context, the court appeared to be merely explaining that the three-year history of routine contact with the A.s was a consequence of the prior finding of parental unfitness. Our interpretation is consistent with the court's summary of its ruling, in which the court did not mention unfitness:

> The question in this matter is whether there is exceptional circumstances in this case. And exceptional circumstances is that it took three years for this situation to occur. And during that three years, there's been significant contact with the paternal grandparents.

> The [c]ourt finds that those are exceptional circumstances in this matter. And because those are exceptional circumstances, the [c]ourt is also finding that this visitation order, including visitations during the summertime, at this point should not change.

In any event, we would agree with Mother and Ms. Karen S. that, under the facts of this case, the prior finding of parental unfitness would not constitute an exceptional circumstance that would allow the court to substitute its judgment regarding the best interest of the child over that of a fit parent.

We conclude that the evidence of the three-year history of routine contact between Child and the A.s, and evidence of the nature of the bond between them, is legally insufficient to sustain a finding of exceptional circumstances. *See Brandenburg*, 193 Md. App. at 192 (A trial court is "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.").

Brandenburg is particularly instructive here. In that case, the parents of four minor children became "involved in a personal dispute" with the paternal grandparents and cut off all contact between the grandparents and the children. *Id.* at 181. The grandparents filed a complaint to establish visitation. *Id.* Based on the evidence at trial, the court made a finding that the children '"had grown accustomed to seeing"' the grandparents '"for hours at a time, on a daily basis and over a period of several years[,]"' and that the grandparents had been '"essential and ever-present adult figures in the lives of all four children."' *Id* at 184. The court rejected the parents' claim that the grandparents were required to present

direct evidence of harm to the children, commenting that such a showing would be impossible because the grandparents had been denied contact with the children. *Id.* at 184. The court determined that there were exceptional circumstances to justify an award of visitation to the grandparents, reasoning that "it belies both commonsense and a decent regard for the importance of human relationships to suggest" that the children "suffered no 'significant deleterious effect'" or that the children were "not continuing to suffer harm" as a result of the lack of visitation. *Id.* at 184 (quotation marks omitted). After making those threshold findings, the court determined that it was in the best interests of the children to have visitation with their grandparents. *Id.* at 185.

On appeal, this Court reversed the decision of the trial court. We held that, because there was no evidence of harm to the children, the trial court erred as a matter of law in concluding that the grandparents had proven the existence of exceptional circumstances. *Id.* at 191. We explained:

> As the trial court conceded . . . there was no evidence of harm to the children caused by the cessation or absence of visitation. 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].

Id. Although we recognized that it would be difficult to establish a "'significant deleterious effect' upon children when there is no opportunity for contact," we held that "we cannot presume such an effect when, as here, no evidence of harm was adduced." *Id.* at 191-92.

Here, as in *Brandenburg*, the record is devoid of "solid evidence" of a "significant deleterious effect" upon Child if court-ordered visitation with the A.s is terminated. The

only evidence regarding future harm was Ms. A.'s statement that Child would be "really hurt" if visitation were discontinued. That evidence, standing alone, was legally insufficient to show future harm. *See Aumiller*, 183 Md. App. at 81-82 (A finding of future detriment to a child "must be based on solid evidence in the record, and speculation will not suffice."). Nor could the court infer that cessation of contact would result in harm to Child based solely on the amount of time that Child had spent with the A.s over the course of three years, and the fact that Child appeared to have a bond with the A.s.

The A.s assert that proof of harm is only "a factor to consider[,]" but that it is not essential. This assertion is incorrect. *See Koshko*, 398 Md. at 441 (The GVS requires "a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children[.]"); *accord Brandenburg*, 193 Md. App. at 189 (quoting *Koshko*, 398 Md. at 441); *Aumiller*, 183 Md. App. at 84 ("[T]he lack of visitation, without other evidence of future harm, does not support" a finding of exceptional circumstances.). *See also McDermott*, 385 Md. at 325 (In a case where a third party seeks to gain custody of children from their natural parents, a trial court must first find that both parents are unfit "or that extraordinary circumstances exist which are significantly detrimental to the child[.]").

The A.s maintain that *Brandenburg* is distinguishable because there, both parents were fit, the grandparents were alleged to be unfit, and the grandparents' actions were the apparent cause of the estrangement. We are not persuaded. Neither the fitness or unfitness of the parties nor the reason why the parents became estranged from the grandparents was

germane to the holding that, to justify an award of third-party visitation, there must be evidence of a "significant deleterious effect" on the children.

The A.s further maintain that *Brandenburg* does not apply because, in this case, there is an order which provides that, should Father be granted supervised visitation, such visitation will occur during the A.s' visitation and be supervised by the A.s. We fail to see how this translates into non-speculative evidence of harm to the Child if visitation is terminated. As the court noted at the hearing on exceptions, in the event that Father proves to the court's satisfaction that he is fit for supervised visitation, other options for supervised visitation are available.

At oral argument, the A.s' asserted that *Brandenburg* is distinguishable because there, the grandparents' access to the children had already been cut off. Essentially, this is an argument that proof of a "current or future detriment"[10] or "significant deleterious effect"[11] to a child in the absence of visitation is not required in a proceeding to modify an existing order for grandparental visitation. We disagree. "The fundamental liberty interests of parents 'provide[] the constitutional context that looms over *any* judicial rumination on the question of custody or visitation.'" *Barrett*, 186 Md. App. at 17 (quoting *Koshko*, 398 Md. at 423) (emphasis in *Barrett*). "Therefore, whenever they are encroached upon, the threshold showing required by *Koshko* necessarily applies to both first instance

[10] *Koshko*, 398 Md. at 445.

[11] *Id.* at 441.

adjudications under the GVS and to subsequent judicial modification of existing GVS orders as well." *Id.*

In sum, we conclude that the court erred as a matter of law in concluding that there were exceptional circumstances to permit the court to substitute its judgment of the best interests of Child for that of Mother. We are not unsympathetic to the grandparents here. And, we are mindful of the difficulty that third parties might encounter in demonstrating that cessation of an existing order for visitation would have future significant deleterious effect on a child.[12] As we have noted, however, "[t]he bar for exceptional circumstances is high precisely because the circuit court should not sit as an arbiter in disputes between fit parents and grandparents over whether visitation may occur and how often." *Brandenburg*, 193 Md. App. at 192.

Underlying the well-intentioned rulings of the magistrate and circuit court was, we believe, a fear that, if given control over visitation, Mother would deny all access to Child by the paternal grandparents. However, Mother testified before the magistrate and testified under oath she would not.[13] Similarly, in oral argument before this Court, counsel for

[12] This Court has recognized that if, as in this case, grandchildren "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." *Aumiller*, 183 Md. App. at 85.

[13] Before the magistrate, Mother responded to a question from Mr. A.:

> Do I think that [visitation] should be court ordered? Absolutely not. Do I think that you should stay in contact with [Child]? Absolutely, as we did. We made a schedule work for the holiday this year. You gave me Christmas day, and I had no problem following what you asked, and I returned [Child]

(continued…)

Mother stated that "she would intend to not deny [them] access, but she wants it to be on her terms, not court-ordered." In exercising her newly-acquired control over third-party visitation, we anticipate that Mother will remember these remarks.

II. Attorney's Fees

On September 29, 2020, 35 days before the hearing on the merits, the A.s voluntarily dismissed their cross-claim for additional visitation. On October 13, 2020, Ms. Karen S. filed a petition for attorney's fees. She alleged that the A.s filed their cross-claim in bad faith, and that she had incurred unnecessary legal expenses as a result. Ms. Karen S. requested that the A.s be ordered to pay legal expenses from the date that they filed their petition to the date it was voluntarily dismissed. In support of her motion for attorney's fees, Ms. Karen S. attached a detailed fee ledger and an affidavit of her attorney, attesting to the reasonableness of the charges. The court awarded attorney's fees in the amount of $750.

Ms. Karen S. contends that the court failed to make findings required by FL § 12-103 or articulate the basis for awarding her only $750 of her claim for attorney's fees of $6,273.33. We disagree.

"'The award of fees and costs is within the sound discretion of the trial court, and such an award should not be modified unless it is arbitrary or clearly wrong.'" *Barton v. Hirshberg*, 137 Md. App. 1, 32 (2001) (quoting *Rosenberg v. Rosenberg*, 64 Md. App. 487,

> to you. You saw him on the holidays. I've never, ever said that I don't want [Child] to see you. I don't like you, but that doesn't mean [Child] doesn't like you.

538 (1985)). Under FL § 12-103, before granting a motion for attorney's fees, the court must consider: "(1) the financial status of each party; (2) the needs of each party; and (3) whether there was substantial justification for bringing, maintaining, or defending the proceeding." FL § 12-103(b). If the trial court fails to consider all the statutory criteria in making an award, then its decision "constitutes legal error." *Petrini v. Petrini*, 336 Md. 453, 468 (1994).

Although the court did not make an express finding regarding substantial justification, it did so implicitly, as evidenced by the fact that the court ordered the A.s to pay attorney's fees to Ms. Karen S. There was no need for the court to consider the A.s' financial status or needs, as the A.s stipulated on the record that they had the financial means to pay an award of attorney's fees. Nor did the court need to consider Ms. Karen S.'s financial needs, as the court ordered the A.s to pay the full amount of fees that it found to be related solely to the cross-claim.

Moreover, the court adequately explained the basis for its award. The court stated:

> There was a request [by the A.s] for additional [visitation] time, which [Ms. Karen S.'s] attorney did, in fact, have to prepare for, but . . . that preparation . . . for that particular issue was largely wrapped up into this entire hearing in this matter[.] . . . [T]here was a minimal amount of effort that would have been expended in order to prepare for this particular legal issue. But there is an expense that was expended for this particular issue, so the [c]ourt will award attorney's fees of $750. . . . [A]ll the other expenditures would have been directly related to the other issues in this matter.

We discern no abuse of discretion in the court's award of attorney's fees.

III. Standing

Mr. A. and Ms. A. contend that Ms. Karen S.'s appeal should be dismissed because she lacks standing. Appellate courts, however, "ordinarily do not decide issues of standing where it is undisputed that one party on each side of the litigation has standing." *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008).

In any event, we note that Ms. Karen S. was a party to the action that is the basis for this appeal. *See* Md. Code, Courts and Judicial Proceedings Article (1974, 2020 Repl. Vol.), § 12-301 (Subject to exceptions not relevant here, "a party may appeal from a final judgment entered in a civil or criminal case by a circuit court . . . unless in a particular case the right of appeal is expressly denied by law."). Moreover, one of the issues on appeal concerns Ms. Karen S.'s request for attorney's fees.

IV. Motion to Enforce Summer Vacation

In light of our conclusion that the court erred in finding exceptional circumstances to justify the continuation of court-ordered visitation, this issue is moot. Therefore, we do not address it.

CONCLUSION

The court erred as a matter of law in denying Mother's motion to modify visitation. We perceive no error or abuse of discretion in the court's award of attorney's fees.

We do not disturb the court's decision to relieve Ms. Karen S. of the responsibility to facilitate Father's weekly telephone access. However, in light of our conclusion that the court erred in denying Mother's motion to modify visitation, the court's order for Father's telephone access to occur while Child is visiting with the A.s and at the A.s' discretion

shall also be reversed and remanded to the court to make alternative arrangements for Father's telephone access. There may be other collateral consequences from our principal holding that are better addressed by the circuit court.

MOTION TO DISMISS APPEAL OF KAREN S. DENIED.

ORDER DENYING APPELLANT SARA S.'S MOTION TO MODIFY THIRD-PARTY VISITATION REVERSED. ORDER PROVIDING FOR MATTHEW W.'S TELEPHONE ACCESS TO TAKE PLACE DURING THIRD-PARTY VISITATION REVERSED. ORDER GRANTING APPELLANT KAREN S.'S MOTION FOR ATTORNEY'S FEES AFFIRMED. CASE REMANDED FOR THE ENTRY OF AN ORDER NOT INCONSISTENT WITH THIS OPINION. TWO THIRDS OF COSTS TO BE PAID BY APPELLEES/CROSS-APPELLANTS AND ONE THIRD OF COSTS TO BE PAID BY APPELLANT/CROSS-APPELLEE MS. KAREN S.