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RECENT DEVELOPMENT

E.N. V. T.R: TO ESTABLISH DE FACTO PARENTHOOD WHERE THERE ARE TWO LEGAL PARENTS, A PROSPECTIVE DE FACTO PARENT MUST DEMONSTRATE THAT BOTH LEGAL PARENTS CONSENTED TO AND FOSTERED THE PARENT-LIKE RELATIONSHIP THAT A NON-CONSENTING LEGAL PARENT WAS UNFIT, OR EXCEPTIONAL CIRCUMSTANCES EXIST.

By: Oluwatosin Adedeji-Fajobi

The Court of Appeals of Maryland using a four-part test for establishment of *de facto* parenthood held as a matter of first impression that under the first factor of the test, where there are two legal parents, a prospective *de facto* parent must demonstrate both legal parents consented to and nurtured a parent-like relationship with the child; the non-consenting legal parent is unfit; or there were exceptional circumstances. *E.N. v. T.R.*, 474 Md. 346, 355-56, 255 A.3d 1, 10. The court held where a child has two legal parents, permitting a single parent to consent to a *de facto* parent relationship could result in a second existing parent having no knowledge that a *de facto* parent relationship was established. *Id.* at 346, 353, 255 A.3d 6.

E.N. and D.D. are the biological mother and father of minor children G.D. and B.D. From 2005 to October 2009, E.N. and D.D. lived together with their children. In October 2009, D.D. was incarcerated. After D.D. was released from prison in 2013, he began a relationship with T.R. and periodically visited with his children. In 2015, D.D. and T.R. moved in together, and in June of that year the children joined them. When D.D. was again incarcerated in 2017, he wrote a letter giving T.R. full custody of the children.

Between June 2015 to 2017, E.N. saw her children once. E.N. attempted to find her children and have them live with her but was unsuccessful. In November 2017, while T.R. and the children were visiting the children's paternal grandparents, E.N. came and asked for her children. E.N. did not see her children again until September 2018.

In February 2018, T.R. filed a complaint against E.N. and D.D. for sole legal and physical custody of the children in the Circuit Court for Prince George County. The court held T.R. was a *de facto* parent and awarded T.R. and E.N. joint legal custody of the children with T.R. having tiebreaker authority over disputed decisions about the children's care and upbringing. In addition, T.R. received sole physical custody. E.N. had visitation rights. E.N. appealed and the Court of Special Appeals affirmed the circuit court's judgment. In 2020, E.N. petitioned for a writ of *certiorari* to the Court of

Appeals of Maryland, which the court granted. The issue before the court was if a *de facto* parentship is formed due to the actions of one legal parent without the knowledge or consent of the other legal parent, or does the non-consenting parent retain a superior custody claim, thereby requiring the potential *de facto* parent prove that the non-consenting parent is unfit or that exceptional circumstances exist to receive custody? *Id.* at 368, 255 A.3d at 13-14.

The Court of Appeals began its analysis by reiterating a parent's right to raise their child is fundamental and cannot be unjustly taken away. *E.N.*, 474 Md. at 371, 255 A.3d at 15 (citing *Conover v. Conover*, 450 Md. 51, 60, 141 A.3d 31, 438). The court elaborated, stating that parental rights to custody of biological children are usually superior to anyone else's. *Id.* at 371, 255 A.3d at 16 (citing *Conover v. Conover*, 450 Md. 51, 60, 141 A.3d 31, 438). The Court of Appeals reiterated the current law for establishing *de facto* parenthood is a four-part test : (1) the biological or adoptive parent consented to, and encouraged, the requester's establishment of a parent-like relationship with the child; 2) the non-biological parent and the child lived together; (3) the non-biological parent assumed the responsibilities of a parent including child's care, education and development, without the expectation of reimbursement; and (4) the requester has been in a parental role for enough time to have established a parental relationship with the child. *E.N. v. T.R.*, 474 Md. 346, 376, 255 A.3d 1, 18 (2021) (citing *Conover v. Conover*, 450 Md. 51, 60, 141 A.3d 31, 438). Additionally, in cases where there are no *de facto* parents and a third party seeks custody or visitation, to receive custody or visitation the third party must show that the parents are unfit or that exceptional circumstances exist. *Id.* at 396, 255 A.3d at 30 (citing *Conover*, 450 Md. at 61, 141 A.3d at 38). A trial court will then apply the best interests of the child standard. *Id.* at 396, 255 A.3d at 30.

In the instant case, the court held that T.R. failed to meet the first factor of the four-part test. *Id.* at 395, 255 A.3d at 30. Although D.D. consented to T.R.'s formation of a parent-like relationship with his children, E.N. did not expressly or impliedly consent to T.R.'s formation of a parent-like relationship with her children. *Id.* In addition, T.R. did not prove that E.N. was an unfit parent or that exceptional circumstances existed that would have given T.R. standing to seek custody of the children. *Id.* As such, the court determined that declaring the existence of a *de facto* parentship based on the consent of only one parent while ignoring the second legal parent's fitness as a parent undermined and negated the second parent's constitutional right to parent their child. *Id.* at 396-97, 255 A.3d at 31.

In its analysis, the court distinguished this case from prior decisions where the child had only one legal parent. *E.R.*, 474 Md. at 395, 255 A.3d at 30 (distinguishing *Conover*, 450 Md. at 55, 141 A.3d at 35.) The court held

that the Court of Special Appeals erred in analyzing precedent in regarding the silence as to the requirement that two legal parents' consent to the *de facto* parentage as the acquiescence of single-parent consent. *E.N.*, 474 Md. at 400, 255 A.3d at 33. Here, the court stated a majority opinion's silence as to the views or concerns in a concurring opinion should not be interpreted as how the Court would later rule on the issue. *E.N. v. T.R.*, 474 Md. 400, 255 A.3d 1, 33 (citing *Conover* at 246, 236 A.3d at 677 (The court here noted that the majority opinion in *Conover* did not comment on the issue of two legal parents consenting.)).

Here, the court established the consent requirement in the first prong of the *de facto* parent test may be given either explicitly or implicitly. *Id.* 474 Md. at 401, 255 A.3d at 34. The court reasoned under the first factor, implied consent requires a legal parent have sufficient information about the formation of a parent-like relationship between a third party and a child, and the parent knowingly and voluntarily not resist or object to it. *Id.* 474 Md. at 402-3, 255 A.3d at 34.

The court found E.N. neither expressly nor implicitly consented to the *de facto* parent relationship. *Id.* T.R. thus failed to satisfy the first prong of the four-part test. *Id.* 474 Md. at 404, 255 A.3d at 35 (citing *Conover*, 450 Md. At 74, 141 A. 3d at 46-47 (quoting *H.S.H.-K.*, 533 N.W.2d at 435-36). E.N. tried to locate her children in 2017 and was unsuccessful. *Id.* 474 Md. at 357, 255 A.3d at 7. She never gave up her parental rights, nor did she abandon her children. *Id.* 474 Md. at 407, 255 A.3d at 37. Her consent was required due to an absence of any exceptional circumstance. *Id.* 474 Md. at 405, 255 A.3d at 36.

The dissent, in this case, held that there was no basis to require the consent of both legal parents. *Id.* 474 Md. at 414, 255 A.3d at 41. The dissent further explained that the majority's holding prevented the court from fully considering the best interest of the child. *Id.* 474 Md. at 417, 255 A.3d at 44. The dissent held that the majority failed to consider a child's right to maintain relationships with parent-like caregivers. *Id.* 474 Md. at 418, 255 A.3d at 44.

In *E.N.*, the Court of Appeals of Maryland held that T.R. failed to satisfy the first factor of the *de facto* parenthood test. T.R. failed to prove that E.N. was an unfit parent or that exceptional circumstances existed that would have given T.R. standing to seek custody. The circuit court erred in concluding that T.R. was a *de facto* parent to the children and in granting her joint legal custody and sole physical custody. This case further bolsters a parent's constitutional right to parent but simultaneously limits the rights and ability of a third party to establish parental rights. It further establishes the notion that a family can only include two legitimate parents and everyone else is

secondary. This law may disadvantage people who have nontraditional children and family units.