Court of Appeals decision on custody concerns some family law attorneys

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Some family law attorneys say Maryland's top court exceeded the appropriate bounds of an appellate panel in its recent landmark decision relaxing the standards for grandparents seeking custody of their grandchildren.

The Court of Appeals went astray not by changing the standards but by then applying them in the instant case of *Burak v. Burak*, overturning the trial judge's decision in favor of the grandparents and returning the child to the mother, despite the new guidelines. The high court should have either deferred to the judge's findings that the child belonged with the grandparents or remanded the case to him to reevaluate the evidence in light of the new standards, said the attorneys, who were not involved in the case.

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In its decision, the Court of Appeals overturned Montgomery County Circuit Judge Terrence J. McGann's ruling that the grandparents should be granted custody of the grandchild whose mother, Natasha Burak, had engaged in polyamorous behavior and

illicit drug use before separating from her husband, the child's father, and prior to the grandparents seeking custody.

Burak's earlier misbehavior did not "overcome the constitutional presumption favoring parental custody" in light of the attentiveness she has shown her child, Judge Michele D. Hotten wrote for the majority.

"The decision concerns me," said attorney Kathleen M. Dumais, a Democratic member of the Maryland House of Delegates from Montgomery County. "Enough deference wasn't given to the trial judge who heard the witnesses, who was able to judge the credibility of the witnesses. He was the one who was able to judge the character and the credibility."

Pleading requirement

The Court of Appeals' Aug. 29 decision was its broadest on the rights of grandparents and other relatives and "third parties" in trying to seek custody of a child based on a parent's unfitness or a showing that exceptional circumstances exist that render the child's interests best served by the custodial change.

The high court said grandparents and other third parties seeking custody must state in their initial pleading sufficient allegations of fact that would show the parental unfitness or exceptional circumstances. This exacting pleading requirement removes the need for a preliminary hearing and permits the judge to get to the issue of custody sooner, which Ferrier R. Stillman called a welcome change.

"The longer a custody case goes on, the worse it is for the children," said Stillman, a partner at Tydings & Rosenberg LLP in Baltimore.

The high court also announced six factors for judges to consider in deciding if a parent is so unfit that a child should be turned over to a grandparent or other "third party" suing for custody, including abandonment, deep neglect or infliction of physical or mental injury. Other factors are whether the parent has an emotional or mental illness that makes them unable to care and provide for the child; has renounced his or her parental duties; or has engaged in conduct detrimental to the child's welfare.

Opinion swerve

The majority opinion's pro-grandparent tenor would lead readers to suspect the court would uphold McGann's decision as the opinion recounted his findings that the mother's past behavior rendered her either an unfit parent or created exceptional circumstances. But the Court of Appeals – to Greenblatt and Dumais' dismay – reviewed anew the evidence presented to McGann and concluded it did not trump the constitutionally

protected presumption favoring parental custody, as the U.S. Supreme Court found in *Troxel v. Granville* in 2000.

In ruling for Natasha Burak, the high court said McGann erroneously found the mother to be neglectful, even expressing doubt that she would rescue the child from drowning. "(T)he record reflects that throughout the child's life, and even more so after petitioner and father separated, petitioner remained active in the child's upbringing and care, including providing shelter to the child in the marital home, deciding what school the child should attend, making doctor's appointments for the child, organizing his transportation to those appointments, responding to the child's behavioral problems at school, and seeking out ways to address those behavioral difficulties," Hotten wrote. She was joined in the 107-page opinion by Chief Judge Mary Ellen Barbera and Judges Clayton Greene Jr. and Sally D. Adkins. Judge Shirley M. Watts joined in the judgment only.

Disregarded findings?

Greenblatt and Dumais noted that McGann – and not the Court of Appeals – heard and watched the grandparents and Barak give testimony.

"They (the high court) poo-pooed everything that Judge McGann found," Greenblatt said. "They interpreted the facts in a completely different way. That to me is where the judicial activism comes in."

Dumais said the high court rendered its decision "without giving enough credence to the trial judge" and in the process failed to consider sufficiently that the child has been living with the grandparents for about the last two years and will now be returned to the mother.

The child's life will be turned "upside-down," said Dumais senior counsel at Ethridge, Quinn, Kemp, McAuliffe, Rowan & Hartinger in Rockville and vice chair of the House Judiciary Committee. "Sometimes I think we lose sight of who's most affected."
The attorneys' concerns about the high court's disregard for McGann's findings reflected those of dissenting Judge Joseph M. Getty.

"This kind of ex post facto overruling of the trial court's decision based on entirely new legal criteria is highly improper," wrote Getty, joined in dissent by Judge Robert N. McDonald. "It is profoundly unfair to the grandparents to reverse the grant of custody based on newly devised standards, without affording the grandparents an opportunity to make their case under those new standards. And, by applying the new standards to the facts of the case, this court usurps the trial court's role to apply the law to the facts and make discretionary findings."