IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

SEPTEMBER TERM, 2004

NO. 1761

B.G.,

Appellant,

vs.

M.R.,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
(THE HONORABLE RONALD D. SCHIFF, PRESIDING)

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF APPELLANT

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PRELIMINARY STATEMENT

In this custody contest between a fit legal parent and his children's maternal grandmother, this Court must address whether a parent's temporary illness due to infection with the human immunodeficiency virus ("HIV") constitutes an "extraordinary circumstance" significantly detrimental to the interests of the children. Appellant B.G. is the father of three children, ages 9, 10, and 11, and shared physical and legal custody with his late ex-wife. In the circuit court, Appellee M.R., the grandmother, sought custody of B.G.'s children based on her unfounded and erroneous assumption that B.G. is unfit to care for his children because of his HIV infection. Significantly, the circuit court did not find that Appellant is unfit. Rather, the court held only that "unusual circumstances" justified depriving Appellant of his constitutionally protected custodial rights as a parent. The circuit court based its decision in part on the fact that Appellee had provided temporary care for Appellant's children following the death of their mother, at a time when Appellant was recovering from illness and unable to take custody of the children. Such circumstances are not even unusual, let alone extraordinary, and do not justify a transfer of custody to the non-parent grandmother.

Amicus curiae Lambda Legal Defense and Education Fund, Inc., submits that Appellant's HIV-related illness does not support the circuit court's finding of "extraordinary circumstances" in this case. The lower court effectively penalized the Appellant for being temporarily unable to care for his children at the time of

their mother's sudden death in February 2004. Moreover, in making that determination, the lower court failed to apply the correct legal standard and committed serious, reversible error. The facts of this case do not remotely approach the very high standard that the Maryland Court of Appeals has established – and very recently re-affirmed – for evaluating the existence of "extraordinary circumstances." Only such a showing may permit infringement of the parent's fundamental constitutional right to care, custody, and control of his children. There is a presumption that a fit parent will act in the child's best interest and nothing in this case indicates that Appellant has failed to do so even when ill. While the lower court correctly concluded that Appellant is a fit parent, the court inappropriately concluded that "exceptional circumstances" existed, and made no finding of significant detriment to the children.

Amicus curiae submits this brief to support Appellant's claim that neither his HIV infection nor his past illnesses constitute "extraordinary circumstances" that are significantly detrimental to the children. First, to explain the circumstances of Appellant's temporary illness, *amicus curiae* provides the Court with current and accurate medical knowledge about the effects, treatment and transmission of HIV. Second, *amicus curiae* sets forth the legal standard which the circuit court should have applied in this case in light of Appellant's constitutionally protected rights, emphasizing the principle that a parent's disability or temporary illness does not on its own merit a denial of parental custody. To that end, *amicus curiae* summarizes the overwhelming judicial

authority indicating that a parent's custodial rights should not be denied simply because he or she is infected with HIV or otherwise disabled. Finally, *amicus curiae* reviews the circuit court's decision in this case and notes that the circuit court inappropriately determined that Appellant's inability to care for his children in February 2004 constituted "extraordinary circumstances" justifying an award of custody to the children's grandmother.

I. MEDICAL KNOWLEDGE ABOUT HIV AND AIDS

A. HIV Disease Progression

HIV is a retrovirus that infects a type of white blood cell known as the CD4+ lymphocyte. Commonly referred to as "helper T-cells," CD4+ cells play an important role in helping the body fight viral, parasitic and fungal infections. See Bragdon v. Abbott, 524 U.S. 624, 634, 118 S. Ct. 2196, 2203 (1998) (summarizing natural course of untreated HIV disease). If a person infected with HIV does not receive appropriate treatment, the disease may progress, lowering the level of CD4+ cells in the person's blood. Id. If untreated, HIV disease progression leads to immune deficiency, making the infected individual vulnerable to certain opportunistic infections and possibly death. See Carlos del Rio & James W. Curran, *Epidemiology and Prevention of Acquired Immunodeficiency Syndrome and Human Immunodeficiency Virus Infection*, in Mandell, Douglas, and Bennett's Principles and Practice of Infectious Diseases 1477, 1484-86 (Gerald L. Mandell et al. eds., Elsevier, Inc., 6th ed. 2005) (1979).

"HIV disease" is a term that describes all phases of HIV infection. Acquired Immune Deficiency Syndrome, or AIDS, is a term that refers to significant suppression of the immune system of a person with HIV. According to the federal Centers for Disease Control and Prevention ("CDC"), a person has developed AIDS when his or her CD4+ count falls below 200 cells/mm^3, or when he or she develops one of a number of infections or other complications specifically listed by the CDC. See Ctrs. for Disease Control and Prevention, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, 41 (RR-17) Morbidity & Mortality Wkly. Rep. (1992).[1] A diagnosis of AIDS generally indicates that an individual's immune system is significantly compromised. Without treatment, people who have been diagnosed with AIDS are at heightened risk for fatal infections. With appropriate treatment, however, a person who has been diagnosed with AIDS may recover to full health. Lisa M. Lee et al., *Survival After AIDS Diagnosis in Adolescents and Adults During the Treatment Era, United States, 1984-1997*, 285 JAMA 1308 (2001).

The overall health of a person who is infected with HIV generally may be measured in two ways. First, the person's CD4+ cell count is tested to determine the health of the person's immune system. See Panel on Clinical Practices for Treatment of HIV Infection, Dep't of Health and Human Servs., *Guidelines for the Use of Antiretroviral Agents in HIV-1- Infected Adults and Adolescents* 4 (2005)

[1] *Available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00018871.htm.

[hereinafter DHHS Guidelines].[2] A person with a healthy immune system generally has between 500 and 1200 CD4+ lymphocytes per cubic millimeter of blood. See U.S. Dep't of Health and Human Servs., *Clinical Management of the HIV-infected Adult: A Manual for Midlevel Clinicians* 19-20 (2003) [hereinafter DHHS Manual].[3] As a general matter, if a person's CD4+ count is below 200 cells/mm^3, the person's immune system may have difficulty adequately fighting infections. See generally National Institute of Allergy and Infectious Diseases, U.S. Dep't of Health and Human Servs., *HIV Infection and AIDS: An Overview* (March 2005).[4]

Second, healthcare providers commonly test an infected person's "viral load." The viral load test measures the amount of virus in the blood of an infected individual. See DHHS Guidelines, supra, at 4-5. A person with advanced, untreated HIV disease may have a viral load of hundreds of thousands or even millions of copies per milliliter, while an HIV-positive person who responds well to treatment may have an undetectable viral load of less than 50 copies/mL. Andrew N. Phillips et al., *CD4 Cell Count Changes in Individuals with Counts Above 500 Cells/mm^3 and Viral Loads Below 50 Copies/mL on Antiretroviral Therapy*, 16 (7) AIDS 1073 (2002). In combination, CD4+ and viral load measurements are considered a good predictor of disease progression; a low viral load and high CD4+ count generally indicates that the individual has a strong

[2] *Available at* http://www.thebody.com/hivatis/pdfs/adult_guide.pdf.
[3] *Available at* http://www.aidsetc.org/pdf/tools/se_midlevel_2003.pdf.
[4] *Available at* http://www.niaid.nih.gov/factsheets/hivinf.htm.

immune system and is not likely to experience progression of HIV disease. del Rio & Curran, supra, at 1485.

At trial in August 2004, B.G.'s CD4+ count was 186 cells/ mm^3 and his viral load was 156 copies/mL, a level so low that it almost cannot be detected by available technologies. (E. 1-1) Earlier, in 2001, Appellant had been diagnosed with CMV retinitis, a staph infection, and a bacterial infection that can cause liver damage ("MAC"). (E. 1-163 – 186) Appellant also experienced an episode of poor health in late 2003 and early 2004. (See E. 2-164 – 73.) However, Appellant began a course of regular medication in late 2003, which had a notably beneficial effect on his health. (E. 1-1, 1-74, 2-183 – 86)[5]

Expressly relying on Appellant's medical records, the trial court concluded that Appellant is fit. (E. 2-307 – 08) Further, the court noted that it gave great weight to an affidavit from the Attending Physician in the Infectious Diseases section at the Veteran Affairs Medical Center who stated that, as of the day before trial, Appellant's HIV infection should not have any medical effect on his ability to take care of his children. (E. 1-74, 2-307 – 08)

B. Treatment of HIV

Until 1987, there was no FDA approved treatment for HIV disease. Lee et al., supra, at 1308. Physicians sometimes were able to treat opportunistic

[5] Contrary to Appellee's repeated assertions, B.G. has never been diagnosed with dementia. Just the opposite, a psychologist conducted a full examination of Appellant in October 2003 and expressly ruled out (signified by the marking "r/o") HIV-related dementia. (E. 1-43)

infections in individual patients, but they were not able to stop the progression of the disease. Even after the widespread introduction of the first medication to treat HIV disease in 1987, HIV was viewed as an invariably fatal disease until the mid-1990s. See Michelle Oberman, *Test Wars: Mandatory HIV Testing, Women, and Their Children*, 3 U. CHI. L. SCH. ROUNDTABLE 615, 616 (1996). In 1996, the introduction of a new class of anti-viral medication marked an incredible revolution in the treatment of HIV. These medications, in combination with existing HIV drugs, are able powerfully and effectively to suppress HIV and prevent resultant immune compromise. See Jonathan E. Kaplan, *Guidelines for Preventing Opportunistic Infections Among HIV-Infected Persons - 2002: Recommendations of the U.S. Public Health Service and the Infectious Diseases Society of America*, 51 (RR-8) Morbidity & Mortality Wkly. Rep. (2002).[6] As combination therapy, commonly known as "highly active antiretroviral therapy" or "HAART," became widely available in the United States, the death rate from AIDS dropped 63 percent between 1995 and 1998. del Rio & Curran, supra, at 1479.

As a result of these medical breakthroughs, many people now experience HIV as a chronic, manageable condition that causes minimal adverse health effects. See Doe v. District of Columbia, 796 F. Supp. 559, 567 (D.D.C. 1992) (ruling that HIV infection did not prevent firefighter from doing his job). There are a large number of HIV-infected individuals receiving proper medical treatment

[6] *Available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5108a1.htm.

for whom HIV should not necessarily be considered a fatal disease. With HAART, the course and effect of the disease varies considerably from one individual to the next. See del Rio & Curran, supra, at 1485; DHHS Manual, supra, at 173-74. Some individuals live without any symptoms of HIV, some remain completely disabled by the disease, and others continue to experience episodic illnesses without significant degradation of overall immune function. Id. Still others experience occasionally debilitating side effects from the medications. Christiane Schieferstein, *Management of HIV Side Effects*, in *HIV Medicine* at 247-248 (Hoffman & Kamps, eds., Flying Publisher 2003). As a result of HIV disease and HAART side effects, many people with HIV experience episodic periods of disability, with extended periods of good health occasionally disrupted by bouts of illness.

C. HIV Transmission

Quite appropriately, neither Appellee nor the circuit court has expressed any concern about HIV transmission in this case, nor is there any indication that such a concern would be warranted. For informational purposes only, *amicus curiae* provides information regarding HIV transmission in this section.

HIV can be transmitted through certain types of exposure of the semen, blood, or breast milk of an infected individual to the open wound or mucous membrane of another. See generally del Rio & Curran, supra, at 1488-92. The virus is fragile and transmission is extremely difficult. Id.; Faya v. Almaraz, 329 Md. 435, 445, 620 A.2d 327, 331-32 (1993). Indeed, surveillance and

epidemiologic data support only four modes of transmission of HIV: unprotected sexual contact, sharing of infected needles, receiving transfusions of infected blood, and transmission from infected mothers to their infants *in utero*, during delivery or through breast feeding. Id.

In contrast, the virus cannot be transmitted through casual contact or day-to-day interactions at home, work or school. One cannot contract HIV through touching, hugging, kissing, or sharing food utensils, towels, bedding, swimming pools, telephones or toilet seats.[7] HIV cannot be transmitted between family members in the normal household setting unless there is contact between the open wound or mucous membranes of one person and the infected blood of another. See Ctrs. for Disease Control and Prevention, *HIV and Its Transmission*, (updated December 24, 2002) (see n.7 for URL). Taking simple precautions in the home can eliminate even this extraordinarily low risk of transmission. Id. In short, there is no actual risk that an individual can contract HIV from a family member in the home. See Jane W. v. John W., 137 Misc. 2d 24, 27, 519 N.Y.S.2d 603, 605 (N.Y. Sup. Ct., Kings County 1987) (noting that father's diagnosis of "AIDS and

[7] See Ctrs. for Disease Control and Prevention, *HIV and Its Transmission*, (updated December 24, 2002) *at* http://www.cdc.gov/hiv/pubs/facts/transmission.htm; Ctrs. for Disease Control and Prevention, *Human Immunodeficiency Virus Transmission in Household Settings - United States*, 43 (19) Morbidity & Mortality Wkly. Rep. (1994) *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00030972.htm. Cf. Faya v. Almaraz, 329 Md. 435, 445, 620 A.2d 327, 331-32 (1993) (taking judicial notice of characteristics of HIV and its modes of transmission); Doe v. Borough of Barrington, 729 F. Supp. 376, 381 (D.N.J. 1990) (relying on Centers for Disease Control and Prevention and Surgeon General reports to observe that AIDS cannot be spread through casual contact).

the possible transmittal of the AIDS virus should play little if any role in determining this . . . application for visitation"); Conkel v. Conkel, 31 Ohio App. 3d 169, 173, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (rejecting mother's argument that children might contract AIDS during overnight visits with father, and noting that "AIDS or other HIV-associated diseases are not contracted by casual household contact").

D. Parents Living with HIV

A large number of families in the United States have been affected by the HIV epidemic. According to the Centers for Disease Control and Prevention, approximately 950,000 Americans are infected with HIV. See Ctrs. for Disease Control and Prevention, *Advancing HIV Prevention: New Strategies for a Changing Epidemic – United States 2003*, 52 (15) Morbidity & Mortality Wkly. Rep. (2003).[8] In Maryland, over 27,000 residents have HIV, and Maryland ranks third in the nation in the per capita incidence of HIV. Maryland Dep't of Health and Mental Hygiene, *Statistics* (updated October 4, 2004).[9] See Maryland residents living with HIV are predominantly African American (82%), male (65%), and middle-aged (70% of cases are among people 30-49 years old). See id.

Many people living with HIV in Maryland and elsewhere successfully are raising minor children. Hundreds of thousands of children in the U.S. have at least one HIV-positive parent, and these families "are found in all regions of the

[8] *Available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5215a1.htm.
[9] *Available at* http://www.dhmh.state.md.us/AIDS/epictr.htm.

country and in communities of all sizes (not just in urban centers)." Mark A. Schuster, et al., *HIV-Infected Parents and Their Children in the United States*, 90 (7) Am. J. Pub. Health 1074 at 1077, 1079 (2000); see also Rotheram-Borus et al., *Six-Year Intervention Outcomes for Adolescent Children of Parents with Human Immunodeficiency Virus*, 158 Archives Pediatric & Adolescent Med. 742 (2004).

II. COURTS ORDINARILY SHOULD NOT INTERFERE WITH A FIT PARENT'S CUSTODIAL RIGHTS BECAUSE OF THE HEALTH OR DISABILITY OF THE PARENT

Maryland has long recognized that parental rights are superior to those of third parties, such as grandparents, and that the law presumes that a parent should have custody absent unfitness or exceptional circumstances. See Ross v. Hoffman, 280 Md. 172, 178-79, 372 A.2d 582, 587 (1977). This presumption applies even when a parent is disabled or has been temporarily unable to care for his or her children. The Maryland Court of Appeals recently reinforced these parental rights in a March 2005 decision. McDermott v. Dougherty, 385 Md. 320, 869 A.2d 751 (2005), is directly on point here as it involves substantially similar legal and factual issues. McDermott also involved a custody contest between a father and grandparents. The father had several prolonged absences from the state over the course of four years during which the grandparents had provided the child with stability. Id. at 330, 869 A.2d at 751. In reversing the circuit court's award of custody to the grandparents, the Court of Appeals noted that the circuit court had "overlooked its own lack of a finding of unfitness," id. at 423, 869 A.2d at 811, and held that the grandparents had not met their high burden of proving

extraordinary circumstances significantly detrimental to the children. Id. at 430-31, 869 A.2d at 816. In an extensive discussion and analysis, the Court of Appeals concluded that the circuit court had not properly weighted the father's constitutional rights. Id.

The decision below contravened well-established Maryland law when decided, and McDermott removes any shred of doubt that the circuit court ruled incorrectly by overweighting the grandparents' role in the children's lives and underweighting Appellant's. Nothing about Appellant's HIV infection provides a basis for a different analysis here.

A. The Constitutionally Protected Custodial Rights of a Biological Parent May Be Overcome by a Grandparent Only on a Showing of Unfitness or Extraordinary Circumstances Making Parental Custody Significantly Detrimental to the Child

The United States Supreme Court and the Court of Appeals of Maryland have "long recognized the right of a parent to raise his or her children as a fundamental one protected by the due process clause of the Fourteenth Amendment." Shurupoff v. Vockroth, 372 Md. 639, 650, 814 A.2d 543, 550 (2003); see also Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000). "The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious . . . than property rights." Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212 (1972) (internal citations omitted). Indeed, the Supreme Court has noted that these rights are "perhaps the oldest of the fundamental liberty interests" recognized under the

federal Constitution. Troxel, 530 U.S. at 65, 120 S. Ct. at 2060. Accordingly, a parent has a strongly protected "fundamental right to direct his or her children's care, custody and control," and the Due Process Clause "does not permit a State to 'infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a "better" decision could be made.'" McDermott, 385 Md. at 352, 869 A.2d at 769 (quoting Troxel, 530 U.S. at 72-73, 120 S. Ct. at 2064).

While the custodial rights of a child's legal parent are not "absolute," it is well-settled that "the right of either parent is ordinarily superior to that of anyone else," including relatives. Ross, 280 Md. at 176-77, 372 A.2d at 586. In a custody dispute between a biological parent and a grandparent or other third party, the litigants "do not stand on an equal footing." Shurupoff, 372 Md. at 662, 814 A.2d at 557. Although grandparents often play a valuable role in assisting to raise children, particularly when parents have work commitments or encounter difficult times, grandparents who contribute in this way do not gain a constitutionally recognized interest in maintaining legal or physical custody. See McDermott, 385 Md. at 430-31, 869 A.2d at 816.

In this case, as in McDermott, the parent "is asserting a fundamental constitutional right" while the grandparent "is not." Id. at 353, 869 A.2d at 770. The trial court erred in comparing each party's claim as if the grandparent's role were parental. "Generally, absent a constitutional statute, the . . . third party has no rights, constitutional or otherwise, to raise someone else's child." Id. For that

reason, "extreme care must be exercised in determining a custody placement other than with a fit parent." Id. at 419, 869 A.2d at 809.[10]

In such cases, "it is presumed that the child's best interest is subserved by custody in the parent." Shurupoff, 372 Md. at 640, 814 A.2d at 544 (quoting Ross, 280 Md. at 178, 372 A.2d at 587). This presumption may be overcome when: (1) the parent is unfit to have custody, or (2) "extraordinary (*i.e.*, exceptional) circumstances" exist such that parental custody would be "significantly detrimental to the child." McDermott, 385 Md. 320 at 325, 418, 869 A.2d at 754, 808. Before considering the best interests of a child and awarding custody of the child to a third party against the wishes of a biological parent, id. at 417-19, 869 A.2d at 808-09, the third party must prove the existence of one of the two exceptions that overcome the presumption of parental custody. It is *only* in the rare case when the third party has met the initial "heavy substantive burden," Shurupoff, 372 Md. at 658, 814 A.2d at 555, of showing that the parents are unfit or that extraordinary circumstances exist such that parental custody is significantly detrimental to the child that the court may then "consider the 'best interests of the child' standard as a means of deciding the dispute." McDermott, 385 Md. at 325,

[10] A father does not have fewer rights *vis a vis* a third party because he agreed to provide the child's mother with full legal and physical custody or had lost custody by his conduct. See Butler v. Harris, 34 Cal. 4th 210, 227, 96 P.3d 141, 152 (Cal. 2004). Appellee contends that Appellant relinquished his custodial rights in a prior proceeding between himself and his ex-wife. (E. 2-355) That Appellant may have been comfortable doing so to the children's mother does not mean he would or has ceded custodial rights to anyone else. Importantly, it is undisputed that Appellant did not relinquish his *parental* rights, Butler, 34 Cal. 4th at 227, 96 P.3d at 152, and he therefore maintains superior rights over a non-parent.

869 A.2d at 754, 808-09. This high standard "is designed to reduce or minimize judicial opportunity to engage in social engineering in custody cases involving third parties." Id. at 380, 869 A.2d at 786 (quoting Watkins v. Nelson, 163 N.J. 235, 248-53, 748 A.2d 558, 565-68 (2000)).

The Court of Appeals recently explained this standard at length in McDermott v. Dougherty. In McDermott, the court reversed a circuit court decision awarding legal and physical custody of a child to the child's maternal grandparents over the objections of his father. The father in McDermott was employed as a merchant marine, and his vocation required him to accept "periodic jobs which took him to sea for several months at a time." McDermott, 385 Md. at 425, 869 A.2d at 813. During his absences, the father was unable to visit his son, whom he left in the care of the child's mother or, when the mother later faced personal and legal difficulties, the child's grandparents. Id. at 327-29, 869 A.2d at 755-56. The trial court in McDermott awarded custody to the child's grandparents, finding that the father was a fit parent but that the accumulation of months-long absences over the course of several years constituted an extraordinary or exceptional circumstance rebutting the traditional presumption in favor of parental custody. Id. at 427-28, 869 A.2d at 814.

In March 2005, the Court of Appeals reversed the circuit court in a comprehensive decision that must lead to reversal here. Affirming the fundamental rights of biological parents and clarifying the legal standard in third-party custody disputes such as the instant case, the court noted that proving the

existence of "exceptional circumstances" is a "weighty task" that ordinarily is difficult to achieve. Id. at 424, 869 A.2d at 812. Though the court acknowledged the contribution of the child's grandparents, it held that

> their efforts . . . cannot overcome the fundamental constitutional right of a fit parent to exercise care and custody of his child and the circuit court, clearly impressed with the grandparents' care, cannot invoke absences occasioned by the parent's proper employment in support of placing the child with the grandparents due to "exceptional circumstances."

Id. at 431-32, 869 A.2d at 816. As the McDermott court explained, "[c]ourts cannot preempt the established and constitutionally-protected fundamental rights of a parent, who is not 'unfit,' . . . merely because a child might be better off, in a particular judge's view, living elsewhere." Id. at 435, 869 A.2d at 818-19. In this case, Appellant's decisions as a parent to accept child care from the grandparents cannot be translated into a decision by him to cede them custodial rights, or serve as a basis to infringe his parental autonomy. See infra Section III.

B. Like All Other Parents, Parents with Disabilities or Illnesses Are Entitled to a Presumption of Parental Custody

The presumption in favor of parental custody detailed in McDermott is no less strong when the parent is ill or disabled. As discussed below, parents with disabilities have the same constitutional rights as any other parents, and appellate courts have admonished lower courts to be wary of bias against the disabled when determining custody. See, e.g., In re Marriage of Carney, 24 Cal. 3d 725, 728, 598 P.2d 36, 37 (1979) (stating that trial court "premised its ruling on outdated stereotypes of both the parental role and the ability of the handicapped to fill that

role"); Bednarski v. Bednarski, 141 Mich. App. 15, 366 N.W.2d 69 (1985) (ruling that trial was unfair and violated law requiring interpreters for hearing impaired litigants in court).

In custody disputes between parents and grandparents, the fit parent's illness or disability generally should not be considered an "extraordinary circumstance" that overcomes the presumption of parental custody, nor can steps the parent takes to meet the child's needs during periods of more serious illness be used against him. See In re the Guardianship of Sams, 256 N.W.2d 570 (Iowa 1977) (presumption in favor of parental custody is not overcome by showing that a parent struggling with illness reached out for assistance in caring for children). Particularly when a parent's illness or incapacity is temporary, the parent's inability to care for his or her child does not give rise to an extraordinary circumstance warranting a change of custody. See id. at 571, 574. Cases involving disputes between two fit parents similarly illustrate that the disability or HIV status of one parent is not a relevant factor in determining the custody of a child. See, e.g., Palmer v. Palmer, 238 Md. 327, 207 A.2d 481 (1965) (paraplegic father could provide wholesome and adequate home); Steven L. v. Dawn J., 148 Misc. 2d 779, 561 N.Y.S.2d 322 (N.Y. Fam. Ct. 1990) (concluding that mere fact that mother tested positive for HIV did not warrant change in custody).

Under well-established law, a parent's temporary incapacity due to illness or disability ordinarily does not create an "extraordinary circumstance" sufficient to overcome the parent's fundamental right to custody. Indeed, McDermott

instructs that a parent's temporary inability to provide physical care for a child does not constitute such an "extraordinary circumstance." McDermott, 385 Md. at 427-30, 869 A.2d at 814-16. Whether the parental absence is necessitated by employment, as in McDermott, or disability, as in the instant case, a parent's temporary or periodic inability to care for his child does not nullify the parent's constitutional rights or the presumption in favor of parental custody. The Court of Appeals expressly acknowledged that its holding in McDermott was not limited to the context of merchant marine or military employment. Id. at 428-30, 869 A.2d at 815. In a variety of contexts, when otherwise fit parents have been "temporarily gone for extended periods and . . . desire[] custody of [their] children," courts have awarded custody to the parents rather than to third parties. Id. at 430, 869 A.2d at 815.

The McDermott court quoted at length from an Iowa Supreme Court case in which a mother had temporarily been unable to care for her children due to illness. Id. at 431, 869 A.2d at 816 (quoting Sams, 256 N.W.2d 570). In Sams, a mother of two young children was hospitalized in the summer of 1974 for gall bladder surgery. During her period of incapacity, the mother left her children with their grandfather. After her release from the hospital, the mother continued to leave the children in the grandfather's home for much of the time. Sams, 256 N.W.2d at 571. Subsequently, as a result of financial and emotional problems, the mother was hospitalized a second time following an overdose of medication. The children were still staying with their grandfather in November 1974 when he applied for

and received an *ex parte* order awarding him guardianship of the children, i.e., custody. The lower court later refused to terminate the guardianship at the mother's request. Id.

In reversing that determination, the Iowa Supreme Court expressed both the strong presumption in favor of parental custody and the need for a policy that does not penalize parents for reaching out for assistance when needed:

> [P]arents should be encouraged in time of need to look for help in caring for their children without risking loss of custody. The presumption preferring parental custody is not overcome by a mere showing that such assistance was obtained. Nor is it overcome by showing that those who provided the assistance love the children and would provide them with a good home. These circumstances are not alone sufficient to overcome the preference for parental custody.

Id. at 573. See also McDermott, 385 Md. at 431, 869 A.2d at 816 (discussing Sams). As in Sams, a parent absented by reason of disability or illness is entitled to no less of a presumption of custody than a parent who is pulled away from his children by his employment.

Courts in other jurisdictions also have upheld the parental rights of disabled parents in custody contests with the children's grandparents. In Michigan, the Court of Appeals reversed a trial court's award of custody to grandparents in a contest between the grandparents and the child's mother, who was deaf. See Bednarski, 141 Mich. App. 15, 366 N.W.2d 69. The appellate court in Bednarski found that the trial court inappropriately had considered the mother's hearing disability as a "highly important factor" in depriving her of custody. Id. at 25, 366 N.W.2d at 73. Moreover, the appellate court instructed that the lower court had

erred by "fail[ing] to consider, either expressly or implicitly, the statutory presumption" in Michigan that "the best interests of the child are served by awarding custody to the parent, unless there is clear and convincing evidence to the contrary." Id. at 24, 366 N.W.2d at 72. Finally, the court noted that public policy favors the integration of disabled people into mainstream society, which includes the recognition of disabled people as parents. Id. at 27-28, 366 N.W.2d at 74 (referencing Michigan Handicappers' Civil Rights Act). Similarly, in a New York custody contest between a father living with HIV and his children's grandparents, the grandparents sought to compel HIV testing to confirm that the father was HIV-infected. See Doe v. Roe, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (N. Y. Sup. Ct., N.Y. County 1988). Refusing to force the father to submit to testing, the court stated,

> It is well-settled that the fact of a handicapping condition alone cannot deny custody to an otherwise qualified parent. . . . The question which must be answered is the effect, if any, of the handicapping condition on the child or children.

Id. at 220, 526 N.Y.S.2d at 726 (citations omitted). The court further noted that as "a bulwark against discrimination of all kinds, the court system must be especially wary about attacks on individual and social rights made in the guise of health-related AIDS claims." Id. at 221, 526 N.Y.S.2d at 726.

In custody contests between parents, in which the custodial presumption favors neither party, courts similarly have held that one parent's disability does not justify a denial of custody to that parent. In these cases, courts repeatedly and

consistently have held that disability should not be considered *prima facie* evidence of unfitness or detriment to the child. The leading case states the general rule:

> [I]f a person has a physical handicap it is impermissible for the court simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual and the family as a whole.

Carney, 24 Cal. 3d at 736, 598 P.2d at 42 (1979). Thus, in applying the "best interests" analysis, courts frequently have awarded custody to disabled parents, reversed determinations that treated a parent's disability inappropriately, and cautioned against giving a parent's disability inappropriate weight. See, e.g., Palmer, 238 Md. at 332, 207 A.2d at 484 (reversing lower court determination and awarding custody to paraplegic father, who could provide "a wholesome and adequate home for his son"); Moye v. Moye, 102 Idaho 170, 627 P.2d 799 (1981) (lower court's "best interests" analysis over-emphasized mother's epilepsy and this constituted an abuse of discretion); Carney, 24 Cal. 3d at 740, 598 P.2d at 44 (reversing lower court because father's accident and quadriplegia did not constitute changed circumstance of "sufficient relevance and materiality" to warrant custody modification); Matta v. Matta, 44 Mass. App. Ct. 946, 693 N.E.2d 1063 (1998) (affirming award of physical custody to mother with multiple sclerosis who had been using a wheelchair since 1991, and who had no hope of recovery or improvement, based on evidence that she could still care for her son); Harper v. Harper, 559 So. 2d 9 (La. Ct. App. 1990) (affirming that mother with

spina bifida was the proper domiciliary parent because she was physically able to care for herself and her child); Hatz v. Hatz, 116 Misc. 2d 490, 455 N.Y.S.2d 535 (N.Y. Fam. Ct. 1982) (refusing to modify custody in light of mother's paraplegia).

These cases illustrate that once a court determines that a parent is fit and able to exercise custodial responsibilities, there is usually little or no basis for making parental disability an important factor in a legal or physical custody determination, especially on a more than temporary basis. The question in custody cases is "not whether a parent has a disability, but whether a parent has the ability to care for a child's needs." Kirshbaum et al., *Parents with Disabilities: Problems in Family Court Practice*, 4 J. Ctr. for Families, Child. & Cts. 27, 29 (2003).

This general rule applies equally in cases involving parents who are HIV-positive. Relying on the straightforward scientific evidence that HIV-positive parents are fully capable of caring for their children, courts throughout the country have rejected arguments that awarding custody to HIV-infected parents is against the best interests of children, let alone dangerous to them. Over the past decade and a half, courts in a variety of factual and procedural circumstances have held that a parent or guardian's HIV status cannot serve as the sole reason for severing or limiting that adult's relationship with his or her child. See, e.g., North v. North, 102 Md. App. 1, 12 n.2, 648 A.2d 1025, 1030 n.2 (1994) (noting that visitation rights of an "HIV-positive parent cannot be restricted on the basis of that parent's HIV status unless the court finds that visitation without that restriction might

endanger the child's physical health or impair his or her emotional development"); Newton v. Riley, 899 S.W.2d 509 (Ky. Ct. App. 1995) (denying father's attempt to modify joint custody arrangement because mother was cohabiting with HIV-positive man); John T. v. Carraher, 4 Neb. App. 79, 538 N.W.2d 761 (1995) (rejecting State Department of Social Services' plan to remove a 3-½-year old foster child from foster home because foster mother had AIDS); Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (holding that father's visitation rights should not be terminated because he had AIDS); Sherman v. Sherman, No. 01-A-01-9304-CH00188, 1994 WL 649148 (Tenn. Ct. App. Nov. 18, 1994) (HIV status of child's uncle, who lived with child's father, was not a basis for limiting father's visitation rights); Steven L., 148 Misc. 2d 779, 561 N.Y.S.2d 322 (concluding that the mere fact that mother tested positive for HIV did not warrant change in custody from mother to father); Roe, 139 Misc. 2d 209, 526 N.Y.S.2d 718 (declining to compel father in custody dispute to submit to involuntary HIV test and noting that his potential diagnosis of AIDS would not justify removing children from his custody); Jane W., 137 Misc. 2d 24, 519 N.Y.S.2d 603; Conkel, 31 Ohio App. 3d 169, 509 N.E.2d 983. See also Doe v. County of Centre, 242 F.3d 437 (3d Cir. 2001) (concluding that county's policy of not placing foster children in homes with other HIV-positive children may violate the Rehabilitation Act and Americans with Disabilities Act).[11]

[11] Scholarly literature also supports the conclusion that a parent's HIV status is not relevant to a determination of the custody of his child. See e.g., Pierce J. Reid &

III. THE LOWER COURT ERRED BY FINDING EXTRAORDINARY CIRCUMSTANCES WERE PRESENT

The circuit court erred by concluding that Appellant's past temporary inability to serve as primary custodian for his children constituted "extraordinary circumstances" sufficient to overcome the well-established presumption in his favor, as the sole legal parent, that was recently reinforced by McDermott. Because Appellant herein is a father in a custody contest with his children's grandparent, Appellant's rights are of constitutional import and can be overcome only if Appellant is unfit or if "extraordinary circumstances exist which are significantly detrimental" to the children's remaining in Appellant's custody. McDermott, 385 Md. at 325, 869 A.2d at 754. Appellee presented no evidence showing that moving into their father's two-bedroom apartment would be detrimental to the children, let alone significantly so. While the lower court correctly found that the Appellant is fit to parent his children, it committed serious, reversible error by concluding essentially that Appellant's temporary inability to care for his children was an extraordinary circumstance meriting an award of custody to Appellee. (E. 2-309 – 310) Indeed, none of the evidence presented at trial, whether relating to Appellant's HIV or otherwise, supports a finding of extraordinary circumstances in this case.

Laura Davis Smith, *HIV, Judicial Logic and Medical Science: Toward a Presumption of Noninfection in Child-Custody and Visitation Cases*, 31 New Eng. L. Rev. 471, 489 (1997); Lauren Shapiro, *An HIV Advocate's View of Family Court: Lessons from a Broken System*, 5 Duke J. Gender L. & Pol'y 133 (1998).

The trial court clearly relied on Appellant's temporary, HIV-related health problems to justify awarding custody to the children's grandmother. Central to the court's decision was that Appellant enlisted the grandparent to care for his children at the time of their mother's sudden death. Specifically, the court concluded that this case presented "unusual circumstances" because when the children's mother died, and the father was ill, "the grandmother was able and ready to step right in and raise these three children in her home." (E. 2-309 – 310) The court observed that the children had suffered trauma, and "they were able to move right into their grandmother's home and not have to adjust to a home that they were not comfortable with."[12] (E. 2-310) Based on these findings, the court ruled that the grandmother had overcome the presumption favoring a parent and proceeded to conduct a "best interests of the children" analysis that treated the parties as if on an equal footing. Id.

As discussed above, McDermott clearly forbids the reasoning adopted by the circuit court in this case. A surviving parent's constitutional rights are not lessened by the tragic death of the other parent, nor do the late parent's parents gain rights from that event. Troxel, 530 U.S. at 68, 120 S. Ct. at 2061. McDermott also establishes that a parent's temporary absence or unavailability by

[12] Notwithstanding the sworn allegation in Appellee's custody complaint (E. 2-356), the evidence does not establish that the children ever *resided* with their grandparents prior to their mother's death and these proceedings. Appellee's own testimony only establishes that the children had stayed overnight on occasion – certainly not an unusual circumstance between grandparents and grandchildren – and that Appellee had provided childcare before and after school. See infra p. 30. The court cannot consider these highly ordinary circumstances as exceptional.

itself should not be construed as an extraordinary circumstance, and the facts of McDermott are quite analogous to those herein.

Like the father in McDermott, Appellant has always been an active and involved parent. The evidence presented at trial established that Appellant has been a constant presence in his children's lives. (See, e.g., E. 2-155 – 56, 2-187, 2-193.) After Appellant and his wife divorced, Appellant continued to reside with his children in the marital home on an every-other-week basis. (E. 2-156 – 57, 2-172, 2-187) This custody arrangement apparently was disrupted around August 2003 when Appellant was hospitalized for dehydration. (E. 2-164 – 167) [13] Appellant temporarily entered an assisted living facility in January 2004 to recover from his illness and adapt to a difficult medication regimen. (E. 2-178 – 180) Appellee does not dispute that Appellant saw his children regularly while he was staying at the facility, with his ex-wife bringing the children to visit him during the day. (E. 2-53) Appellant was living at that facility when his ex-wife was murdered by her brother's wife on February 10, 2004. Therefore, as in McDermott, Appellant was unavailable to provide primary custodial care to his children for a particular period of time, but not because of any wrongdoing, improper motive, or lack of love or care for his children.[14]

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[13] Appellee testified that B.G. did not share every-other-week custody when he was sick in 2001 (E. 2-42 – 43), but there is no evidence that he did not see his children during this period.

[14] The father in McDermott had several prolonged absences over a period of about four years, and was completely absent from his son's life during the periods when he was away. McDermott, 385 Md. at 327-30, 869 A.2d at 755-56. In contrast,

Because Appellant was not in a position to care for his children at the moment of their mother's death, he consented to the children staying with their grandparents until the end of school year. (E. 2-68, 2-181) However, the fact that Appellant enlisted Appellee to provide temporary care following their mother's unexpected death when he was recovering from illness does not entitle Appellee to legal or physical custody. See McDermott, 385 Md. at 324, 417-32, 869 A.2d at 753, 808-816; Sams, 256 N.W.2d at 573 (awarding custody to mother who had suffered from poor health and left her children with their grandparent for several months).

Indeed, at the time of trial in this case, Appellant was fully capable of assuming full custody of his children, according to an infectious disease specialist. (E. 1-74) In the months following his decision to allow the children to stay with their grandmother for the remainder of the school year, Appellant's health improved dramatically. By March 2004, he was in court, represented by an attorney, and asserting his right to custody of his children. (E. 2-251 – 272) Since April 2004, he has been residing in a two-bedroom apartment with sufficient space for his children (E. 2-178), has continued to pursue custody, and has continued to see his children regularly on weekends and for a summer vacation. (E. 2-188, 2-193)

Appellant B.G. has been involved substantially and consistently in his children's lives, including from the time these proceedings were commenced in February 2004 to the trial in August 2004. (E. 2-188, 2-193)

Courts have recognized that parents sometimes have health problems that cause them to be temporarily unavailable to their children. In Pitts v. Pitts, 181 Md. 182, 29 A.2d 300 (1942), a mother had undergone three operations and had been hospitalized for four months. Nonetheless, the Court of Appeals approved a custody modification in the mother's favor after her health had improved. In an analogous Louisiana case, the appellate court affirmed a physical custody award to a mother who had experienced substantial problems with substance abuse and depression. Timmons v. Timmons, 605 So.2d 1162 (La. Ct. App. 1992). In Timmons, the mother had been away from her children for a month of inpatient treatment and frequently left her children with a babysitter so she could attend Alcoholics Anonymous meetings. Id. at 1164-66. These cases acknowledge that the fact of parental illness or disability should not be too heavily weighted, that a parent's health problem, past or present, does not necessarily cause detriment to a child, and that parents should not be denied custody as they recover from illness. See also Weiss v. Weiss, 954 S.W.2d 456 (Mo. Ct. App. 1997) (ruling that wife's transitory depression did not justify overturning trial court's award of physical custody to her). Courts also have recognized that even when a parent will not recover, the best interests of the child can lie with a terminally ill parent. Matta, 44 Mass. App. Ct. at 946-47, 693 N.E.2d at 1063-65 (awarding physical custody to mother with multiple sclerosis who had no hope of recovery or improvement).

In light of these persuasive authorities, the weight and importance given by the trial court to Appellant's temporary illness was legal error and an abuse of

discretion. Moreover, this case is quite distinguishable from those instances in which children have resided with their grandparents or other third parties for years on end, without the parent making any effort to regain custody, and where such a change would be detrimental to the children because the only home they have always known suddenly would be taken from them. See, e.g., Ross, 280 Md. at 192, 372 A.2d at 594. Appellant's three children always have resided with their parents, see infra, not their grandparents, and only stayed in Appellee's home in early 2004 because of Appellant's temporary inability to care for his children while he recovered from an HIV-related illness.

The circuit court offered only one other unsupportable rationale for granting custody to the children's grandmother. (E. 2-309 – 310) The circuit court stated that Appellee "has been more than the normal grandmother to Byron, Brittany, and Brooke" and adopted the grandmother's self-serving description of herself as a "just like [the children's] mother" (E. 2-61), or, in the court's words, a "surrogate parent." (E. 2-309)[15] The court also noted that the children attended schools in close proximity to their grandmother's house, and that she had "provided both preschool care and after school care to all three children." (E. 2-309)

[15] The record contains no evidence that either parent ever intended Appellee to be a parent or that this was in fact her role or relationship to the children. At trial, Appellant's brother Marcellus testified that B.G. and his ex-wife had asked Marcellus and his wife Janet to be the children's godparents. (E. 2-220)

A grandparent's generosity with her time and care of grandchildren does not vest her with custodial rights reserved to parents. The record, including Appellee's testimony, clearly establishes that prior to their mother's death, the children never resided with their grandmother. (E. 2-37 – 39, 2-78) Rather, it is undisputed that the parents paid the grandmother to provide child care for the children while the parents were at work, which is a particularly strong indicator that Appellant intended to cede no rights. (E. 2-38 – 42, 2- 60 – 61, 2-77, 2-156) Further, Appellee concedes that during the weeks when he had custody, Appellant – seemingly without fail – picked up his children after work at about 5:00 or 5:30 in the evening and took them to his home, sometimes after dinner. (E. 2-41 – 42) The trial court's reasoning threatens to invest every day care provider with parental rights. See In re Hood, 252 Kan. 689, 692-94, 847 P.2d 1300, 1303-04 (1993).

None of these facts rise to the level required to rebut the high burden set forth in McDermott. The mere fact that a grandparent provides financial assistance, stability, or better schooling to a child does not constitute an "extraordinary circumstance" that overrides a fit parent's constitutional right to raise his or her child. McDermott, 385 Md. at 417-20, 869 A.2d at 808-09. When a contest is between a parent and a grandparent, it is not enough to conjecture that a grandparent might provide a better home. Id. at 435-37, 869 A.2d at 819. Thus, the lower court's finding that Appellee is a good grandmother does not establish

extraordinary reasons – involving significant detriment to the children – that justify depriving a father of his custodial rights.[16]

Further, the other record evidence submitted by Appellee but not explicitly referenced in the circuit court's decision offers no support for the court's finding of "extraordinary circumstances." Although the court heard extensive evidence and argument from Appellee and her family members regarding their opinions about Appellant's health (see, e.g., E. 2-121; 2-139), that evidence was irrelevant and insignificant. Specifically, the court heard testimony that Appellant once had boils on his face. (E. 2-59, 2-163) Appellee and her daughter Kim also testified that when Appellant picked up his children after work, he frequently would be tired, would lie on the couch, and would let Appellee cook dinner for the children. (E. 2-41 – 42; 2-139) Appellee also attempted to portray Appellant as extremely sick and constantly hospitalized. The trial court appropriately rejected this mischaracterization based on the medical evidence. (E. 2-191 – 200)[17] None of this evidence seriously challenged Appellant's fitness or indicated the existence of extraordinary circumstances.

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[16] The circuit court appears to imply that the mother's murder is in itself an extraordinary circumstance. (E. 2-309 - 310) However, the court heard no evidence suggesting that, because they suffered a trauma, Appellant's children are better off with their grandmother, let alone that it would be detrimental for them to live with their father.

[17] The trial court found that Appellant had been hospitalized approximately three times since 2000, each time for a couple of days. The court appropriately refused to find Appellant unfit based on these past hospitalizations. (E. 2-307 – 308)

The circuit court committed error by failing to follow the correct legal standard. It mentioned in passing the presumption in favor of a parent *vis a vis* a third party but expressly applied a "best interests" analysis in which the parent and grandparent improperly were placed on an equal footing. (E. 2-309 – 318) The court repeatedly referred to the alleged presence of "unusual" (rather than "exceptional" or "extraordinary") circumstances, which suggests a misunderstanding of the strength and height of the applicable standard. (E. 2-309, 2-310, 2-318) Moreover, the court did not apply the Ross v. Hoffman factors to determine whether an extraordinary circumstance exists. See Ross, 280 Md. at 191, 372 A.2d at 593-94. Perhaps most importantly, the court failed to identify any significant detriment to the children from having their father as custodian, as the law requires. See McDermott, 385 Md. at 325-27, 869 A.2d at 754. The lower court's order substantially infringed Appellant's parental rights, which are protected by the Due Process Clause, without adequate justification. The court did not identify any truly extraordinary circumstance or any significant detriment to the children that would result from parental custody, and its order must be reversed.

CONCLUSION

Illness and disability are common in parents throughout society. Indeed, in 1990, Congress found that 43 million Americans are living with disabilities and that the number is growing. See Americans with Disabilities Act, 42 U.S.C. § 12101. Nearly one million Americans, including hundreds of thousands of parents, are infected with HIV. The circuit court's reasoning in this case, including its failure fairly to apply the well-established presumption in favor of parental rights in third-party custody contests, implicates the rights of all these parents and their families. Courts must take special caution to ensure that the primary parent-child bond in these families is not eroded because of fear, bias, or inaccurate assumptions about HIV and illness. In this case, the circuit court essentially penalized Appellant for a temporary period of HIV-related illness. In declaring that he had lost his parental autonomy by arranging alternate care plans for his children, the order below also threatens all working parents who rely on day care.

For the foregoing reasons, *amicus curiae* urges this Court to reverse the lower court's decision and award custody to Appellant.

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June 2, 2005

Respectfully submitted,

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