Circuit Court for Anne Arundel County
Case No. C-02-FM-16-002665

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 32

September Term, 2020

NICOLE M. SKILES

v.

AARON J. SAIA

Fader, C.J.,
Nazarian,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: October 27, 2020

Again, we are asked to address how to balance a parent's fundamental right to travel against the overall best interests of her children in custody disputes. Although each custody decision turns largely on facts and circumstances of the families involved, legal determinations about parental constitutional rights are also weighty.

After an almost 8-year marriage, Nicole M. Skiles ("Mother") and Aaron J. Saia ("Father") went their separate ways. In doing so, Mother and Father agreed to joint physical and legal custody of their two minor children and adopted a schedule with alternating holidays and weekends. Mother and Father eventually both met new partners, and Mother's new partner lived in the state of Georgia. Mother approached Father several times about the possibility of relocating with the children to the state of Georgia, but Father refused to agree to the move and wanted to keep the current custody arrangement intact.

Eventually, Mother filed a motion requesting the circuit court to award her full physical and legal custody of the children and to approve her relocation to Georgia. Father responded by requesting a modification to grant him full physical and legal custody if Mother relocated to Georgia. After a hearing, the trial court denied Mother's proposed modification and ordered that to retain even her joint custody status, she must live within 20 miles of Father's current residence.

Mother submitted two questions[1] to this Court on appeal, which we rephrased:

> 1. Whether the court's order infringes on Mother's constitutional right to travel and imposes a constitutionally impermissible custody condition.
>
> 2. Whether the court abused its discretion when it imposed a 20-mile radius relocation restriction on Mother.

We answer question one in the negative, and reverse the radius requirement in question two for the reasons below.

FACTS AND LEGAL PROCEEDINGS

Mother and Father were married on June 14, 2008. During their marriage, they had two children, born in 2009 and 2012. On June 5, 2016, after almost 8 years together, Mother and Father physically separated, beginning the process of ending their marriage. They entered into a Marital Settlement Agreement ("MSA") on September 20, 2016, agreeing to "maintain joint legal custody of their minor children," as well as "joint physical custody of the minor children." In this MSA, Mother and Father agreed to a schedule:

[1] Mother's questions are as follows:

1. Does the lower court's order denying the Mother's request to relocate with the children to Georgia, and restricting the Mother from relocating the children further than 20 miles from the Father's home, infringe on the Mother's constitutional right to travel, and impose a constitutionally impermissible custody restriction?

2. Did the lower court err and abuse its discretion when it denied the Mother's request to relocate with the children to Georgia, and restricted the Mother from relocating the children from that 20 miles from the Father's home, when the Father had not pled any request for such a restriction, and the record below contains no analysis of the relevant facts and circumstances that resulted in the lower court's restrictive order?

> Every Monday & Tuesday, the children will be in [Mother's] . . . physical custody, barring any discussed holiday schedule that might interfere. Every Wednesday & Thursday, the children will be in [Father's] . . . physical custody, barring any discussed holiday schedule that might interfere. Every other Friday, Saturday and Sunday will be switched between [Mother] and [Father] respectfully.

Under this schedule, each parent had approximately half of the time with their minor children. A year later, on August 3, 2017, the parents agreed to the same custody agreement in a second MSA. Later, their Judgment of Divorce on September 21, 2017 "ratified and incorporated by reference" both prior MSAs, so their shared custody arrangement was reaffirmed once again.

Mother and Father both moved on with their lives after the separation, and found new romantic partners. Mother began dating Georgia resident Christopher Todd Bateman around August 2017. Father knew about Mother's relationship with Bateman, and Mother even brought the children to visit Bateman in Georgia a few times. Around February 2018, Mother expressed to Father that she wanted to move with their two children to Georgia. Father was not in agreement about the move: "I was not going for it. I can't be that far away from my kids."

Mother, pressing on, filed a Motion for Modification of Custody, Visitation, Child Support, and Other Related Relief in November 2018. Mother asserted that "the parties are no longer able to effectively communicate as it relates to legal custody decisions [a]ffecting the minor children." She requested full legal and physical custody, as well as permission to relocate with the children to Georgia. Mother stated concerns about Father's

"ability to properly supervise the minor children while in his care," that he "is not involved in the minor children's academics," and that he "refuses to monetarily contribute to the well-being of the minor children."

Father responded in January 2019, saying that the current custody agreement "is working in the best interests of the minor children." His counter-motion asserted that Mother's actions were not in the best interests of the children, but "the personal interests and desires of [Mother]," and requested "primary physical custody of the minor children in the event that [Mother] relocates to the state of Georgia."

Mother and Bateman welcomed a child in April 2019, and married soon after in August. The following month, Bateman bought a house in Georgia close to where he grew up, and where his parents currently live. Mother later found out she was pregnant with their second child together, due in March 2020.

Trial occurred in February 2020. Mother testified about the house Bateman bought in Georgia, and based on her internet research, she described the nearby schools as "four star schools" with high academic levels. Mother also said that there was a "lack of discipline" for the children occurring "[a]t their father's home," causing some behavioral worries in one of the children. Although she would be taking the children several states away, Mother mentioned that she planned to keep Father involved and informed, and welcomed him to visit at his convenience.

Even if her relocation was denied, Mother planned to retire from retail work so she could "put my kids, you know, more in gear." While her plan included leaving her current

residence no matter what happened with the relocation approval, she had not looked at anywhere in the area because "there are so many balls up in the air right now determining this case so as soon as this case is determined, that's when we are able to decide." She still wanted the custody schedule to change if she remained in Maryland, so she could have the kids "Monday through Friday" because "the school is going to change."

Father described the current custody arrangement by saying that "it works out good. It gives both parties equal time with the children, with our kids." He expressed that both he and Mother love the kids and are good parents. Despite communication problems between Mother and Father every now and then, he thinks that "for the most part, I do think we do communicate very well." Father was steadfastly against Mother moving with the kids to Georgia from the very beginning: "I felt like I was abandoned by my father when I was about 6 or 7 years old, and just knowing what that is like, not having that other parent around. I didn't want my children to go through that same phase, that same feeling." Father perceived no lack of discipline at his house and thought that he and Mother did not "have much difference in how we want to discipline the children." He did not think moving to Georgia would be in the best interests of the children: "They are excelling in their education. Their friends and family are here. They are not in Georgia. A part of me feels that this is more or less in the best interest of [Mother] than it is the children themselves."

At the end of the trial, the trial judge announced his decision: Mother's "motion to modify will be denied in part and granted in part," while Father's motion "will be denied." He said that they "are both wonderful parents," and found no issue with their parental

fitness. Although no one had requested a mileage restriction, the court ruled that Mother "may not establish a residence for the minor children more than a 20-mile radius from [Father's] current home."

After the trial, the trial court released a written order:

> **ORDERED**, that [Mother] shall not relocate the minor children . . . to a residence more than twenty (20) miles from the current residence of [Father]; and it is further
>
> **ORDERED**, that the parties shall continue to hold joint legal and physical custody of the minor children pursuant to the physical sharing schedule detailed in the parties' marital settlement agreements as incorporated but not merged in the Judgment of Absolute Divorce dated September 21, 2017.
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> ***
>
> **ORDERED**, that either party shall provide advance written notice of at least 90 days to the court and the other party of the intent to relocate the permanent residence of the party or the children either within or outside the State of Maryland.

Mother also received tie-breaking authority on "public school district/feeder system" decisions for the children, with the caveat that she would be "solely responsible for all custody exchange transportation" for the schools. This appeal followed.

DISCUSSION

I. Constitutional Right To Travel

Mother argues that the denial of her relocation to Georgia with the children—and the 20-mile radius requirement—infringe on her constitutional right to travel. Father responds that because her right to travel is qualified by the best interests of the children, the trial court's order does not infringe on her constitutionally protected rights.

We perform "an independent constitutional appraisal" because "[a] trial court cannot, in the exercise of its discretionary power, infringe upon constitutional rights enjoyed by the parties." *Braun v. Headley*, 131 Md. App. 588, 596 (2000). The "constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Id.* at 600 (citing *Saenz v. Roe*, 526 U.S. 489, 498 (1999)). But we bear in mind that "the right to travel is qualified, and must be subject to the state's compelling interest in protecting the best interests of the child by application of the best interests standard." *Braun*, 131 Md. App. at 602–03. As we have said in this context, "there are no absolutes other than the best interests of the child." *Id.* at 609 (cleaned up).

Domingues v. Johnson, 323 Md. 486, 501 (1991) stressed the fact-specific considerations for all custody cases:

> [T]he . . . difficulty of the decision-making process in custody cases flows in large part from the uniqueness of each case, the extraordinarily broad spectrum of facts that may have to be considered in any given case, and the inherent difficulty of formulating bright-line rules of universal applicability in this area of the law.

As the Court of Appeals explained, "[t]he view that a court takes toward relocation may reflect an underlying philosophy of whether the interest of the child is best served by the certainty and stability of a primary caretaker, or by ensuring significant day-to-day contact with both parents." *Id.* In that same vein, when "both parents are interested, and are actively involved with the life of a child on a continuing basis, a move of any substantial distance may upset a very desirable environment, and may not be in the best interest of the child." *Id.* at 502. The *Domingues* court quoted Professor Paula Raines, who wrote that

"moving children away from one parent, after a successful joint custody arrangement has been instituted, is rarely in a child's best interest." *Id.* (quoting Paula Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. Fam. L. 625, 630 (1985–86)).

The Court of Appeals also addressed a few additional considerations:

> In the present case, there was evidence that the father had a very close relationship and strong bonds with the children. Although the father did not have equal physical custody, he did have, and regularly exercised, extensive rights of visitation. As a result, the children spent substantial periods of time with each parent. The close relatives of the children, maternal and paternal, with whom the children had enjoyed close contact, reside in this area. Additionally, there was evidence that the attitude and conduct of the mother and her husband were likely to exacerbate the adverse effects of a physical separation of the children from their father, to the detriment of the children.
>
> The issue of stability cuts both ways in this case. Continued custody in the mother, the primary caretaker in fact, certainly offers an important form of stability in the children's lives. However, permitting the children to remain in an area where they have always lived, where they may continue their association with their friends, and where they may maintain frequent contact with their extended family, also provides a form of stability.

Domingues, 323 Md. at 502–03. The Court ultimately reiterated that the issue "is one that cannot be determined as a matter of law." *Id.* at 503.

Later, in *Braun v. Headley*, we addressed a mother's move from Maryland to Arizona, followed by her request to modify visitation, as well as the constitutional right to travel in terms of custody arrangements. *Braun*, 131 Md. App. at 592–93. At trial, the father testified that the mother "substantially and repeatedly interfered with his ability to

speak with the child." *Id.* at 595. The trial court awarded custody of the child to the father, "and reserved visitation with [the mother] 'until further order of this court.'" *Id.* at 596 (cleaned up). In her appeal, the mother argued, among other things, that the *Domingues* standard for analyzing a parent's relocation violated her constitutional right to travel. *Id.* at 597.

We agreed "that the constitutional right to travel should not be ignored in custody decisions involving the decision of one parent to relocate." *Id.* at 602. But we rejected the argument that the standard set in *Domingues* violated this right. We observed that cases from other states that "address[ed] the constitutional right of travel, and its interplay with the best interests standard *accord a lower priority to the constitutional right*, and in doing so, apply standards that are consistent with . . . *Domingues*." *Id.* at 603–04 (emphasis added). We acknowledged that *Domingues* did not directly address the constitutional right to travel but pointed out that "it did mention the right to travel in its opinion, and made reference to commentaries discussing the right." *Id.* at 608 (cleaned up).

We ultimately concluded:

> The approach taken by the Court of Appeals in *Domingues* sufficiently protects the constitutional right to travel because *it requires consideration of that right*, and gives the parent choosing to exercise that right an equal footing as the other parent with respect to the burden to show the best interests of the children.

Id. at 609 (cleaned up) (emphasis added).

In the present case, Mother reiterates the issues raised in *Braun*. She claims that prohibiting her "from relocating with the children . . . infringes on . . . her constitutionally

protected rights, particularly when the Mother articulated in her testimony the ways in which she would ensure the children will continue to have a meaningful relationship with the Father if she were permitted to relocate."

The circuit court weighed Mother's fundamental right to travel and the best interests standard while making its decision:

> This case involves some concepts of law and some constitutional rights . . . . The Supreme Court of the United States has clearly said that people have a constitutional right to travel; to live where they want, move where they want, et cetera, et cetera.
>
> But that is not an unlimited right . . . . [O]ne of the limitations on that is in the area of children, minor children and their custody, when the Court has the burden . . . to determine and temper [the best interest of the child] against the right to travel.

The court ultimately found that Mother's move to Georgia was "primarily in her interest, and although there are certainly beneficial aspects to the children for that move, it is not primarily for their interests in order to facilitate that."

In reaching its conclusion, the court appropriately addressed factors analyzing the best interests of the children, such as the benefits of joint custody, fitness of the parents, and relationship between the parents and the children. In denying Mother's relocation request, the court assessed the current arrangement to be in the best interests of the children: "[t]he decision is basically that those things that aren't broke you shouldn't try to fix . . . ." The joint legal custody arrangement, which the trial court found had already worked for years, was hampered by "the singular conflict of the relocation . . . ."

We see no violation of Mother's constitutional right to travel in the circuit court's denial of her relocation to Georgia based on its findings that it was not in the best interests of the children. The court adequately addressed Mother's right to travel, and Mother does not challenge the court's findings under the best interests standard.

Mother also challenges the constitutionality of the 20-mile radius (from Father's residence), relying on *Frase v. Barnhart*, 379 Md. 100, 125 (2003). In *Frase*, the Court of Appeals struck down a custody order that required a mother to apply for housing and relocate to a specific building. *Id.* After the circuit court found that the mother was a fit parent, "the court had no more authority to direct where she and the child must live than it had to direct where the child must go to school or what religious training, if any, he should have, or what time he must go to bed." *Id.*

Frase is inapposite. The trial court here did not order Mother to apply for a specific housing, nor did it direct which neighborhood Mother should live in or what kind of house she should have. In any event, as explained below, because we reverse the court's 20-mile radius order on non-constitutional grounds, it is unnecessary to decide its constitutionality.

II. The 20-Mile Radius—Non-Constitutional Challenge

Mother argues that the trial court abused its discretion by restricting her movement to a 20-mile radius because neither party asked for it, and the mile restriction is not reasonable. Notably Father never requested this, or any other specific radius at trial. His brief on appeal defends the restriction—arguing that the court acted within its discretion because Mother sought both relocation and modification of the custody agreement.

"[O]rders concerning custody and visitation are within the sound discretion of the trial court, not to be disturbed unless there has been a clear abuse of discretion." *Gizzo v. Gerstman*, 245 Md. App. 168, 199 (2020) (cleaned up). A trial court abuses its discretion "when no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles, or when the ruling is clearly against the logic and effect of facts and inferences before the court." *Id.* at 201. A trial court abused its discretion when denying a paternity petition and resolving a custody dispute without considering the biological father of the child to determine the best interests of the child. *See Sider v. Sider*, 334 Md. 512, 534 (1994).

In 2019, this Court overturned a custody order, finding that the trial judge abused her discretion in giving the father primary physical custody of the child. *Azizova v. Suleymanov*, 243 Md. App. 340, 344 (2019). In vacating the juvenile court's decision, we saw "not one scintilla of evidence . . . that linked the mother's behavior as a part-time worker and student to an adverse impact on [the child] or her development." *Id.* at 373. We rejected consideration of the mother's past behaviors that the child did not observe. *Id.* In remanding, we instructed the trial judge and parties to prove what is in the child's best interest with actual evidentiary support. *Id.* at 373–74.

We addressed mile restrictions in *Schaefer v. Cusack*, 124 Md. App. 288 (1998). In *Schaefer*, the parents were required to live within 45 miles of each other. *Id.* at 303. We reversed that requirement:

> In this case we have no findings or statements relative to the needs of the child in the imposition of this 45-mile limit. It

> does not necessarily follow that it should be permissible for the parents to be 44 miles apart but against the best interests of the child for them to be 46 miles apart. We hold that the best interest of the child can be determined better at the time a relocation is proposed than in an attempt to look into the future and to say now that the best interest of the child requires a present determination that a separation of the parents by more than 45 miles would have an adverse effect upon the child.

Id. at 307.

We apply similar reasoning here. Mother did not have a residence location selected in case the trial court denied relocation to Georgia. When stating its findings, the trial court did not make "findings or statements relative to the needs of the child in the imposition of this [20]-mile limit." *Id.* Nor did it provide any reasoning for the specific radius requirement. Its order just required that Mother "shall not relocate the minor children . . . to a residence more than twenty (20) miles from the current residence" of Father.

Although we appreciate that the trial judge sought to preserve for the children the lifestyle and stability currently existing, there is no evidence that this exact radius is necessary to do so. As we said in *Schaefer*, "the best interest of the child can be determined better at the time a relocation is proposed . . . ." *Id.* Nothing in the order or the trial court's findings supports an evidence-based conclusion that a specific 20-mile radius is in the best interests of the children.

Finally, by imposing an arbitrary mile limitation, the court placed Mother in an untenable position: even if she found a house located 22 miles away, she would be required to show a substantial change in circumstances—since the date of this order—to justify that

location. *See Gillespie v. Gillespie*, 206 Md. App. 146, 171–72 (2012) ("In the custody modification context . . . the burden is . . . on the moving party to show that there has been a material change in circumstances since the entry of the final custody order and that it is now in the best interest of the child for custody to be changed." (cleaned up)). That is an unreasonable and arbitrary burden to impose on Mother under these circumstances. Therefore, we reverse the 20-mile radius requirement because it was not within the discretion of the trial court.

Under Maryland law, a judge may require parties in a custody order to "provide advance written notice of at least 90 days to the court, the other party, or both, of the intent to relocate the permanent residence of the party or the child either within or outside the State." Maryland Code (1984, 2019 Repl. Vol.), § 9-106(a)(1) of the Family Law Article. The parties included this requirement in both of their MSA's, which were incorporated in earlier custody orders. The trial judge affirmatively reminded the parties of this by telling Mother and Father to "give certain formal notice of their relocation intentions, either inside or outside the state." This requirement in and of itself provides enough oversight for the court on any potential move Mother makes in the future**.**

CONCLUSION

In making our decision, we do not take the fundamental right to travel lightly and acknowledge its longstanding importance. Nevertheless, under settled law, the right is a qualified one, which is subordinate to the overall best interests of the child. We do not agree with Mother's contention that denying her the right to move the children to Georgia

violated her right to travel. We affirm the trial court's decision regarding Mother's relocation to Georgia.

Although we reverse the trial court's order that Mother must relocate within 20 miles of Father, we do not remand for proceedings to determine a specific radius that includes findings supporting it. The requirement to notify the court and other parent at least 90 days in advance provides sufficient safeguards to allow the trial court to determine the appropriateness of a relocation within the area when it is proposed and planned.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID THREE QUARTERS BY APPELLANT, AND ONE QUARTER BY APPELLEE.