Circuit Court for Montgomery County
Case No. FL-134248

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 501

September Term, 2017

MARIE POULIN

v.

RUSSELL CHOWDHURY

Kehoe,
Shaw Geter,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: May 10, 2018

After learning that appellant, Marie Poulin, intended to relocate to Texas with their minor child, appellee, Russell Chowdhury, filed an emergency motion to enjoin appellant from removing the child from Maryland. Following a hearing, the Circuit Court for Montgomery County granted appellee's motion. Appellant timely appealed and raises the following question for our review:

> I. Did the circuit court err in enjoining the primary custodial parent from relocating to another state, where the primary custodial parent took steps to protect the other parent's visitation access, and the visitation was not extensive?

For the reasons to follow, we affirm.

BACKGROUND

Appellant and appellee were married in 2014 and are the natural parents of K.C., a male child born in November 2015. Due to growing concerns over appellee's drug use, appellee moved out from their shared apartment, and appellant informed appellee that she intended to move their minor child to Houston, Texas, where the two would live with appellant's mother. On February 22, 2016, appellee filed a complaint for custody and child support, as well as an emergency motion to enjoin appellant from removing the child from Maryland. Following a hearing on the motion, the circuit court issued an order that "no-one shall remove [the minor child] from the state of Maryland until further order of [the] Court." Appellant filed a counterclaim for custody, child support, relocation, and other relief.

On October 17, 2016, the parties reached an agreement resolving the custody and visitation issues. The circuit court approved a consent order memorializing the agreement

three days later. Under the terms of the order, appellant received primary custody of the minor child, and appellee had the right to supervised visitation three days per week during the first year. The consent order provided that visitation would gradually increase on the condition that appellee remained sober. The order also provided that appellee submit to random drug testing. In the event appellee "tests positive or be considered a positive result for a final test . . . this will be considered a material change in circumstances and [appellant] will have temporary sole legal custody. [Appellant] may at her option and at her risk move to Houston, TX with the minor child and access will be supervised in Houston until further agreement or order of court."

On April 1, 2017, appellant, who is a registered nurse, notified appellee that she received a job offer with a higher paying salary in Texas. Appellant indicated that the increased income, in addition to reduced housing expenses and the opportunity to be around her family, justified relocating with the minor child to Texas. She did not, however, file a motion to modify the consent custody order that had previously been entered by the circuit court. In response, appellee filed an "Emergency Motion To Enjoin [Appellant] From Removing The Minor Child From The State Of Maryland."

The circuit court held a hearing on the motion on May 4, 2017. No testimony was taken. During the hearing, appellee's counsel argued that "if Ms. Poulin wishes to remove the child to Texas to live, it's my position that she would actually be in contempt of court without having done the appropriate thing, which in this case was to file a motion to modify her consent custody order[.]" Counsel observed that, under the terms of the consent order, "Ms. Poulin has the obligation on Tuesdays and Thursdays to actually bring the child to

the library in Montgomery County in Silver Spring . . . to Mr. Chowdhury who then returns him to her house." Since moving to Texas would make it impossible to comply with the court order, appellee argued that the only way for appellant to relocate to Texas is to file a motion to modify and prove there has been a material change in circumstances.

Appellant, on the other hand, concentrated on her constitutional right to travel. She maintained that she gave adequate notice to appellee prior to moving and that she attempted to work with appellee to protect his visitation time, which was not extensive. Appellant also argued that the change of address provision in the consent order, which provides that "both parties will notify each other of any change of address . . . within five days of any such change," authorized her to move to Texas.

At the conclusion of the hearing, the court held that the change of address provision, when viewing the consent order as a whole, did not permit appellant to move to Texas, especially when doing so would violate the clear and unambiguous visitation schedule. As a result, the court issued an order that enjoined appellant from removing the minor child to Texas, pending further order of the court. This appeal followed.

DISCUSSION

The Court of Appeals set forth four factors a court must consider when granting an interlocutory injunction in *Dep't of Transp. v. Armacost*:

> As a general rule, the appropriateness of granting an interlocutory injunction is determined by examining four factors: (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience" determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

299 Md. 392, 404–05 (1984) (footnote omitted). "[T]he party seeking the injunction must prove the existence of *all four* of the factors set forth in *Armacost* in order to be entitled to preliminary relief. The failure to prove the existence of even one of the four factors will preclude the grant of preliminary relief." *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 456 (1995) (citations omitted).

Appellant argues the circuit court erred by failing to make findings with respect to 1) appellees likelihood of prevailing on the merits, and 2) the balance of harm from a decision granting or denying the injunction. Next, the court's statement "[i]t's not enough to say that the mother has offered some other solution, one that would entail some schedule to which the parties did not agree and which the Court did not order" essentially shifted the burden to appellant. Finally, under *Domingues v. Johnson*, 323 Md. 486 (1991) and *Braun v. Headley*, 131 Md. App. 588 (2000), a custodial parent has the constitutional right to travel, and the non-relocating party will likely not prevail on the merits where the relocating party takes efforts to work with the non-relocating party to protect their visitation rights, especially where those rights are not extensive.

Appellee, by contrast, argues the circuit court made clear that the consent order prevented appellant from removing the minor child from Maryland, and that remaining in Maryland was in the child's best interest. Appellee also argues that appellant was, in essence, seeking a modification of custody because appellant raised the same argument in her counter-complaint, and that dispute was resolved when the parties entered into the consent custody order.

We have carefully reviewed the transcript of the hearing, as well as the court's subsequent order, and we agree with appellant that the court did not make a finding as to the likelihood of success on the merits. During oral argument, appellee argued that we could infer the likelihood of success factor from the court's statement "when the parties reach a [consent custody order] agreement like that, an agreement is presumed to be in the child's best interest[.]" We disagree. As *Armacost* makes clear, it was appellee's burden to prove the existence of all four factors. On the record before us—in the absence of a clear statement from the court, combined with appellee's failure to present any evidence at the hearing—we cannot say that the likelihood of success factor was articulated by the court. As such, there was no basis to grant injunctive relief, and we need not address the remaining factors.

This issue, however, is not dispositive because we view the nature of the court's order as one of enforcement, rather than one that is injunctive. The plain language of the consent order prohibited appellant from relocating to Texas: "[appellant] may also take other trips with the child (e.g. to Houston) with advance notice to [appellee]. . . . *But, these trips will not occur more than once every three months for a period of 1 week unless otherwise agreed by the parties*[.]" (Emphasis added). The only way for appellant to move to Texas is in the event of a material change in circumstances, which, according to the order, would occur if appellee failed a drug test:

> [S]hould [appellee] test positive or be considered a positive result for a final test for the substances set forth above on page 2 of this Order, this will be considered a material change in circumstances and [appellant] will have temporary sole legal custody. *[Appellant] may at her option and at her risk*

> *move to Houston, TX with the minor child and access will be supervised in Houston until further agreement or order of court*.

(Emphasis added). Compliance with the order, moreover, would have been impossible if appellant moved to Texas: appellee is entitled to visitation on Tuesdays and Thursdays at the public library in Silver Spring, and for a period of time on weekends. As a result, although the court's order was styled as one for injunctive relief, we shall affirm on the ground that its purpose was to enforce the prior consent custody order. *See Pope v. Bd. of Sch. Comm'rs*, 106 Md. App. 578, 591 (1995) ("[A]n appellate court will affirm a circuit court's judgment on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.").

The cases cited by appellant do not persuade us that a different result should follow. In *Domingues v. Johnson*, the mother filed a petition for modification of the existing order to modify the father's visitation schedule to accommodate her projected move with her new husband in San Antonio, Texas. 323 Md. at 489. Similarly, in *Braun v. Headley*, the custodial mother moved to modify visitation on the ground that she was moving from Maryland to Arizona. 131 Md. App. at 593. The father filed an answer and a counter-complaint for sole custody and/or for modification of custody. *Id.* While both courts acknowledged that a custodial parent has the constitutional right to travel, *Braun* held "that the right to travel is qualified," *id.* at 602, and *Domingues* emphasized that "the result depends upon the circumstances of each case." 323 Md. at 500.

Here, unlike *Braun* and *Domingues*, there is a prior custody order that prohibits appellant from traveling to Texas. Moreover, unlike *Braun* and *Domingues*, there was no

trial on the merits, and appellant had not moved to modify the custody order at the time of the emergency hearing. As such, both cases are distinguishable, and appellant's right to travel was not violated. The court's order enforcing the prior consent agreement and order was justified under the facts of this case.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.