Circuit Court for Cecil County
Case No. C-07-FM-16-000245

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0761

September Term, 2018

MARNI MACIEJEWSKI

v.

JOSEPH SUTTON

Fader, C.J.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: December 14, 2018

We are asked to determine whether the Circuit Court for Cecil County violated the due process rights of appellant Marni Maciejewski when it gave appellee Joseph Sutton sole custody of the parties' minor child during a hearing on Ms. Maciejewski's motion to postpone the parties' upcoming custody hearing. Because the court did not provide Ms. Maciejewski with notice that custody would be considered at the postponement hearing or a meaningful opportunity to be heard under the circumstances, and because the record lacks a factual basis supporting the reason given for the custody change, we vacate the custody order and remand for further proceedings.[1]

BACKGROUND

The marriage of Mr. Sutton and Ms. Maciejewski produced one minor child ("Daughter") before it ended in divorce in December 2017. Since the divorce, the parties have shared joint physical and legal custody under an arrangement in which Daughter spent alternating months with Ms. Maciejewski in Illinois and Mr. Sutton in Maryland pending a three-day custody hearing that had been scheduled to take place on June 20-22, 2018.

In April of this year, Mr. Sutton filed an ex parte request for immediate custody of Daughter in which he alleged, among other things, that he believed that Ms. Maciejewski was experiencing a high-risk pregnancy, would not be able to travel to Maryland for the June hearing, and would not return Daughter to Maryland. Ms. Maciejewski denied that her pregnancy was high-risk and asserted that Mr. Sutton's "pure speculation that [she] will not attend [the June hearing] d[ue] to pregnancy is completely unfounded and without

[1] Mr. Sutton did not file a brief or otherwise participate in this appeal.

any basis . . . ." The court denied the request. The court also denied an identical request Mr. Sutton filed the following month.

On June 19, the day before the custody hearing was to begin, Ms. Maciejewski filed an Emergency Request for Postponement in which she claimed that medical complications with her pregnancy had increased significantly in the past few weeks and precluded her from traveling to Maryland for the hearing. In support of her motion, Ms. Maciejewski submitted letters from two doctors recommending that she not travel until the birth of her child, expected in early August.

The circuit court held a hearing on the emergency motion that counsel for both parties attended. Ms. Maciejewski's counsel informed the court that his client's medical problems both prevented her from traveling and had interfered with his ability to prepare for the custody hearing. Mr. Sutton's counsel countered that Ms. Maciejewski's purported health problems were merely a "ploy" to postpone the custody determination until Daughter became enrolled in school in Illinois. Mr. Sutton's counsel also asked the court to reconsider Mr. Sutton's ex parte request for immediate custody.

After confirming that Mr. Sutton would be available to fly to Illinois to retrieve Daughter, the court said that it would only be willing to grant the postponement request if Daughter were returned to Maryland until Ms. Maciejewski's "health issues are resolved and the pregnancy is – well, she has her child." When Ms. Maciejewski's counsel objected to a change in custody without prior notice during the postponement hearing, the court stated that a change in custody was in Daughter's best interest because Ms. Maciejewski

"isn't able to fly" and "isn't able to get [Daughter] back for her visits." After additional objections by Ms. Maciejewski's counsel based on the lack of notice and absence of evidence supporting the change in custody, the court explained its belief that if Ms. Maciejewski was unable to fly to Maryland, "and given what the diagnosis is and what's going on, I don't see how she can care for the minor child." The court also expressed a concern that "[t]his case has dragged on too long."

The court denied Ms. Maciejewski's counsel's request for a stay pending appeal. The following day, the court entered a *pendente lite* order granting physical custody to Mr. Sutton and granting the postponement. Ms. Maciejewski immediately noted an appeal to this Court. We granted her motion for a stay pending appeal of the *pendente lite* order's "provisions affecting custody of the parties' minor child."[2]

DISCUSSION

We review a circuit court's child custody determination for abuse of discretion. *Petrini v. Petrini*, 336 Md. 453, 470 (1994); *In re Yve S.*, 373 Md. 551, 586 (2003). A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons[,]" *Levitas v. Christian*, 454 Md. 233, 243

[2] We take judicial notice that the records of the Circuit Court for Cecil County reflect that on October 15, 2018, Mr. Sutton's counsel filed a line asking the court to vacate the custody hearing scheduled for November 13, 14, and 15, 2018 because "there is an appeal pending in the Court of Special Appeals." Without opposition, the court granted that request on November 1, 2018. We lack insight as to why that hearing was canceled. Ms. Maciejewski's appeal from the *pendente lite* order did not deprive the circuit court of jurisdiction to enter a permanent custody determination, which likely would have mooted this appeal and prevented a further delay in achieving a permanent resolution of the parties' custody dispute.

(2017) (quoting *Neustadter v. Holy Cross Hosp. of Silver Spring, Inc.*, 418 Md. 231, 241 (2011)) (emphasis removed), or when it acts "without reference to any guiding rules or principles." *Santo v. Santo*, 448 Md. 620, 625-26 (2016) (quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). "[L]ack of notice constitute[s] a denial of due process and itself constitute[s] prejudicial error." *Van Schaik v. Van Schaik*, 90 Md. App. 725, 739 (1992).

THE CIRCUIT COURT VIOLATED MS. MACIEJEWSKI'S DUE PROCESS RIGHTS WHEN IT CHANGED CUSTODY WITHOUT PROVIDING ADVANCE NOTICE THAT IT MIGHT DO SO AS PART OF THE HEARING ON THE EMERGENCY MOTION TO POSTPONE.

Parents have "a constitutionally protected liberty interest in the care and custody of [their] children." *Burdick v. Brooks*, 160 Md. App. 519, 524 (2004). "Once it is determined that an interest is entitled to due process protection, the pertinent inquiry then becomes what process is due." *Id.* (quoting *Pitsenberger v. Pitsenberger*, 287 Md. 20, 30 (1980)). "[D]ue process 'does not require procedures so comprehensive as to preclude any possibility of error.'" *Burdick*, 160 Md. App. at 525 (quoting *Wagner v. Wagner*, 109 Md. App. 1, 24 (1996)). Rather, "due process merely assures reasonable procedural protections, appropriate to the fair determination of the particular issues presented in a given case." *Id.* "[A] denial of due process claim is tested by analyzing the totality of the facts in the given case." *Burdick*, 160 Md. App. at 525.

In the context of custody modification, due process requires that parents whose parental rights have not been terminated are afforded "notice and an opportunity to be heard" before a custody modification is made. Md. Code Ann., Fam. Law § 9.5-205(a).

"[U]nless . . . a party otherwise receives adequate notice of an issue during the course of a proceeding, due process is denied." *Van Schaik*, 90 Md. App. at 739 (quoting *Blue Cross of Maryland, Inc. v. Franklin Square Hosp.*, 277 Md. 93, 101 (1976)). To be sufficient, notice must convey to the parents that the court is contemplating making a custody decision. *Van Schaik*, 90 Md. App. at 738 ("It is clear that if a court is contemplating holding a hearing at which it will, or may, determine custody issues, a parent with custodial rights . . . must be notified that such an issue may be the subject of the hearing.").

Twice before this Court has addressed decisions in which a circuit court modified custody during a hearing in which the party adversely affected by the ruling lacked advance notice that the court might change custody. Both times we vacated the custody change. In *Van Schaik*, the hearing had been scheduled to address "visitation and child's possessions." *Id.* at 730. Although there was no discussion during the hearing of a custody modification and neither parent was aware that custody might be modified, *id.* at 739 & 730 n.4, the court nonetheless terminated the father's custody at the conclusion of the hearing, *id.* at 730. We held that the father's due process rights were violated. *Id*. at 739.

In *Burdick v. Brooks*, the court had scheduled a 15-minute status hearing that it specifically stated would not be a trial or include witness testimony. 160 Md. App. at 523. Ms. Burdick appeared with her counsel, who had only entered his appearance in the case earlier that day. *Id.* at 527. At the time, Ms. Burdick had been failing to cooperate with a psychological evaluation the court had ordered. *Id.* at 523. Concluding that it needed to "do something drastic" to coerce her cooperation, *id.* at 528, the court removed the children

from Ms. Burdick's custody over her objection, *id.* at 523-24. As in *Van Schaik*, we held that the court had not provided Ms. Burdick with adequate notice that custody might be altered during the status conference and, therefore, that her due process rights had been violated. *Id.* at 526. We also observed that the court's rationale for changing custody in an effort to coerce Ms. Burdick's compliance could "be described at best as punitive." *Id.* at 527.

Here, the June 19 hearing was called to address Ms. Maciejewski's request for a postponement, not custody. Prior to showing up at the hearing, neither party had any notice that the court would be considering altering the custody arrangement that day. To be sure, Ms. Maciejewski's situation is less sympathetic than that of the appellants in *Van Schaik* and *Burdick*. Unlike in those cases, Ms. Maciejewski's custody hearing was scheduled to begin the following day and, unlike in *Burdick*, her counsel was not new to the case. And we are sympathetic with the circuit court's frustration that Ms. Maciejewski appeared to be engaging at the very last moment in precisely the same behavior that Mr. Sutton had predicted two months earlier and that Ms. Maciejewski had, at that time, brushed off as baseless speculation. However, those differences do not alter the fundamental requirement that the court provide notice and a meaningful opportunity to be heard before changing the custody relationship. On these facts, the court did not do so.

Furthermore, the court's stated reason for changing custody at the postponement hearing—that Ms. Maciejewski's medical condition prevented her from caring for Daughter—appears to lack any basis in the record. Ms. Maciejewski's motion stated that

she was having "ongoing medical issues related to her pregnancy," including "preterm labor contractions" and "chronic kidney stones." As a result, she claimed, two medical providers had advised her against "traveling as it is not safe for her or the baby given her current complications and to prevent any further complications with her pregnancy and delivery." She thus asked the court to postpone the hearing until November 13, 2018, the next date on which the court was available.

The letters from her two medical providers were to the same effect. One identified the same medical conditions and said that Ms. Maciejewski "cannot fly/travel at this time and will not be advised to fly/travel until she delivers." The second letter similarly recommended that Ms. Maciejewski was "not suited to fly at this time due to" the kidney stones. Neither Ms. Maciejewski's motion nor the letters from her physicians identified any medical condition that precluded her from caring adequately for Daughter in Illinois.

Nor did Mr. Sutton identify any medical or other issues that would prevent Ms. Maciejewski from caring for Daughter in Illinois. To the contrary, Mr. Sutton's response to the request for postponement introduced an e-mail suggesting that Ms. Maciejewski did not actually have a high-risk pregnancy and that her kidney stones issue had been resolved. Mr. Sutton also pointed out that Ms. Maciejewski had flown to Maryland less than two weeks earlier and claimed that she was fully capable of doing so for the hearing. The record before the circuit court thus contained no support for the conclusion that Ms. Maciejewski was unable to care for Daughter pending giving birth.

We do not suggest that the court lacked any options when confronted by what it apparently viewed as a less-than-good-faith ploy to wait until the last second to seek a postponement of the custody hearing. Indeed, under the circumstances, the court would at least arguably have been acting within its discretion had it simply denied her emergency motion and proceeded with the hearing scheduled to commence the next day, with or without Ms. Maciejewski present. But what the court could not do is render a custody decision in connection with a hearing at which there was no notice that custody would be an issue, at which Ms. Maciejewski's counsel was not given a meaningful opportunity to argue the merits of the custody issue, and where the court's decision was made based on a rationale that lacked a factual basis in the record. We vacate the order and remand for further proceedings.

ORDER MODIFYING TEMPORARY CUSTODY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO PAID BY APPELLANT.