Circuit Court for Baltimore County
Case No. 03-C-09-012968

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1215

September Term, 2016

SHERIDAN MOHINI ROSE

v.

KENNETH SWENSON

Beachley,
Shaw Geter,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: June 22, 2017

For the second time, appellant, Sheridan Rose ("Mother"), appeals a consent order issued by the Circuit Court for Baltimore County concerning custody of a minor child ("G.") resulting from the dissolved marriage of Mother and appellee Kenneth Swenson ("Father"). On November 6, 2014, the circuit court issued its first consent order. When Mother appealed that order, a panel of this Court reversed the portions of the consent order that did not accurately represent the agreements of the parties and remanded to the circuit court. *Rose v. Swenson*, No. 2671, Sept. Term 2014 (filed Oct. 13, 2015).

On March 18, 2016, the circuit court held a hearing pursuant to the panel's instructions on remand; the court then issued its revised consent order on March 25, 2016, which is the subject of this appeal. We have consolidated and rephrased Mother's questions presented on appeal:

1. Did the trial court abuse its discretion in failing to reference Mother's tie-breaking authority during the summer months when she retains primary physical custody?

2. Did the trial court abuse its discretion by incorrectly representing the parties' agreement regarding telephone communication access?

3. Did the trial court abuse its discretion by limiting the people permitted to transport G. to only Kelsi Swenson and Priscilla Torres?

4. Did the trial court abuse its discretion by failing to accurately represent what the parties agreed to on the record?

For the reasons that follow, we reverse in part and affirm in part the judgment of the circuit court.

FACTS AND PROCEEDINGS

The parties are the divorced parents of G. On August 26, 2014, the circuit court held a hearing regarding petitions to modify the custody and access schedule as provided in the Judgment of Absolute Divorce. *Id*., slip op. at 2. During the hearing, the parties purported to reach an agreement, which the circuit court attempted to reduce to a consent order; that order was entered on November 18, 2014. *Id.*, slip op. at 3. Finding what she believed to be errors in the consent order, Mother moved to revise and requested a hearing. When the trial court denied her motion, Mother filed her first appeal. *Id*.

In her first appeal, Mother alleged that the trial court committed four reversible errors in its consent order: 1) that the court improperly deprived her of tie-breaking authority while G. would be in her custody; 2) that the court incorrectly ordered that Father could retain custody of G. for the first week of G.'s summer vacation; 3) that the court erroneously concluded that the parties agreed to a default time of 7:00 p.m. for telephone communication while G. was in the other parent's custody; and 4) that the court erred in stating that the parties agreed that only Kelsi Swenson could transport G. in accordance with the child access schedule.

In its unreported opinion, the panel first concluded that Mother could take an appeal from the consent order because the order "was inconsistent with the parties' oral Agreement[.]" *Id*., slip op. at 12. The panel quoted *Barnes v. Barnes*, 181 Md. App. 390, 411 (2008), where the Court of Appeals stated, "If there was no actual consent because the *judgment was coerced, exceeded the scope of consent,* or was not within the jurisdiction of

the court, *or for any reason consent was not effective*, an appeal will be entertained." *Rose*, slip op. at 8-9.

Holding the consent order appealable, the panel concluded that the circuit court abused its discretion with respect to tie-breaking authority and summer visitation, but declined to consider the telephone communication issue and who could transport G. in accordance with the access schedule. *Id.*, slip op. at 11, 13-14. Comparing the court's consent order to the transcript of the hearing, the panel stated, "The record demonstrates that the Consent Order did not reflect the parties' agreement regarding tie-breaking authority. To the contrary, there was no reference to [Mother] retaining tie-breaking authority during the summer months when she has primary physical custody of minor child G." *Id.*, slip op. at 11. With regard to summer visitation, the panel stated, "The record reflects that [Mother] did not agree to [Father] having the first week of summer" but noted how the consent order provided that Father "shall have the minor child in his care and custody the first week after school ends." *Id.*, slip op at 14. The panel concluded, "Given the inconsistencies between the oral Agreement and the Consent Order regarding tie-breaking authority and the start of summer visitation, [Mother's] Motion to Revise should have been granted." *Id.*, slip op. at 15. Additionally, the panel held that Mother properly requested and should have received a hearing on her motion. *Id.*, slip op. at 17.

Pursuant to the panel's opinion, the trial court held a hearing on March 18, 2016. At the hearing, Mother argued the same four issues that gave rise to the first appeal. At the conclusion of the hearing, the trial court issued its revised consent order dated March 25,

2016. Mother moved to alter or amend this revised consent order, alleging that the trial court had failed, once again, to employ language indicative of the parties' agreements. Following several subsequent motions and oppositions, the trial court denied Mother's motion to alter or amend. Mother timely appealed.

DISCUSSION

As noted previously, the law is clear that we may review consent orders that exceed the scope of the parties' consent. Because we hold that the revised consent order exceeds the scope of the parties' consent, the revised consent order, like the original consent order, is appealable. "[A] court's refusal to enter a consent judgment submitted by the parties is reviewable for an abuse of discretion." *Long v. State*, 371 Md. 72, 86 (2002).

I. Tie-Breaking Authority

A panel of this Court previously held the first consent order deficient because, "there was no reference to [Mother] retaining tie-breaking authority during the summer months when she has primary physical custody of minor child G." *Rose*, slip op. at 11. The revised consent order suffers from the same error; it states as follows with regard to tie-breaking authority:

> In the event the parties are unable to agree after a reasonable attempt to reach an agreement, then, in that event, *Plaintiff [Father] shall have tie-breaking authority to make the final decision.* (Tr., Aug. 26, 2014 at Pgs. 4-5) In the event that [G.] is in the Defendant's [Mother's] physical custody and an emergency ("urgent") issue regarding the minor child shall occur, then in that event, if an agreement cannot be reached between the parties, *Defendant [Mother] shall make the required emergency decision* in the best interest of the minor child and immediately advise Plaintiff [Father] of same. (Tr. Aug., 26, 2014 at pgs. 36-37)[.]

(Emphasis added). Rather than vest Mother with tie-breaking authority during the summer months when she retains primary physical custody of G., the revised consent order merely vests Mother with the ability to unilaterally make "emergency ('urgent')" decisions.

The trial court's revised consent order relies on, and even cites to, the record to support its language. Pages 4-5 in the transcript of the August 26, 2014 hearing consist of Father's former trial counsel stating the following: "If [the parents] are unable to come to a joint shared decision that is in the minor child's best interests related to a legal custody decision after consultation . . . [Father] will have the tie break, will have the tie breaking decision making authority." Later at that same hearing, however, Mother's attorney explained that,

> Tie breaker means that after reasonable efforts by both parties and sincere efforts by both parties to resolve any issues of dispute in reference to a particular item, that if you are not able to reach a decision that is satisfactory to both of you, *the person that has physical custody will make that decision.* The other person is then free to petition the Court to reverse that decision. That's what a tie breaker means.

(Emphasis added). Mother told the trial court, "It doesn't seem fair that [Father] would be the one to have the tie breaker." The trial court replied,

> Well, let me ask you this. If you have a tie -- . . . and it is an issue that needs to be decided -- let me say, let me use something extreme, a blood transfusion -- . . . and let's say one parent said no, I'm opposed to that and the other parent said, well, I think it should happen because it is medically indicated, and it is an emergency situation, somebody has got to make a decision.
>
> If the child is with dad the majority of the time during the school year, then if the parties can't *reach an agreement about major issues, educational, medical, et cetera, then it makes sense and it is consistent with what Courts have done in the past that that parent that has primary physical custody during the school year would make the decision.*

> *Now, in the summer when he's with you the majority of the time, when [G.] is with you the majority of the time, then if there is an issue, an urgent issue, you would discuss it with Mr. Swenson and if agreement couldn't be reached, my understanding is that you would make the tie breaking decision.* Why? Again because he is going to be primarily physically with you during that time period.

(Emphasis added). Mother told the court she was satisfied.

The trial court's revised consent order still does not comport with the record. The record shows that, at the August 26, 2014 hearing, Mother's attorney described tie-breaking authority as applying to "any issues of dispute in reference to a particular item." He stated that this authority would be determined by who had physical custody of G. The trial court then gave an example of an emergency issue—a blood transfusion. Yet when the court explained *Father's* tie-breaking authority, the court described that authority as applying to "major issues, educational, medical, et cetera"—not simply to emergencies.

The deficiency from the first consent order still remains in the revised consent order. That deficiency, as the panel's opinion explained, is that "there [is] no reference to [Mother] retaining tie-breaking authority during the summer months when she has primary physical custody of minor child G." *Rose*, slip op. at 11. The trial court improperly limited Mother's authority to only make "emergency decisions." Accordingly, the trial court abused its discretion by failing to capture the agreement of the parties—that Mother retain tie-breaking authority during the summer when she has physical custody of minor child G.

II. Telephone Communication

Mother next argues that the revised consent order provides terms inconsistent with the parties' agreements regarding telephone communication with G. We disagree.

The revised consent order provides, "During the hearing on March 18, 2016, Plaintiff [Father] *suggested the days of Monday, Tuesday and Thursday for telephone contact* at 7:00 PM in light of the minor child's schedule and studies *although Defendant [Mother] did not agree to be limited to those three days and times*[.]" (Emphasis added). We note, as did the trial court, that the parties never consented to only these three days for telephone communication.

At the first hearing, on August 26, 2014, Father's trial counsel told the court that telephone communication "will just be liberal and reasonable weeks but that it happen several times a week." At the remand hearing on March 18, 2016, Father apparently agreed that Mother should be permitted to call G. by cell or video chat several times a week. The trial court correctly retained the "reasonable and liberal telephone" access language from the first consent order, although it unnecessarily mentioned that the parties disagreed about permitting only specific days for such access. In short, while the trial court correctly stated in its revised consent order that the parties did not agree to specific days for telephone contact, this language was unnecessary and not binding on the parties. Given the highly contentious nature of this case, we urge the trial court on remand to only include in its consent orders terms to which the parties have expressly agreed.

III. Transportation

Mother next alleges that the trial court erred by indicating in its revised consent order that only Kelsi Swenson and Priscilla Torres are permitted to transport G. in accordance with the access schedule. Mother complains that Kelsi Swenson does not yet

have her driver's license, and that Priscilla Torres has moved and can no longer provide transportation. The trial court did not err. The parties could only agree on these two drivers, and the trial court accurately reflected this agreement in the revised consent order.

IV. "Agreement to Agree" and "Other Inconsistencies with Oral Record"

Finally, from what we can glean from her brief and reply brief, Mother argues that the trial court's revised consent order contains additional errors. First, according to Mother, the parties agreed that they would, in the future, reach agreements on several matters, including the logistics of telephone communication, and acceptable drivers to transport G. Regarding this "agreement to agree," we see no error in the revised consent order regarding promises to come to agreements. As we explained *supra*, excluding the language regarding Monday, Tuesday, and Thursday, for telephone access, the trial court otherwise accurately captured the extent of the parties' agreement regarding liberal telephone access. With regard to transportation issues, the trial court accurately represented the extent of the parties' agreement as of March 18, 2016.

Second, Mother argues that the language in the revised consent order which states that the order "resolves all outstanding issues in the above-captioned matter" inaccurately represents the status of the case because "[b]oth parties have several pleadings before the Circuit Court that are unresolved." Relying on the docket entries Mother provided in her record extract, we see no outstanding issues or pending motions as of the date of the March 18, 2016 hearing.

Finally, Mother argues that the language "the terms contained herein are in full force and effect as of August 26, 2014" causes confusion. We disagree. With the exception mentioned above regarding tie-breaking authority, the trial court accurately represented the agreement of the parties as of August 26, 2014.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED IN PART AND AFFIRMED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.