UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2233

SEPTEMBER TERM, 2014

TRACY J. FLECK

v.

ZACHARY L. PHIPPS

Eyler, Deborah S.,
Kehoe,
Bair, Gary E. (Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.
Concurring Opinion by Kehoe, J.

Filed: December 3, 2015

Tracy Fleck, the appellant, challenges an order of the Circuit Court for Cecil County holding her in contempt for violating the joint legal custody provisions of a marital settlement agreement ("MSA") that was incorporated, but not merged, into her judgment of divorce. The appellee is Zachary Phipps, Fleck's ex-husband and the father of their child.

Fleck presents five questions for review, which we have combined and rephrased:

> I. Did the circuit court exceed its authority by issuing an order purporting to sanction Fleck for contempt but actually modifying the MSA?
>
> II. Did the circuit court err by finding Fleck in contempt for having posted photographs of the minor child on Facebook and by awarding attorneys' fees for costs incurred with respect to that issue?

For the reasons to follow, we shall reverse the circuit court's order, including the award of attorneys' fees.

FACTS AND PROCEEDINGS

Fleck and Phipps were married on October 8, 2005. They have one child, a daughter, born on November 13, 2008. We shall refer to their child as "A." During the marriage, the parties lived in a house in Chesapeake City, which is in Cecil County, very close to the Maryland/Delaware border. On January 1, 2012, the parties separated. Fleck and A. remained in the marital home.

On March 25, 2013, when A. was four and a half years old, the parties were divorced. The MSA was executed that same day.

"Item 5" of the MSA gives the parties joint legal and shared physical custody of A. Fleck's residence is "deemed [A.'s] residence for educational purposes," so long as

Fleck continues to live within a sixty-mile radius of the marital home. A. is in Phipps's custody every Wednesday beginning after school (or at 11:45 a.m. if there is no school that day) until the start of school on Thursday morning; and alternate weekends, from Friday at 5 p.m. until Monday at 9 a.m. Phipps was living in Pennsylvania. Custody exchanges were to take place at Fleck's parents' house in Newark, Delaware, which was about equidistant from the parties' residences at the time.

Under the MSA, during the summer, each party is "entitled to two (2) consecutive or non-consecutive weeks of vacation" with A. In odd-numbered years, Phipps must notify Fleck of his vacation weeks no later than May 1 and Fleck must notify Phipps of her vacation weeks by May 15; that is reversed in even-numbered years.

"Item 6" of the MSA, entitled "Decisions Regarding Child's Welfare," states:

> The parties shall have joint legal and joint decision-making power with each other regarding the emotional, moral, educational, physical, and general welfare of the Child. It is the intention of the parties that each of them shall participate as much as possible in making all decisions with respect to education, medical treatment, illness, operations (except in emergencies), health, welfare and other matters of similar importance affecting the Child. Decisions with respect to the aforesaid matters shall not be made by either party in such a manner as to exclude the other from participation therein, and each party shall notify the other and invite the other to participate in any meeting or conferences with third parties which might affect such decisions, except in the event of an emergency. Each party shall, upon request, provide the other with medical, educational, and other records, notices or information which relate to any aspect of the welfare of the Child and execute any authorizations so that all information concerning each [sic] child shall be equally available to both parties.

"Item 7" addresses child support. Phipps is to pay $500 per month in child support to Fleck and "the cost of daycare/preschool expenses for the Child directly to the daycare/preschool provider." The parties agreed that, "at [that] time, the Child [would]

attend the Chesapeake Learning Center for a minimum of three (3) full days per week" and, if Fleck were to become employed, Phipps would pay for A. to attend that same preschool five full days per week.

"Item 26," governing attorneys' fees and costs, states, as relevant, that if "either party breaches any provision of [the MSA] . . . said party shall be responsible for any reasonable legal fees incurred by the other party in seeking to enforce [the MSA] which are awarded by a court of competent jurisdiction."

The Contempt Petition

On June 18, 2014, Phipps filed a petition for contempt in the circuit court. He alleged that Fleck had violated the MSA by withdrawing A. from the Chesapeake Learning Center ("the preschool") without his consent; enrolling A. in the Newark Charter School ("NCS") for kindergarten, to begin in September 2014, "without consulting [him] or having an agreement"; moving to Delaware with A. "without discussing same with [him]"; and scheduling a dentist appointment for A., with only 24-hours' notice to him, and then refusing to reschedule the appointment when he advised that he could not attend. He asked the court to order Fleck to comply with the MSA; to re-enroll A. at the preschool for the rest of the summer; to award him $750 in attorneys' fees; and to sentence Fleck to a term of incarceration for her violations of the terms of the MSA.

On June 23, 2014, the court issued a show cause order. It scheduled a hearing on the contempt petition for August 26, 2014. Fleck answered the contempt petition on July 3, 2014. She denied the allegations that she had violated the MSA.

On July 16, 2014, Phipps amended his contempt petition to add two more allegations that Fleck had violated the MSA. First, she made a doctor's appointment for A. without giving him adequate notice and when A. did not need to be seen by a doctor; and second, without his consent, she "posted numerous photos of [A.] on [the Facebook page for her photography business,]" some of which were "inappropriate" because they depicted A. "sitting with her legs open" and her underwear and her private parts visible.

On July 24, 2014, Fleck answered the amended contempt petition. She denied the allegations and, with respect to the Facebook photos, asserted that she had been posting pictures of A. on Facebook regularly for years without any complaint from Phipps and that Phipps's characterization of the photos was an "inflammatory misrepresentation[] to this Court."

The Contempt Hearing

The contempt hearing took place on August 26 and 29, 2014. In his case, Phipps testified and called one witness, his wife, Jaime Phipps ("Jaime"). In her case, Fleck testified and called one witness, her mother, Antonia Fleck ("Antonia"). The testimony and evidence introduced at the hearing largely pertained to the decision to withdraw A. from the preschool; the decision to enroll A. at the NCS; communications about medical appointments; and the Facebook photos. Because the court did not make any contempt

finding with respect to the preschool issue, we shall focus on the testimony and evidence regarding the latter three issues.[1]

1. Enrolling A. at the NCS for Kindergarten

On April 25, 2014, Phipps, Fleck, Jaime, and Antonia all were present at a doctor's appointment for A. After the appointment was over, the adults stood together talking outside while A. played on a playground. Phipps testified that he and Fleck discussed enrolling A. at the NCS for kindergarten (which was to start in late August 2014). Fleck told him she was going to move out of the marital home and into her parents' house, in Newark, Delaware, and that she planned to enroll A. at the NCS for kindergarten. Fleck asked him if he "would . . . be okay with that," and he replied that he thought the NCS was a "great school." Jaime corroborated Phipps's testimony.

The NCS is a very popular school, and there are so many more children whose parents want them to attend than there are slots that the school holds a "lottery" each year for open slots. Sometime after his April 25, 2014 conversation with Fleck, Phipps did some research about the NCS and learned that applications for the lottery had been due in

[1] In his contempt petition, and at trial, Phipps complained that Fleck had violated the MSA by moving to her parents' house in Newark, Delaware. There was no contempt finding concerning this allegation. Moreover, the MSA does not contain any language prohibiting either party from moving, or from moving without the consent of the other party. Indeed, the provision of the MSA that makes Fleck's residence controlling for where A. will attend school, unless Fleck moves beyond a 60 mile radius from the marital home, seems to anticipate that Fleck may move. Finally, Fleck's parents' house is a short distance from the marital home and is closer to Phipps's residence than the marital home is.

February of 2014. He became suspicious that Fleck had taken steps to enroll A. at the NCS without consulting with him. Phipps testified that when he brought this to Fleck's attention, she denied having entered A. in the lottery in February, but told him that A. had been admitted to the NCS. Phipps testified that he did not have a "problem with [the NCS]," but that he did have "a problem with the decisions being made without [him] being involved."

On cross-examination, Phipps acknowledged that Fleck may have told him about her plans to move out of the marital home earlier in 2014, but denied that she had said she was going to move in with her parents. He also denied that Fleck had told him before April 25, 2014, about any plans to enter A. in the NCS lottery.

Fleck testified to a starkly different account of events. In November of 2013, she told Phipps she no longer could afford to live in the marital home and she planned to move in with her parents by the summer. The marital home was on the market, but there had not been any offers. She told Phipps that if she could not sell it, she would lease it to tenants. In that same conversation, she and Phipps discussed the possible schools A. could attend in Newark, when she began kindergarten in August of 2014. Neither of them liked the public school near Fleck's parents' house. Fleck told Phipps that she would enter A.'s name in the lottery for the NCS, but that it was extremely hard to get in. They agreed that they would wait and see what happened with the lottery and, if A. did not get in, they would discuss whether Phipps wanted to pay for private school.

After the NCS lottery, Fleck received a postcard in the mail telling her that A. had been accepted. She notified Phipps. On March 12, 2014, she completed a "Certification

of Intent to Enroll" form for the NCS. On May 1 and 12, 2014, she and Phipps attended two NCS welcoming events for parents of incoming students. A. attended the May 12 event with them. Before starting kindergarten, the NCS required students to undergo an assessment. At the May 1 event, Phipps and Fleck together signed A. up to have her assessment on June 6. Fleck attended the assessment, but Phipps did not. According to Fleck, until he filed the contempt petition, Phipps never raised any concern with her about her moving to Delaware or A.'s enrolling at the NCS. A. started at the NCS a few days before the contempt hearing began. Antonia corroborated Fleck's testimony about the NCS.

2. Communication About Medical Appointments

In early March of 2014, the parties agreed that A. should be scheduled for her first dentist appointment with a particular dental office located near the preschool. On March 6, 2014, Phipps went to that dental office and scheduled an appointment for A. for March 20, 2014, at 8:30 a.m. He did not tell Fleck that he had made an appointment.

Four days later, on March 10, 2014, Fleck called the dental office to make an appointment for A. because A. was experiencing tooth pain. She was informed that Phipps had scheduled an appointment for March 20. Fleck cancelled the March 20 appointment and scheduled an appointment for the next day, March 11, at noon. According to Fleck, she did so because she did not want A. to wait until March 20 to have her tooth pain addressed. After Fleck scheduled the appointment, she sent Phipps a text message telling him about it and asking him why he hadn't told her about the

appointment he had scheduled for A. Phipps responded by text that he had meant to tell her, but had forgotten. He also sent a text saying he would not be able to attend an appointment the next day at noon and asking Fleck to reschedule it to a date and time when he could attend. Fleck did not respond to those text messages. Without telling Fleck, Phipps called the dental office and cancelled A.'s March 11, 2014 appointment. The next day, Fleck took A. to the dentist for her appointment and learned that the appointment had been cancelled. The dental office was able to accommodate her, however, and A. was seen that day. The dentist took x-rays and determined that A. was having tooth pain because her 5-year-old molars were coming in.

There also was testimony about a health incident that happened on Monday, June 30, 2014. That day, Phipps dropped A. off at the preschool in the morning, after she spent the weekend with him. Fleck was waiting at the preschool to take A. home.[2] She noticed that A. was "having a hard time walking." A. told Fleck that her legs hurt. When they got home, Fleck examined A.'s legs and observed two "baseball-sized welts" on her inner thighs. She asked A. what had happened to her legs, and A. replied that she had been at the beach and at a water park with Phipps.

A photograph showing abrasions on A.'s inner thighs was introduced into evidence. Fleck called A.'s pediatrician's office and asked for a recommendation for a cream to apply to the area.

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[2] Fleck was waiting there because Phipps insisted on taking A. to the preschool even though Fleck had the summer off and wanted A. to spend time at home instead of at the preschool.

The pediatrician's office called Fleck back that afternoon and told her that A. needed to be seen by a doctor. Fleck made an appointment for A. for 3:50 p.m. At 3:24 p.m., she sent Phipps a text message telling him she had made the appointment because of the "massive baseball size abrasions between [A.'s] legs that [Phipps had] neglected to tell [her] about." Phipps responded that A. was "chafed not hurt" and that it was from her "thighs ru[bb]ing together." He said he had applied "[c]ornstarch powder" to the area and it seemed to have helped. Phipps also asked why Fleck had waited more than thirty minutes after she made the appointment to notify him. (Phipps had called A.'s pediatrician's office to ask when Fleck had made the appointment; the office informed him that she had made the appointment at 2:43 p.m.)

Fleck took A. to the 3:50 p.m. doctor's appointment. The doctor wrote a prescription for an antibiotic cream and directed Fleck to apply it to A.'s thighs. Phipps did not attend the appointment.

Phipps testified that, since the parties' separation, he had attended 90 percent of A.'s doctor's appointments. He complained that Fleck would take A. to urgent care centers, rather than to the pediatrician's office, without justification, and that she did so for non-emergencies and with insufficient notice to him.

Fleck disputed this, saying she was the one who took A. to the doctor the vast majority of the time and that Phipps attended those appointments around 30 percent of the time. She described several recent instances when she had taken A. to an urgent care center, including once for tonsillitis and another time for an ear infection. Both times A.

was treated and prescribed antibiotics. She also testified that on six occasions Phipps had unilaterally scheduled doctor's appointments for A. without notifying her of them. Often, he made these appointments for dates and times when A. was scheduled to be with Fleck, not with him.

3. The Facebook Photos

Fleck had a fledgling photography business, for which she created a Facebook page. Phipps testified that in June of 2014 he looked at photos of A. that Fleck had posted on her photography business's Facebook page and found them to be "disgusting and appalling" and "highly inappropriate." He described them as "depict[ing] [A.] sitting in a chair with her legs spread showing her underwear, and in a couple of them her underwear is not covering her private area." He complained that Fleck had not asked him for permission to post the photographs. He could not believe that they were "open for public view." He characterized them as "child pornography" and said he would "never condone or allow any pictures even being taken of [A.] like this." Printouts of Fleck's Facebook page showing many photographs of A., including the challenged Facebook photos, were admitted into evidence.

At the conclusion of Phipps's case, Fleck's lawyer moved for judgment.[3] Among other things, he argued that the Facebook photos were entirely appropriate and that Fleck's posting them on Facebook did not violate any provision of the MSA. Phipps's

[3] At that point, Fleck's mother already had testified because Fleck had asked to call her out of turn. Her testimony did not pertain to the Facebook photos.

counsel opposed the motion and began to talk about the Facebook photographs. The judge interjected, stating, "You don't even need to address them."

The court denied the motion for judgment. With respect to the Facebook photos, the judge stated:

> I don't want to hear any more testimony about the photographs. I think posting those photographs shows a decided lack of judgment on mother's part, and I'm going to order at the end of the case that they be stricken from Facebook and any other site. It [sic] know they're out there, with access. . . .
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> But look at the prints of the photographs and they're – I don't think they're pornography, but they're close to obscene, and if they're on any other sites, they're going to be ordered stricken from there. There should be no further photos that show a little girl's underwear or anything else. I can't imagine the teasing that would occur by her peers, who – kids see stuff on Facebook all the time. There shouldn't be anything on there, not only for her peers, but for any stalker or somebody who's looking for a photo like that. They're not – they would be artistic if they were from the waist up, but they're not once the child sits down; and I was – I was horrified by the photographs. I almost stopped the hearing then to take care of them. We will take care of them now, and there will be no further testimony about the photographs. They're not going up. They're coming off the site. There will be no further photographs without approval from father that are posted.

Counsel for Fleck objected to the court's ruling that Fleck would not be permitted to testify about the Facebook photos. The court responded,

> I don't want to hear what she has to say. I think they're – I just said, it shows a decided lack of judgment in posting photographs where you can see a little girl's underwear, period. ***If she has something to say to rebut that, I don't want to hear it***.

(Emphasis added.) A moment later, the court added:

> Actually, I've indicated that the pictures are to be stricken, and I find them offensive. But there may be an attorney's fee issue involved, so I will let limited testimony in as to the photographs***. It's a foregone conclusion***

> ***what I think of them.*** I will hear testimony that may affect the assigning of the attorney's fees.

(Emphasis added.)

Fleck then testified. She explained that A.'s underwear was not visible in the Facebook photographs because A. was wearing bloomers over her underwear. She said that when she took the photographs, she was focused on "a moment in [A.'s] childhood of her hat blowing off." She "didn't see anything else" and "didn't know that they would have ever been interpreted any other way." She was "sorry that they were." She stated that if Phipps had simply "texted [her] or called [her] and asked [her] to take them down [she] would have." She explained that she had routinely posted pictures of A. on her Facebook page since 2012, when she joined Facebook. She testified that Jaime also belonged to Facebook and regularly posted pictures of A. on Facebook as well.

The Circuit Court Ruling

At the conclusion of the hearing, the court ruled from the bench. It held Fleck in contempt, stating that she had "failed to comply with the provisions of the joint custody order; to wit the photos on Facebook . . . , the actions surrounding the notification—surrounding the application to the Newark Charter School, and issues surrounding scheduling of urgent and emergency medical appointments, more so, the urgent appointments." Stating that it was "amending and clarifying the order," the court read into the record new provisions. It characterized the provisions of its order as a "supplement to the [MSA]" and directed Fleck *and* Phipps to comply "with these provisions as well as the terms of this order and the [MSA]." It stated that, if Fleck

complied, the court would purge her contempt. The court announced that Phipps would be awarded attorneys' fees, in an amount to be determined, for costs he incurred pertaining to the Facebook photos.

On October 3, 2014, the court entered an order in follow up to its oral ruling.[4] We quote in full the provisions of the order concerning joint decision-making about A. and about attorneys' fees:

> ORDERED that there shall be no communication with the minor child's dental and medical offices without notice to the other party first, unless the matter is an emergency, defined as life threatening, in which case the second call after a call to 911 shall be to the other party. Urgent matters that do not require an ER visit but should be dealt with right away shall be scheduled only after consultation with the other party, and accommodations should be made for the other party's schedule to enable that parent to attend;[5] and it is further
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> ORDERED that there shall be no educational decisions made without prior notice to the other party. If the parties are unable to make a decision, then mediation shall take place; and it is further

[4] The court's explanation of its contempt finding varied slightly from its oral ruling. It reads:

> [T]his Court hereby finds [Fleck] in contempt, to wit, she has failed to comply with the provisions of the joint custody order as well as the images of the minor she posted on Facebook and the actions surrounding the notification to [Phipps] as to school applications, and by issues surrounding scheduling of urgent and emergency medical appointments.

[5] During the judge's oral ruling, she explained that "[a]n ear infection is not life threatening. . . . Live-threatening [sic] is not breathing, and that's a 911 call." The court directed that, in the event that A. had a non-life-threatening, but urgent, medical problem, the parent having physical custody of A. at that time must call the other parent and discuss a treatment plan.

ORDERED that there shall be no written or electronic correspondence with the minor child's school without copies to the other party; and it is further

ORDERED that there shall be no expectation of summer school; however, any such recommendation by the child's school or a counselor shall result in productive conversation between the parents. If no decision is made, then mediation shall take place; and it is further

ORDERED that the minor child shall not be enrolled in any activity without notification to the other party, although each party may have one dedicated activity at any time with the minor child that is exclusively that parent's activity. For instance, if child requests that she have ice skating or gymnastics, as has occurred with just one parent, she may do so provided that there is notification to the other party BEFORE enrollment takes place, and photographs or videos of said participation shall be provided to the other party; and it is further

ORDERED that there shall be absolutely no photographs of the minor child posted on any web page or any type of social media without the express consent of both parents.[6] However, photographs taken in the course of an extracurricular activity (for instance, participation in a sporting event) by a non family member for publication in a promotional or periodical publication are permitted; and it is further

ORDERED that a parent coordinator shall be appointed to facilitate conversation and effect decisions between the parties. Should the parties not be able to determine issues with the assistance of the parent coordinator, then mediation shall take place; and it is further

ORDERED that failure to notify the other party by May 1 of that party's vacation dates constitutes a waiver of right of first refusal on vacation dates; and it is further

ORDERED that parties must work together on the child's chronic medical issues; everyone involved with this child must be consistent with

[6] In its oral ruling, the judge remarked that, although some of the Facebook photos were "very well done and artistic," Fleck had "no right to post that without [Phipps's] permission."

> regard to menu, snacks, exercise, and any other issues surrounding this situation; and it is further
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> ORDERED that [Fleck] shall pay unto [Phipps], attorney's fees in the amount of $2,359.62 (Two Thousand Three Hundred Fifty Nine Dollars and Sixty Two Cents)[7] for hours incurred by counsel regarding the issue of the photographs that were posted on [Fleck]'s professional Facebook page; and it is further
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> ORDERED that this court anticipates that there will be changes to the child's schedule during the course of her education. Should the need arise for different pick up/drop off sites and if the parties are unable to agree to said changes, the matter shall go to mediation; and it is further
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> ORDERED that this court shall purge the contempt after payment of the attorney fees to [Phipps]'s counsel and after a year of the parties working together successfully. The court notes that grounds for a change from joint to sole custody would arise if the parties are not able to do so.

(Emphasis in original.)

Fleck filed a timely motion to alter or amend the October 3, 2014 Order. She argued that the court exceeded its authority by modifying the MSA when there was no motion to modify pending, the court did not make a threshold finding of a material change of circumstances, and the court did not assess whether the modifications would be in A.'s best interest. She further argued that the court erred by ordering the parties to mediate certain future disputes and by ordering the appointment of a parenting coordinator. With respect to the Facebook photos, she argued that the court pre-judged

[7] As noted, at the time of the oral ruling, the judge stated that the amount of fees being awarded to Phipps was "to be determined." On October 1, 2014, counsel for Phipps filed with the court a "Line" and attached a copy of an invoice for "attorney's fees incurred by . . . Phipps, in the amount of $4,719.25" in the contempt action. The court awarded Phipps exactly half that amount.

the issue before she (Fleck) was allowed to put on any evidence; the court improperly substituted its judgment that the photos were inappropriate and bordering on the obscene for Fleck's judgment as a parent; the photos were not obscene as a matter of law; and the court's order prohibiting the parties from posting any photos of A. on social media was improper. Finally, Fleck argued that the award of attorneys' fees to Phipps for the costs incurred with regard to the Facebook photos issue was improper because he failed to put on any evidence of the amount of his fees at the contempt hearing and the amount of fees awarded was unreasonable.

By order entered October 27, 2014, the court appointed a parenting coordinator.

On November 12, 2014, the court denied Fleck's motion to alter or amend. This timely appeal followed. We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Fleck contends the trial court abused its discretion and committed legal error by entering the October 3, 2014 Order, for several reasons. Acting *sua sponte*, without notice and an opportunity to be heard, the court modified the joint legal custody provisions of the MSA, in a proceeding for contempt. The purge provision in the order, which requires the parties to "work together successfully" for a year, is improper because the purge is outside her control. In addition the court lacked authority to appoint a parenting coordinator and to order mediation.

Phipps responds that the October 3, 2014 Order is an appropriate "'ancillary order' entered for the 'purpose of facilitating compliance or encouraging a greater degree of

compliance with court orders.'" (Quoting *Dodson v. Dodson*, 380 Md. 438, 448 (2004)). It "put[] in place mechanisms meant to prevent further unilateral actions" by Fleck in violation of the joint legal custody provisions of the MSA and, thus, was intended, properly, to coerce her compliance. The court's appointment of a parenting coordinator and its directive that the parties mediate certain disputes also were within the court's authority, in Phipps's view.

"'In Maryland, custody orders entered by the consent of the parties are treated as final orders, subject to modification upon a sufficient showing of a change in the circumstances of the parties.'" *Green v. Green*, 188 Md. App. 661, 687-88 (2009) (quoting with approval from decision of the family law master); *see also* Md. Code (1984, 2012 Repl. Vol.), § 8-103(a) of the Family Law Article ("FL") (a court may modify a settlement agreement between spouses "with respect to the care, custody, education, or support of any minor child of the spouses, if the modification would be in the best interests of the child"). In other words, a final custody order, including an order establishing legal custody, only may be modified upon proof of a material change in circumstances and that the required modification would be in the best interest of the child.

Neither Phipps nor Fleck moved to modify the custody provisions of the MSA. Phipps filed a petition asking the court to hold Fleck in constructive civil contempt for

violating provisions of the MSA, as they then existed.[8] Unlike a custody modification proceeding, a civil contempt proceeding is not concerned with material changes in circumstances and the best interests of the child. It "is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties." *State v. Roll & Scholl*, 267 Md. 714, 728 (1973). It is remedial, not punitive, with the ultimate goal being "to coerce compliance with court orders for the benefit of a private party or to issue ancillary orders for the purpose of facilitating compliance or encouraging a greater degree of compliance with court orders." *Dodson*, 380 Md. at 448; *see also Roll & Scholl*, 267 Md. at 728 (civil contempt proceedings are "remedial in nature and . . . intended to coerce future compliance"); *Long v. State*, 371 Md. 72, 89 (2002) (same).

A contempt order issued in a constructive civil contempt proceeding must contain a lawful purge provision. Md. Rule 15-207(d)(2) (court shall issue a "written order that specifies the sanction imposed for the contempt . . . [and] specify[ing] how the contempt may be purged"); *Roll & Scholl*, 267 Md. at 728 ("penalty in a civil contempt must provide for purging"); *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 120 (2009) ("Absent a purging provision, the sanction is no longer coercive and remedial.").

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[8] Constructive civil contempt is a sub-type of civil contempt, which may be direct or constructive. *See State v. Roll & Scholl*, 267 Md. 714, 731-32 (1973). "Direct contempt is committed in the presence of the trial judge or so near to him or her as to interrupt the court's proceedings, while constructive contempt is any other form of contempt." *Hammonds v. State*, 436 Md. 22, 33 (2013) (citation omitted). There is no dispute that Fleck was found to be in constructive civil contempt.

The October 3, 2014 Order states that its provisions are a sanction for Fleck's contempt, and she only can purge the contempt by "working together successfully" with Phipps for a year to comply with the terms of the contempt order. We agree with Fleck that this is not a lawful purge provision. To be lawful, a purge provision must put "the keys to the prison in [the contemnor's] own pocket." *Jones v. State*, 351 Md. 264, 281 (1998). In other words, Fleck must have the ability to purge the contempt, on her own. The purge provision at issue conditions Fleck's ability to purge the contempt on Phipps's cooperation, however.

Moreover, the sanctions generally are not lawful because the October 3, 2014 Order modifies many joint legal custody provisions of the MSA, without a proper legal basis to do so. The October 3, 2014 Order sets forth nine directives governing the manner in which the parties must exercise joint legal custody of A. The order states that these provisions are "meant as a supplement to the [MSA]" and they are, in fact, a modification of the joint decision-making terms in Item 6 of the MSA. For example, the first provision requires that neither party "communicat[e]" with A.'s medical or dental providers without first notifying and consulting with the other party unless the situation is "life threatening." This provision plainly modifies Item 6 of the MSA, which requires the parties to work together to ensure equal participation "as much as possible in making all decisions with respect to . . . medical treatment [and] illness . . . (except emergencies)"

and prohibits the parties from making decisions about medical treatment in such a way "as to exclude the other from participation therein."[9]

Similarly, the fifth provision of the October 3, 2014 Order requires the parties to notify each other before enrolling A. in any activity, but permits each parent to have "one dedicated activity at any time with [A.]." The MSA does not require communication between the parties with respect to A.'s activities. This provision plainly modifies the custody order. The sixth provision prohibits the parties from posting any photographs of A. on social media without the other party's prior consent. As we shall discuss, *infra*, there are no provisions in the MSA about photographs of A., or about posting photographs. Thus, this also was a modification of the custody order.

Three provisions require the parties to mediate certain disputes if they cannot resolve them. In particular, if the parties cannot reach a decision about A.'s education, or about summer school, or about changes in pickup or drop off times, they must engage in mediation. Although Rule 9-205 authorizes a court to order parties to engage in non-binding mediation on "a petition for contempt by reason of non-compliance with an order

[9] The modified provision about medical and dental treatment plainly is not in A.'s best interest. As it is written, if A. experiences an urgent medical or dental injury, condition, or disease, but one that is not ***life threatening***, the parent having A. with him or her must accommodate the other parent's schedule before taking A. for treatment. So, if A. develops excruciating tooth pain (for which a root canal ends up being the necessary treatment), the parent having A. with him or her must consult with the other parent, cannot consult with the dentist before doing so, and must accommodate the other parent by scheduling the dental visit to enable the other parent to attend. If the other parent is three states away, is A. to remain in excruciating pain until that parent returns? It appears so. That is child abuse, and the provision requiring it is without question contrary to A.'s best interest.

or judgment governing custody," it does not authorize a court to order mediation as part of a contempt disposition. The MSA does not require mediation and this requirement modifies that order.

The court also directed the appointment of a parenting coordinator (and for the parents to mediate any issues the parenting coordinator could not help them resolve). This provision of the October 3, 2014 Order was effectuated by an order entered October 27, 2014. Rule 9-205.2 gives the circuit court authority to appoint a parenting coordinator in contested custody and visitation matters, in certain circumstances. A court may appoint a parenting coordinator *sua sponte* "during the pendency of the action" in which the custody of or visitation with a child of the parties is in issue, with the appointment to terminate "upon the entry of a judgment granting or modifying custody or visitation." Md. Rule 9-205.2(f)(1). Also, a court may appoint a parenting coordinator after the entry of judgment, but only with the consent of the parties. Md. Rule 9-205.2(f)(2).

Here, a final judgment was entered on March 25, 2013, granting the parties joint legal custody and shared physical custody of A., and no motion to modify the custody or visitation provisions of the divorce judgment was filed. The parenting coordinator was not appointed during the pendency of the action. And the parties did not consent to the

appointment of a parenting coordinator. Thus, the court did not have any authority to appoint a parenting coordinator.[10]

The court made all these modifications (and others) to the joint legal custody provisions of the MSA *sua sponte*, without notice to either party, without a showing of a material change in circumstances, and without any assessment of whether the modifications are in the best interest of A. *See Van Schaik v. Van Schaik*, 90 Md. App. 725, 738-39 (1992) (due process violation for court to change custody in hearing for which notice only stated that visitation would be addressed); *Sigurdsson v. Nodeen*, 180 Md. App. 326, 344 (2008), *aff'd*, 408 Md. 167 (2009) (material change in circumstances since entry of final custody order must be shown for court to change custody); *Taylor v. Taylor*, 306 Md. 290, 303 (1986) (best interest of child standard is "of transcendent importance" and is the "sole question" in family law disputes over custody of children).

To be sure, in a contempt proceeding, a court may issue an "ancillary order" to effectuate compliance with the order that has been violated. *See Dodson v. Dodson*, *supra*. The October 3, 2014 Order is not such an ancillary order. It is a wholesale modification of the joint legal custody provisions of the MSA.

II.

[10] The October 27, 2014 Order is captioned "Consent Order For The Appointment Of A Parenting Coordinator Upon Entry of Judgment." It is clear, however, that Fleck and Phipps neither requested nor consented to the appointment of a parenting coordinator before, during, or after the contempt proceeding.

Fleck contends the circuit court erred by finding her in contempt for having posted the Facebook photos. She maintains that the MSA did not prohibit posting photographs of A.; the court deprived her of due process of law by predetermining that her posting of the Facebook photos of A. was contemptuous before hearing her testimony; and the court ruled based on the judge's own personal, subjective opinion of the photos, rather than making an objective assessment of their content. She further argues that the court erred by awarding Phipps $2,359.62 in attorneys' fees, ostensibly for hours incurred by his counsel relative to the Facebook photos, as there was no breach of the terms of the MSA to trigger its fee-shifting provision; Phipps presented no evidence at the hearing on the issue of fees; and the "Line" filed more than a month after the hearing was not competent evidence to support the court's award of fees.

Phipps responds that Fleck was not deprived of due process of law at the August 2014 hearing because she had notice that the Facebook photos were at issue and the court permitted her to cross-examine him and to testify about the photos. He argues that the court acted within its discretion in awarding fees premised upon a breach of the MSA and that the fee award was reasonable.

In *Royal Investment Group, LLC v. Wang*, 183 Md. App. 406, 447-48 (2008), we explained:

> "Before a party may be held in contempt of a court order, the order must be sufficiently definite, certain, and specific in its terms so that the party may understand precisely what conduct the order requires." *Droney v. Droney*, 102 Md. App. 672, 684, 651 A.2d 415 (1995). Moreover, "one may not be held in contempt of a court order unless the failure to comply with the court order was or is willful." *Dodson*, 380 Md. at 452, 845 A.2d 1194 (2004).

> Civil contempt must be proven by a preponderance of the evidence. *Bahena v. Foster*, 164 Md. App. 275, 286, 883 A.2d 218 (2005). "'This Court will only reverse such a decision upon a showing that a finding of fact upon which the contempt was imposed was clearly erroneous or that the court abused its discretion in finding particular behavior to be contemptuous.'" *County. Com'rs for Carroll County. v. Forty West Builders, Inc*., 178 Md. App. 328, 394, 941 A.2d 1181 (quoting *Droney*, 102 Md. App. at 683-84, 651 A.2d 415).

The circuit court's finding that Fleck violated the MSA by posting photographs of A. on her professional Facebook page was clearly erroneous. As detailed above, the MSA contains two sections pertaining to joint custody of A.: Item 5, which sets forth the custody and visitation schedule, and Item 6, which governs "Decisions Regarding Child's Welfare." Item 6 states that the parties are to have "joint decision-making power with each other regarding the emotional, moral, educational, physical, and general welfare" of A., and goes on to describe the decisions the parties should not make "in such a manner as to exclude the other from participation," including those concerning A.'s health and education. It requires the parties to provide pertinent records to each other upon request.

Neither Item 5 nor 6 explicitly or implicitly prohibits the parties from posting photographs of A. on websites or any form of social media. The MSA plainly is not "sufficiently definite, certain, and specific in its terms" to have put Fleck on notice that posting photographs of A. on Facebook could result in a finding of contempt. Indeed, it is clear that the MSA did *not* prohibit Fleck from posting pictures of A. on Facebook or any social media site. Notably, Fleck *and Jaime* routinely posted photographs of A. on Facebook for years prior to the contempt proceeding. Fleck's decision to post photographs of A. on her professional Facebook page was not contemptuous and could

not serve as a basis for the court to impose sanctions. It follows that the award of attorneys' fees for costs incurred by Phipps relative to the Facebook photos must be reversed.

It is not necessary to delve into Fleck's due process argument, but we will comment as follows. The judge's remarks make plain that she decided the Facebook photos issue against Fleck before Fleck testified and that she had no use for Fleck's testimony on that issue. Nothing Fleck could say—including that in the photos A.'s private parts were covered by underwear *and* bloomers—was going to change the judge's already made up mind that the photos were "horrif[ying]" and "close to obscene." A bench trial in which the presiding judge announces, midstream, that she has decided an important issue against a party before that party has testified, and makes clear that she will ignore that party's testimony is plainly unfair. It is worth nothing that the judge declared that she "[did not] want to hear what [Fleck] has to say" before Fleck testified about *anything*. Although the comment was directed to the Facebook photos issue, one must question whether the judge's negative view of Fleck spilled over to the other issues in the case. Certainly, the judge's comments created a perception of bias.

We have reviewed the record in this case, including the Facebook photos. They depict A., then 5 years old, wearing a white sundress, cowgirl boots, and a straw hat. She is sitting in a chair in the middle of a field on a sunny day. Her legs are spread slightly and her bloomers are visible between her legs. She is sitting in a natural, relaxed position that is appropriate for a 5 year old. There is nothing sexual, prurient, provocative or in

any way improper about the photos. A.'s bloomers (and underwear) cover her genital area. No private part of her body is exposed. There is nothing "horrif[ying]" or "offensive" or "close to obscene" about the photographs.

III.

Ordinarily, we would remand this case to the circuit court to impose a lawful sanction for its contempt findings (other than the finding based on the Facebook photos). For the following reasons, we shall not do so and instead shall reverse the contempt order in full.

The two contempt findings by the court, other than the Facebook photos finding, were set forth in the October 3, 2014 Order as follows:

> [T]his Court hereby finds [Fleck] in contempt, to wit, she has failed to comply with the provisions of the joint custody order . . . and *the actions surrounding the notification to* [*Phipps*] *as to school applications, and by issues surrounding scheduling of urgent and emergency medical appointments.*

(Emphasis added.) These contempt findings are legally inadequate in that they are vague, nonspecific, and conclusory. The court did not resolve factual disputes before it, and made no *factual* findings of particular, identifiable acts or omissions on Fleck's part that violated any provision of the MSA.

Even if we were to surmise that the court rejected all of Fleck's testimony on the disputed facts, the contempt findings cannot be sustained, as they are not based on legally

sufficient evidence.[11] Fleck put A.'s name in the lottery for a spot at the NCS. Assuming (contrary to her own testimony) that she did not inform Phipps that she had done so, her action did not violate the MSA. The most that would happen if A. won the lottery (which she did) was that she would have an *opportunity* to enroll at the NCS—a school that both parents favored. Fleck told Phipps that A. won the lottery, and they decided to enroll her there. Fleck did not enroll A. in a school without consulting with Phipps and without his participating in the decision.[12]

As discussed, there were two "medical events" about which the parties testified. In one, Fleck made an appointment, one day in advance, to have A. seen by a dentist because she was experiencing tooth pain. She told Phipps about the appointment and he insisted that it be changed because he would not be available then—and he already had made a general dental appointment for A. for almost two weeks later, without telling Fleck. When Fleck would not change the appointment, because to do so would leave A. in pain, Phipps called the dental office and cancelled it, also without telling Fleck.

[11] Of course, we should not have to surmise what the court was thinking. We note that it is particularly troubling to surmise that the court rejected all of Fleck's testimony, as it appears to have done, because, for reasons already discussed, the court had made up its mind to reject Fleck's testimony before she took the stand, at least on the Facebook photos issue, which created the appearance that the court was biased against Fleck.

[12] One must question why, upon learning that his daughter had the remarkable good fortune to win the lottery for a position at a school that he considered excellent, Phipps's reaction was not to celebrate but to pursue a mission to determine whether Fleck had entered A.'s name in the lottery without his permission or knowledge (neither of which were required).

Fortunately, when Fleck took A. to the appointment, not knowing it had been cancelled, the dentist was able to see and treat A.

Under Item 6 of the MSA, each of the parties shall participate "as much as possible in making all decisions with respect to medical treatment . . . affecting" A. Decisions are not supposed to be made by either party so as to exclude the other from participating, and the parties are supposed to notify each other and invite the other's participation. Fleck did so. She informed Phipps that A. had tooth pain, so she had made a dental appointment for her the following day, and invited Phipps to attend. That is all the MSA required. Unfortunately, instead of being concerned that A. be seen as soon as possible for her tooth pain, Phipps petulantly cancelled the appointment without telling Fleck.

The other "medical incident" concerned welts that developed on A.'s thighs when she was at Phipps's house for the weekend and was playing on a water slide. The next day, A. complained to Fleck that the areas on her thighs hurt. Fleck called A.'s doctor for advice about a cream to apply to A.'s thighs so they would not hurt. Later that day, the doctor called back and told Fleck she would have to bring A. in to be seen. Fleck made an appointment and notified Phipps. His reaction was to insist that A. was "chafed not hurt," *i.e.*, that she did not need to be seen by a doctor, and to complain that Fleck did not give him enough notice of A.'s doctor's appointment (going so far as to call the doctor's office to determine precisely when the appointment was made). Fleck took A. to the doctor and the doctor wrote a prescription for a cream to apply to her thighs.

Fleck complied with the MSA's requirements in handling this medical situation as well. Both of these "medical events" involved situations in which A. was complaining of pain and needed to be seen by a doctor for that reason. Fleck notified Phipps and he had the opportunity to participate. It is not a reasonable interpretation of the MSA that if one parent is not able to change his schedule to attend an urgent appointment A. will remain in pain until that parent can be accommodated. That is *not* in A.'s best interest, and it is A.'s best interest that is "transcendent," as the Court of Appeals has made crystal clear. *Taylor*, *supra*, 306 Md. at 303.

OCTOBER 3, 2014 AND OCTOBER 27, 2014 ORDERS OF THE CIRCUIT COURT FOR CECIL COUNTY REVERSED. COSTS TO BE PAID BY THE APPELLEE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2233

SEPTEMBER TERM, 2014

TRACY J. FLECK

v.

ZACHARY L. PHIPPS

Eyler, Deborah S.,
Kehoe,
Bair, Gary E. (Specially Assigned),

JJ.

Concurring Opinion by Kehoe, J.

Filed: December 3, 2015

Although I reach the same results, my reasoning differs in some respects from that of the Majority.

First, I believe that the circuit court erred in entering an order of contempt in this case for the reason that the alleged behavior of Ms. Fleck did not, in my view, violate the terms of the parties' marital settlement agreement.[1] This conclusion makes it unnecessary for me to weigh in on the issue of the appropriateness or wisdom of Ms. Fleck's decision to display the photographs at issue in this appeal on her business's Facebook page. With that said, however, I do have some comments.

In its analysis, the Majority points out that both Ms. Fleck and Mr. Phipps have posted pictures of A. on their Facebook pages prior to their current dispute. I believe that it is important to bear in mind that the Facebook page in question is for Ms. Fleck's business. Access to it is not restricted to her "Facebook friends" but is available to anyone with a web browser. The photographs were not posted to keep friends and family current with what is going on in A.'s life but to assist Ms. Flack's efforts in marketing her photography business. What the parties post on their private, that is restricted-access, Facebook pages should not be the only consideration. Mr. Phipps has a legitimate interest in whether images of A. should be used for commercial purposes and, if so, how those images should be displayed in a web page available for public viewing. But Ms. Fleck has precisely the same interest. Mr. Phipps's invocation of the trial court's contempt power to resolve the parties' dispute would have been appropriate only if there

[1] For this reason, the award of attorney's fees in Mr. Phipps' favor must also be reversed.

were a term in the settlement agreement that specifically addresses the issue, and there is not.

Second, I agree with the Majority that those portions of the October 3, 2014 Order that were intended to *supplement* the custody provisions of the separation agreement in fact *modified* the terms of the agreement in substantive ways. The trial court should not have modified the terms of the agreement in this proceeding because Mr. Phipps did not seek this relief in his petition for contempt.

The last issue before us is whether the trial court erred in appointing a parenting coordinator. Maryland Rule 9-205.2(f) provides that a court may appoint a coordinator in "an action in which the custody of or visitation with a child of the parties is in issue and the court determines that the level of conflict between the parties with respect to that issue so warrants[.]" I believe that the terms of custody were at issue in the contempt petition and that the parties could have benefitted from a coordinator's assistance. However, I agree with the Majority that, after judgment is entered, a parenting coordinator can be appointed only with the consent of the parties. Rule 9-205.2(f)(2). When a parent withholds his or her consent, the trial court's hands are tied.