Circuit Court for Prince George's County
Case Nos. CAD1700157 & CAD1640045

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2514

September Term, 2019

SAYO EBRAHIM

v.

TAJU OSMAN

Berger,
Gould,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: February 19, 2021

Sayo Ebrahim ("Mother"), the appellant, challenges an order of the Circuit Court for Prince George's County holding her in civil contempt; modifying physical and legal custody of her minor child ("Child") with ex-husband Taju Osman ("Father"), the appellee; and directing her to pay Father's attorneys' fees. Mother raises the following questions, which we have rephrased slightly:

I. Did the trial court err by holding Mother in constructive civil contempt without providing a legal purge provision?

II. Did the trial court err by changing physical custody of Child from Mother to Father without Mother's having notice that modification of physical custody was at issue and without considering the relevant best interest factors?

III. Did the trial court err by awarding attorneys' fees to Father without evidence of the financial status or financial needs of the parties as required by Md. Code Ann., Fam. Law Art. § 12-103?

We answer the first two questions in the affirmative, and therefore do not address the third question. We shall vacate the court's order respecting contempt and convert the remainder of that order to a *pendente lite* order during proceedings on remand, as set forth in our "Conclusion and Disposition."

FACTS AND PROCEEDINGS

Child was born in 2013, during Mother and Father's marriage. This divorce case began on December 27, 2016, initially with a complaint for limited divorce and continuing with an amended complaint for absolute divorce.

In August 2017, a Judgment of Limited Divorce was entered that incorporated agreements of the parties regarding custody, visitation, and child support. Thereafter, on October 15, 2018, the court issued a Judgment of Absolute Divorce further incorporating

agreements of the parties resolving their divorce case, including provisions regarding custody, visitation, and child support. The Judgment of Absolute Divorce was entered on the docket on October 22, 2018 ("October 22, 2018 Judgment").

As relevant to this case, the October 22, 2018 Judgment granted "shared physical custody" of Child, with Mother having primary residential custody for school purposes, and granted joint legal custody of Child, with Mother having tie-breaking authority. The Judgment set forth a detailed visitation schedule. Father would have Child for alternate weekends until December 7, 2018, and thereafter for the first, second, and fourth weekends of each month, from Friday at 7:00 p.m. to Sunday at 6:00 p.m. Beginning in the Summer of 2019, the parties would have Child on alternating weeks, and for portions of Winter breaks, Spring breaks, and various holidays, including Father's Day and certain specified holidays. The October 22, 2018 Judgment established that the exchange point for Child would be the Landmark Mall in Alexandria, Virginia. (By the time the Judgment was entered, Mother was living in Virginia; Father was still living in Maryland.) Father was ordered to pay child support.

Notwithstanding that the October 22, 2018 Judgment characterized physical custody as "shared," under the schedule it set forth, Child was in Mother's physical custody over 75% of the time during the school year and 50% of the time during the summer, effectively giving her physical custody of Child.

About six months after the October 22, 2018 Judgment was entered, Father filed a motion for modification and/or contempt, asking the court to hold Mother in contempt for

denying him visitation and to change the exchange site.[1] The court issued a show cause order, after which Mother filed an answer, denying that she was in contempt and asserting that Father had violated the October 22, 2018 Judgment by not adhering to the visitation schedule. She also filed a motion to change legal custody from joint to solely in her and to modify the visitation schedule by increasing her time with Child, so Father "has access that he will actually utilize."

Father subsequently filed an amended motion for modification and/or contempt. He asserted that Mother was interfering with his access to Child and was refusing to share significant information about Child, specifically, his extra-curricular activities; and that Mother's new husband had threatened him during exchanges. He asked the court to hold Mother in contempt; remove the legal custody "tie-breaker authority provision"; reduce Mother's time with Child "during the summer months as a make-up for missed visits"; prohibit Mother from allowing third-parties to conduct exchanges; and award him attorneys' fees.

The hearing date for Father's motion for contempt and modification and Mother's response was rescheduled several times. The order resetting the date the last time directed that Child, then 6 ½ years old, be brought to the hearing.

The hearing went forward on December 17, 2019. Both parties testified, and Mother called her mother and a friend as witnesses. The evidence established that Mother and her husband were living in Aldie, Virginia; Father was living in Accokeek, Maryland; and

[1] At all times both parties have been represented by counsel, except Father filed his initial motion for modification and/or contempt *pro se*.

Child was in the first grade at Arcola Elementary School, in Aldie. As directed, Mother brought Child to the hearing. The judge had him sit in the front row at the outset. Apparently, Child left the court room when the rule on witnesses was imposed.

Father testified that, contrary to the terms of the October 22, 2018 Judgment, he was not given access to Child from November 2018 until January 2019; he saw Child once each in January, February, and March 2019; and he did not see Child from March 28, 2019 to June 28, 2019. He did have his four weeks with Child over the summer, however. Father estimated that he was denied 20 weekend visits by Mother. He explained that Mother sometimes was a "no-show" at the exchange site. He acknowledged that there were times he did not appear at the exchange site when he was supposed to but said that happened because Mother did not respond to his texts seeking confirmation that the exchange was taking place. He would not appear in that situation, and then she would text him to say she was waiting for him at the exchange site. He testified that sometimes he showed up at the exchange site at the designated time, but Mother texted him asking him to meet her at another location; sometimes he refused to do so. Father further testified that Mother did not tell him where Child was attending school; did not provide him adequate information about Child's ADHD diagnosis; and filed false protective orders against him three times to prevent him from seeing Child, one of which resulted in his having to miss Child's kindergarten graduation.

Mother testified that Father failed to show up for exchanges or would not wait for her if she was running late. (The exchange site was roughly 36 miles from Mother's home and roughly 24 miles from Father's home.) Mother denied missing as many exchanges as

Father was claiming she did. She acknowledged that in June 2019, during the week of Child's kindergarten graduation, she filed for a protective order against Father in which she alleged that, on April 13, 2019, he had made statements that caused her to fear for her and Child's safety. When it became clear from the testimony elicited that the parties did not see each other in April 2019, Mother testified that she had had difficulty recalling the date on which Father had made those statements. She also testified about the problems the parties had communicating, including, in her view, that Father used "apps" that she did not have so that she did not receive his communications.

Mother testified about the difficulty in getting Child to the exchange site in Alexandria by 7:00 p.m. on Fridays, as she had to drive home to Aldie from work at the Pentagon, pick up Child, and then drive from Aldie to Alexandria. She asked that the exchange site be changed to make it easier for her to reach. She also testified that to the extent Father was entitled to make-up time, she would be willing for that to take place during Winter and Spring breaks and in the Summer.

Mother's mother testified that she lives in Fairfax, Virginia and would be willing to have her house serve as the exchange site for Child. Mother's friend testified that she had driven with Mother to Landmark Mall twice in April 2019, and that they had waited 30 minutes, but Father had failed to show. While they were waiting, Mother attempted to reach Father by text messages.

In closing argument, counsel for Father asked the court to hold Mother in contempt; award Father make-up time for visitations he had lost; eliminate tie-breaking authority altogether; change the exchange location; and award Father attorneys' fees. Mother's

counsel responded that, if a contempt finding were to be made, a purge provision was required to be included.

After hearing testimony and arguments, the court made findings of fact regarding Mother's testimony, which it found to be inconsistent. It pointed out that she had stated in her protective order filing in June 2019 that Father had threatened to kill her and Child, but she had testified that, since October 2018, Father had not assaulted her. In addition, she had testified contradictorily about using a certain "app" to communicate with Father. The court also found that Mother had "used" the court system to obtain a protective order to prevent Father from attending Child's kindergarten graduation. The court found that Mother had interfered with Father's visitation and that she lacked credibility.

Without making any other findings (including resolving the question of how many visitations had been missed and for what reasons), the court held Mother in civil contempt for willfully, deliberately, and intentionally denying Father access to Child in violation of the October 22, 2018 Judgment. The court determined that Mother's interference with Father's visitation rights was a material and substantial change in circumstances making it in Child's best interests to modify physical and legal custody. The court ordered that 1) beginning "forthwith," *i.e.*, immediately, at the close of the hearing, primary residential custody would be changed from Mother to Father; 2) Child would remain in Father's custody until January 3, 2020; 3) a new visitation schedule would commence on January 3, 2020, by which Father would have primary residential custody of Child, and Mother would have visitation three weekends a month (in other words, physical custody would change to Father, and Mother would have visitation, under the same schedule as in the

October 22, 2018 Judgment); 4) legal custody would remain joint but tie-breaking authority would be changed from Mother to Father; and 5) the exchange site would be changed to the Union Bethel AME Church in Brandywine, Maryland, and, on any day that is closed, the exchange would occur at the police station on Wheeler Road in Alexandria. Finally, the court ordered Mother to pay Father's attorney's fees of $5,880 and suspended Father's child support obligation.

The court's written order memorializing these rulings was signed on January 7, 2020, three weeks after the hearing, and was entered on January 16, 2020 ("January 16, 2020 Order").

Mother filed a timely notice of appeal. We shall provide additional facts as relevant to our discussion of the issues.

DISCUSSION

I.

Contempt

Citing *Kowalczyk v. Bresler*, 231 Md. App. 203 (2016), Mother contends the court's contempt order was illegal because it did not provide a proper purge provision. Father responds that there was a proper purge provision because, once Mother complied with the directive to immediately transfer physical custody of Child to Father at the end of the December 17, 2019 hearing, she would "no longer be in contempt." Father is wrong.

"The contempt power is a tool available to a court to compel a person to act or not to act in a specified manner." *Droney v. Droney*, 102 Md. App. 672, 683 (1995).

> "A civil contempt proceeding 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. These proceedings are generally remedial in nature and are intended to coerce future compliance."

Dodson v. Dodson, 380 Md. 438, 448 (2004) (quoting *State v. Roll and Scholl*, 267 Md. 714, 728 (1973)). Because the purpose of civil contempt is to coerce future compliance and not to punish for past conduct, the penalty "must provide for purging; [meaning] *it must permit the defendant to avoid the penalty by some specific conduct that is within the defendant's ability to perform*." *Bryant v. Howard County Dept. of Soc. Servs.*, 387 Md. 30, 46 (2005) (emphasis added). *See* Md. Rule 15-207(d) (requiring that a constructive civil contempt order contain a sanction and purge provision).

We will "not disturb a contempt order [on appeal] absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed." *Kowalczyk*, 231 Md. App. at 209 (citation omitted). "[W]here the order involves an interpretation and application of Maryland statutory and case law, [we] must determine whether the lower court's conclusions are 'legally correct' under a *de novo* standard of review." *Walter v. Gunter*, 367 Md. 386, 391-92 (2002) (citation omitted).

In *Kowalczyk*, a contempt petition was filed in a domestic case. The circuit court held the mother in contempt for violating the terms of the court's custody order by engaging in unsupervised text messaging with the parties' minor child. The contempt order allowed for mother to purge herself of contempt by "abid[ing] by the modified provisions of the [visitation orders] as set forth below[.]" 231 Md. App. at 208. In the next paragraph, the court modified the existing visitation order "on a temporary basis" by denying mother

visitation or any access to or contact with the child "until further order of the Court." *Id*. Mother appealed, arguing that the contempt order was unlawful because it was punitive. *Id*. We agreed.

We reiterated that a civil contempt order must include a lawful purge provision, and that a lawful purge provision "affords the defendant the opportunity to exonerate him or herself, that is, to rid him or herself of guilt and thus clear him or herself of the charge[, and i]n this way, a civil contemnor is said to have the keys to the prison in his own pocket." *Id*. at 210 (quotation marks and citation omitted). We observed that the court's sanction for contempt and what purported to be its purge provision were the same, *i.e.*, suspension of mother's access to and contact with the child until authorized by the court. Because the sanction and purge provision were the same, "[t]here was no way for [the mother] to perform some act and thereby avoid the sanction." *Id*. (citation omitted). As, "[o]rdinarily, there cannot be a finding of [civil] contempt unless the contemnor has the present ability to comply with a proper purging provision[,]" we vacated the contempt order. *Id*. at 211 (citing *Dodson*, 380 Md. at 450).

We return to the case at bar. The court's contempt order stated:

> ORDERED, that [Mother] is held in contempt for willfully, deliberately and intentionally violating the Court's October 15, 2018 Order[2]; and it is further
>
> ORDERED, that [Mother] deliver the minor child forthwith to [Father] following the merits trial on December 17, 2019 to be in [Father's] custody until January 3, 2020[.]

[2] As noted, the Judgment of Absolute Divorce, which is what the court was referring to, was issued on October 15, 2018 and entered on October 22, 2018.

The court went on to state that, "having found that a material and substantial change in circumstances exists because the mother has frustrated the father's effort to visit with the minor child, it is in the best interests of the minor child for the Court to hereby modify [the prior order.]" The court then set forth the modifications.

The sanction and the purge provision in the court's contempt order were the removal of Child from Mother's physical custody to Father's physical custody immediately following the December 17, 2019 hearing until January 3, 2020. As in *Kowalczyk*, the court's sanction and the purge provision were the same, *i.e.*, denying Mother physical access to Child for a set time period. Because they were the same, there was nothing Mother could do to avoid the sanction, and therefore, the purge provision was unlawful. The sanction was punitive, as it could not be avoided.

Father argues that the purge provision was not unlawful because once Mother complied with the "purge," *i.e.*, did not have physical custody of Child for the stated time period, she would "no longer be in contempt." Father also suggests that because the purge provision was separate from the modification of custody paragraphs that followed, the purge provision was proper. Neither argument has merit.

As explained above, the point of a purge provision is to provide the contemnor in a civil contempt proceeding a means to avoid the sanction. Father's first argument fails to recognize this. One does not avoid a sanction by suffering through it until it is over. This is the point we were making in the *Kowalczyk* case. The order in the case at bar plainly imposed a sanction on Mother - - the forfeiture of time with Child she otherwise was entitled to - - without affording her a means to avoid it. She had "no ability to comply with

the purging provision and, by doing so, avoid the sanction." *Kowalczyk*, 231 Md. App. at 211. Accordingly, the sanction was punitive, not coercive.

Father's second argument - - that the subsequent paragraphs of the court's order modifying custody and visitation vitiated the unlawful purge provision - - makes no sense. There is nothing in the language appearing later in the order that afforded Mother a means to avoid the sanction imposed for the contempt.

As we explained in *Kowalczyk*, in a civil contempt, "[o]rdinarily, there cannot be a finding of contempt unless the contemnor has the present ability to comply with a proper purging provision." *Id*. at 211. Clearly, there also cannot be a finding of contempt if there is no proper purging provision at all. The court's finding of contempt and sanction were legally incorrect and an abuse of discretion, and, accordingly, shall be vacated.

II.

Modification of Custody

(A)

Mother contends the court erred by modifying physical custody of Child at the December 17, 2019 hearing, when she had not been given notice that the court would be considering modification of physical custody at that hearing. Father responds by acknowledging that he had sought only a change in legal custody but arguing that, by requesting a change in visitation in her response to his amended motion for modification/contempt, Mother "put physical custody into issue."

Legal custody is "the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major

significance concerning the child's life and welfare." *Taylor v. Taylor*, 306 Md. 290, 296 (1986) (footnote and citations omitted). Physical custody is "the right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent[.]" *Id.* Visitation, as the term still is used today, means the physical access the parent without physical custody has with the child. As noted, in this case, although physical custody was described in the October 22, 2018 judgment as "shared," the schedule that judgment set forth resulted in Mother's having physical custody of Child.

In the case at bar, neither party sought a change in physical custody in their pre-hearing filings and the record of the hearing makes plain that physical custody was not at issue.[3] At the outset of the hearing, Father's counsel advised the court that Father was seeking a holding of contempt, "makeup time for the contempt," and "modification of legal custody" that either would give Father sole legal custody or tie-breaking authority. Father testified that he wanted sole legal custody and a change in the exchange site. In closing argument, Father's lawyer asked that Mother be found in contempt and that Father be given tie-breaking authority with respect to legal custody. At no time did Father or his lawyer request a change in physical custody.

[3] In his initial handwritten *pro se* motion for contempt and/or modification, Father asked that Mother lose her right to custody for failing to follow the court's order. It is not clear whether he was referring to legal custody or physical custody. However, his subsequent amended motion, filed by his attorney, made no mention of physical custody. The only request in that filing relating to custody was to change Mother's tie-breaking authority, which of course concerns legal custody.

Likewise, Mother never pleaded for a change of physical custody and did not request a change in physical custody at the hearing. Father cites no legal authority to support his claim that Mother put physical custody at issue when, in her response to Father's filings, she asked for additional time with Child so Father actually could utilize his visitation, which she contended he was not doing. At most, that was a request by Mother that her physical custody be increased; it was not a request for a change in physical custody to Father. Moreover, at the beginning of the hearing, Mother's lawyer told the court that she was seeking a change in legal custody from joint to solely in her. Neither Mother's counsel nor Mother in her testimony asked for a change in physical custody or addressed physical custody.

During the hearing, after both parties had testified but before Mother's two witnesses were called, the court posed a somewhat cryptic question to Mother: what should her visitation rights be if Father were awarded custody? Mother, probably suspecting that the court's reference to visitation meant it was asking about physical custody, not legal custody, answered, "I don't think I can live with that."

In closing argument, Mother's lawyer asked the court to maintain joint legal custody with tie-breaking authority in Mother. Perhaps sensing from the court's strange question to Mother that it might be considering physical custody, even though neither party had raised or presented evidence about it, Mother's counsel said, "but we don't think a change in custody in terms of physical custody would be in the best interest of the child." After the court ruled from the bench changing physical custody from Mother to Father, Mother's lawyer objected, stating that neither party had requested such a change.

Mother relies on *Van Schaik v. Van Schaik*, 90 Md App. 725 (1992), to support her argument that the court's physical custody order should be vacated because she was not given notice that a change in physical custody would be at issue at the December 17, 2019 hearing. In that case, parents entered into a separation agreement providing that mother would have primary physical custody of child, legal custody would be shared, and father would have visitation. After the agreement was filed with the court, the child's appointed attorney requested a hearing on "visitation and other issues." *Id*. at 730. The notice sent to the parties stated that the hearing was on "visitation and child's possessions." *Id*. Upon receiving notice of the hearing, father's counsel met with father and contacted child's counsel. As a result of these contacts, father and his counsel understood that the hearing would involve visitation and "property issues." *Id*. The record reflected that no one – neither the parties nor child's counsel - requested a change in custody. At the end of the hearing, the circuit court terminated the father's joint legal custody of child. *Id*. Father appealed.

This Court vacated the judgment on the ground that the court had failed to provide adequate notice to the parties that custody would be at issue at the hearing. We stated:

> 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, or one who has the right to claim custody, must be notified that such an issue may be the subject of the hearing. The notice in the case at bar did not notify either parent that the court was contemplating making a custody decision. Neither parent had asked for a change in custody or for a custody determination. . . . [T]he record reflects that, until the court made its ruling on custody at the conclusion of the hearing, neither parent was aware that the hearing was in any way concerned with the matter of custody. *See Blue Cross of Maryland, Inc. v. Franklin Square Hosp.*, 277 Md. 93, 101 (1976), and cases therein cited, where the Court of Appeals stated: "[U]nless . . . a

party otherwise receives adequate notice of an issue during the course of a proceeding, due process is denied." (Citations omitted.) In *Phillips v. Venker*, 316 Md. 212, 222 (1989), the Court stated:

> [I]t is axiomatic that they were entitled to adequate *notice* of the time, place, and *nature* of that hearing, so that they could adequately prepare.
>
> Counsel for the plaintiffs was not given any meaningful opportunity to review his file, collect his thoughts, or otherwise prepare for oral argument. That he was able to participate in some fashion in the argument the trial judge insisted be held does not suggest that he was able to participate effectively. [Emphasis added. Citations omitted.]

See also Sullivan v. Ins. Comm'r, 291 Md. 277, 284 (1981) ("[T]he court may not act without notice under circumstances where, on motion of a party, notice would be required.").

> It cannot even be reasonably argued that Van Schaik had an opportunity for effective argument on the issue of custody when there was no notice at all that it would be considered nor any discussion during the hearing itself of that issue. Appellant's first notice that custody was to be determined was when he was divested of it in the court's decree at the conclusion of the hearing.
>
> The lack of notice constituted a denial of due process and itself constituted prejudicial error.

Id. at 738-39.

Van Schaik is on point and leads us to conclude that the court's decision, at the December 17, 2019 hearing, to change physical custody of Child from Mother to Father was made in violation of Mother's due process rights. Mother was given no notice whatsoever before that hearing that physical custody of Child would be at issue so that she could lose physical custody of Child. Neither she nor her counsel had an opportunity to prepare to be heard on that issue. Indeed, neither party was on notice that physical custody would be considered, and for that reason, neither party addressed that issue in their

evidence or their arguments. The only allusion to physical custody was the court's enigmatic question, half-way through the hearing, suggesting that physical custody might be on the judge's mind. Clearly, that was not notice to anyone.

The court changed physical custody of Child from Mother to Father when neither party was on notice that physical custody would be considered at the hearing. Clearly, the inability to engage in any preparation to address physical custody and to submit any evidence on the issue not only violated Mother's fundamental due process rights but seriously prejudiced her.

(B)

Mother also argues that the court erred by changing physical custody of Child without considering the best interest factors set forth in *Montgomery County Depart. of Soc. Servs. v. Sanders*, 38 Md. App. 406 (1977). Father maintains that there was some evidence before the court as to each of the relevant *Sanders* factors and case law holds that a court need not expressly address each factor to have considered them. Even though we already have held that the custody modification must be vacated, we briefly shall address this issue as well.

It is well-established that to modify a final custody order, a court first must find a material change in circumstances; and that finding will trigger an analysis of whether changing custody is in "the best interest of the child." *Braun v. Headley*, 131 Md. App. 588, 610 (2000) (citations omitted). Although consideration of what is in the best interest of the child will vary depending upon the facts of each case, in *Sanders*, this Court set out ten non-exclusive factors that, to the extent relevant, the court should consider in making

custody determinations: 1) fitness of the parents; 2) character and reputation of the parties; 3) desire of the natural parents and agreements between the parties; 4) the ability to maintain natural family relations; 5) preference of the child; 6) material opportunities affecting the future life of the child; 7) age, health, and sex of the child; 8) residences of parents and opportunity for visitation; 9) length of separation from the natural parents; and 10) prior voluntary abandonment or surrender. 38 Md. App. at 420.

Here, at the conclusion of the evidence and arguments, the court ruled from the bench, making findings of fact and then modifying legal and physical custody. Virtually all of the court's findings rejected facts testified to by Mother about what happened during the exchanges, the parties' difficulty communicating because of the "apps" they were using, and about how, when Child was returned to her on Sunday nights after visitation with Father, he had to stay up late doing homework because Father would not help him with his homework. The court found that Mother did not have a basis to seek a protective order against Father, and her doing so interfered with Father's ability to attend Child's kindergarten graduation. Finally, the court concluded that Mother had intentionally frustrated Father's efforts to visit with child. The court found that that was a material change in circumstances.

Assuming that finding was not clearly erroneous, and if the issue of modification of a final order of physical of custody were before the court, which it was not, the court was required to consider the best interests of Child before modifying custody. It did not do so. This is not a situation where the court touched on factual matters mirroring some of the *Sanders* factors but did not expressly identify the factors it was considering. Rather, the

court said nothing relevant to what custody arrangement would be in the best interests of Child. Immediately upon the court's rendering its surprising ruling changing physical custody, counsel for Mother brought to the court's attention that a best interest analysis was necessary for a change in custody. Even after this reminder, the court did not engage in such an analysis.[4]

We note that, with no discussion, the court changed the exchange location for Child from Landmark Mall, in Alexandria, Virginia, to a location in Brandywine, Maryland that is *east* of Father's home in Accokeek, in the opposite direction of Mother's home. The new exchange location in Brandywine is approximately 58 miles from Mother's home in Aldie, Virginia, and approximately 12 miles from Father's home. Given that Mother's home is approximately 53 miles from Father's home, to pick up Child at the new exchange location, Mother must drive five miles farther than she would have to drive to go directly to Father's home. Neither party asked for the exchange location to be changed to Brandywine and there is no sensible reason that can explain why that change was made.

In their briefs, the parties do not discuss the court's decision to change tie-breaking authority from Mother to Father with respect to legal custody. The court gave no reason for that change and no explanation for why it would serve Child's best interests. Because we are vacating the order with respect to physical custody, we also shall vacate the order

[4] Given that neither party was afforded notice that physical custody would be at issue at the hearing, and therefore neither party put on evidence related to the *Sanders* factors or argued about them, the court did not have before it the facts necessary to conduct a best interest analysis in any event.

with respect to tie-breaking authority for legal custody, so those issues may be addressed together on remand.

CONCLUSION AND DISPOSITION

In the January 16, 2020 Order disposing of Father's motion for modification/contempt, the court failed to impose a legal purge provision when holding Mother in civil contempt, modified physical custody of Child on the spot when physical custody was not before it and without considering Child's best interests, modified legal custody without explaining why, and changed the visitation exchange location to make it substantially farther away from Mother's home and substantially closer to Father's home.[5] We understand from the court's findings that it was displeased and frustrated with Mother for what the court perceived to be her intentional interference with Father's visitation rights and for having filed for a protective order against Father without basis. Unfortunately, we cannot help but conclude that the court's rulings, especially on contempt and physical custody, were made to punish Mother and were not the product of considered decision of the issues properly before it.

As was confirmed during oral argument before this Court, the court's modification of physical custody of Child "forthwith" at the end of the December 17, 2019 hearing caused an abrupt, unanticipated change in Child's primary residence from Mother's home

[5] Physical custody was capable of being changed immediately because Child had been brought to the hearing at the direction of the court. During oral argument before this Court, counsel for Father posited that the court had made that direction so it could interview Child if necessary. The court did not interview Child. Given the issues properly before the Court - - contempt and legal custody - - we fail to see any reason why the court would have needed to interview Child.

in Virginia to Father's home in Maryland, and further resulted in Child's changing schools, suddenly, in the middle of the year. These major changes in his life were imposed without any consideration of how they would affect him. The person whose best interests always are transcendent in family law cases involving children was not even on the court's radar screen.

On remand, the issue of contempt will not be considered because Mother fully suffered the contempt sanction that was imposed, having no way to purge it.

Because physical custody was changed without factual or legal basis, the issue of physical custody will be before the court on remand, as will the related issues of visitation (including site of exchange), legal custody, and child support. More than a year has passed since physical custody was changed, which is a long time in the life of a young child. Whether or not there was any material change of circumstances when physical custody abruptly was modified on December 17, 2019, the court's change of physical custody then, and the continuation of that change for over a year, are themselves material changes in circumstances. What is in the best interests of Child will need to be carefully considered.

On remand, a hearing on physical custody, visitation, legal custody, and child support should be scheduled promptly, to take place before a different judge. Attorneys' fees may be awarded if appropriate. To avoid more abrupt changes in Child's life, we shall vacate the January 16, 2020 Order with respect to physical custody, visitation, legal custody, and child support to the extent the order was final, and convert it to a *pendente lite* order, until the entry of a new order on the above issues by the circuit court. *See Koffley*

v. Koffley, 160 Md. App. 633, 641 (2005). The attorneys' fees award in that order shall be vacated.

JANUARY 16, 2020 ORDER OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED WITH RESPECT TO CONTEMPT AND AWARD OF ATTORNEYS' FEES, AND OTHERWISE VACATED AS A FINAL ORDER AND CONVERTED TO A *PENDENTE LITE* ORDER; CASE REMANDED FOR FURTHER PROCEEDINGS, BEFORE A DIFFERENT JUDGE, NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.