Circuit Court for Montgomery County
Case No. 121273

CHILD ACCESS

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01324

September Term, 2017

LISA MAGNAS

v.

DANIEL PERLMAN

Leahy,
Shaw Geter,
Salmon,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 13, 2018

Appellant Lisa Magnas appeals from an order entered in the underlying case in the Circuit Court for Montgomery County, which resolved a motion for contempt and a motion to modify a visitation order filed by Appellee Daniel Perlman. In the order dated July 26, 2017, the trial court found Ms. Magnas to be in constructive civil contempt for failing to comply with the provisions of the amended custody and visitation order ("Amended Custody Order") that the court entered on May 7, 2015. As a result, the court imposed a sentence of 15 days' incarceration that was suspended upon Ms. Magnas' compliance with the modified visitation schedule. The trial court found, further, that there had been a material change in circumstances since the original entry of the order warranting a modification of the visitation schedule. As relevant to this appeal, the court subsequently granted Mr. Perlman access to the children on the first night of Rosh Hashana and the first night of Sukkot in 2017 and every year thereafter.[1]

Before this Court, Ms. Magnas presents eleven questions, some of which we have rephrased, reordered, and consolidated as follows:[2]

[1] Having found a material change in circumstances to warrant a modification, the trial court also clarified the substance of certain provisions in the existing visitation order. These actions are not challenged on appeal.

[2] Ms. Magnas phrases the issues as follows:

1. Did the trial court's conduct of the hearing constitute reversible error, plain error?
   A. The trial court excluded testimony from expert witness Rabbi, whose testimony would have informed the court regarding issues of timing in Orthodox Jewish religious observances. These issues were apparent in context – as they are implicated in Appellee's Motion for Modification of the Jewish Holiday visitation.

1. Did the trial court abuse its discretion in refusing to continue the hearing and proceeding in the absence of Ms. Magnas?
2. Did the trial court err in "conduct[ing] three Show Cause hearings and a Motion for Modification of Visitation, without any delineation among the different issues"?

   B. Trial court excluded all evidence, which required authentication by the Appellant and all testimony by the Appellant, the sole custodian of the children whose best interests was at issue.
   C. Trial court failed to check on the welfare of the Appellant, after she stood up – at the close of an entire day of trial, which consisted solely of the Appellee's case – and informed the court that she was sick and needed to leave the courtroom.
   D. Trial court undermined the Appellant's right to counsel and the right to be present at three contempt hearings with requested incarceration.
   E. The court abruptly terminated the two-day trial after hearing only the Appellee's case and without prior notice to the parties.
   F. Trial court based its decisions solely on Appellee's testimony, which was rife with hearsay and lacked indicia of credibility.
   G. Trial court conducted three Show Cause hearings and a Motion for Modification of Visitation, without any delineation among the different issues.
   H. The court revised the Burrell Order to cause the Orthodox Jewish Observances to be violated on the basis of the Court's mistaken view that timing of sundown is "extremely unreliable."
2. Did the court commit court commit reversible error in finding the Appellant in contempt of a court order, when the court order was silent in the face of an emergency situation and when the Appellee was seeking to enforce an 'arrangement' rather than the actual court order and when the Appellant was *unable* to comply with the order to bring the children to the Police Station?
3. Did the trial court commit reversible error in its so-called "purge" provision?
4. Did the trial court commit reversible error in fashioning a visitation modification against the best interests of the children and which impinges on the Appellant's right to practice her religion?

3. Did the court commit reversible error in finding [Ms. Magnas] in contempt of a court order?
4. Did the trial court err in excluding expert testimony from Rabbi Rosenbaum?
5. "Did the trial court commit reversible error in its so-called 'purge' provision?"
6. "Did the trial court commit reversible error in fashioning a visitation modification against the best interests of the children and which impinges on [Ms. Magnas'] right to practice her religion?"

We affirm the circuit court's decision to modify the visitation order. We also affirm the circuit court's finding that Ms. Magnas was in constructive civil contempt of the visitation order. For the reasons stated below, however, we vacate the circuit court's contempt sanction and remand to the circuit court to issue a written order that specifies the sanction imposed for the contempt and an appropriate purge provision.

BACKGROUND

A. The Relationship of the Parties

Ms. Magnas and Mr. Perlman have three children together: Ad., born in 2008, and twins, born in 2009. The parties were never married and never lived together; since birth, the children have lived with Ms. Magnas at her home in Silver Spring, Maryland. Mr. Perlman lives in Fort Lee, New Jersey. Ms. Magnas practices Orthodox Judaism, and Mr. Perlman, while also a member of the Jewish faith, is non-Orthodox.

On July 24, 2014, Mr. Perlman filed a complaint for visitation before the Circuit Court for Montgomery County, requesting visitation every "2nd and 4th week of the month[;]" "rotating holidays, birthdays, [and] summer vacations;" and for inclusion in each

of the boys' bar mitzvahs. Ms. Magnas opposed Mr. Perlman's requested visitation schedule, alleging that Mr. Perlman's location out-of-state would make visitation a hardship and would "put unhealthy demands" on the children contrary to their best interests due to the children's strict observance of the Jewish religion. On December 7, 2014, Ms. Magnas filed a *pro se* counterclaim for sole physical and legal custody of the children. Later that month, the circuit court entered an Order of Referral, granting Mr. Perlman supervised visitation, which provided for six visits, lasting two hours each, to take place within the following three months. The Order set a review hearing for March 21, 2015. Meanwhile**,** Mr. Perlman filed a *pro se* counterclaim for joint legal custody and an amended complaint for visitation. A flurry of motions and court proceedings followed Mr. Perlman's request for visitation. We will only address those procedural facts that are relevant to the issues before this Court.

B. The Custody and Visitation Order

On April 13, 2015, the parties appeared before Judge Sharon Burrell for a two-day trial on the merits. In an order entered on May 1, 2015, Judge Burrell granted sole physical and legal custody of the children to Ms. Magnas, and a right of regular visitation to Mr. Perlman. Judge Burrell's order ("the Custody Order") included the following provisions relevant to the case on appeal:

> A. Regular Visitation
>
> 1. Beginning on May 2, 2015, [Mr. Perlman] shall have visitation with the Minor Children every other weekend on Saturday and Sunday. On Saturday, the visits shall be from 5:30 p.m. until 8:30 p.m. The next day, Sunday, the visits shall be from 8:30 a.m. to 2:00 p.m.

2. Beginning on August 1, 2015, the visits shall be overnight, from 5:30 p.m. on Saturday until 5:30 p.m. on Sunday. The visits shall be in Maryland.

* * *

B. Holidays

1. [Ms. Magnas] is to notify [Mr. Perlman] no later than one month in advance of Sukkot as to the dates that he can participate with her and the Minor Children.

* * *

3. Each year [Mr. Perlman] shall have access to the Minor Children on one night of Chanukah and one Seder of Passover. The parties shall agree on the dates and times. If the parties are unable to agree, [Ms. Magnas] shall choose.

* * *

ORDERED, that [Mr. Perlman] shall have access to the Minor Children for at least 2 hours on their birthdays. If the Minor Children are out of town on their birthdays, [Mr. Perlman] shall have access for at least 2 hours on a day close to the birthdays; and it is further

ORDERED, that [Mr. Perlman] and [Ms. Magnas] shall meet that the Wheaton Police Station, or other mutually agreeable location, for the drop off and pick up of the Minor Children for visitation; and it is further

* * *

ORDERED, that a parent shall notify the other parent immediately if any of the Minor Children has a medical emergency[.]

C. The Amended Custody and Visitation Order

On the same day, May 1, Ms. Magnas filed an emergency motion for reconsideration, asking the court to revise the visitation order to accommodate the observance of the Sabbath. She averred that the children could not travel during the court-ordered pick-up time of 5:30 p.m. on Saturday, which was when the Sabbath began. May 7, 2015, Judge Burrell issued the Amended Custody Order, changing, in relevant part, Mr. Perlman's access with regard to the visits beginning on August 1, 2015:

A. Regular Visitation

1. Beginning on Sunday, May 3, 2016, and until Summer break commences for the schools of all of the Minor Children, [Mr.

> Perlman] shall have visitation with the Minor Children every other weekend on Sunday from 8:30 a.m. to 8:30 p.m.
>
> 2. On the first Sunday after the Summer break commences for the schools for all of the Minor Children until August 1, 2015, [Mr. Perlman] shall have visitation with the Minor Children every other weekend on Sunday from 10:30 p.m. to 4:00 p.m. and on Monday from 10:30 a.m. to 1:30 p.m. Counsel for [Ms. Magnas] shall provide notice to [Mr. Perlman] and to the Court of the date(s) that the Summer breaks commence.
>
> 3. Beginning on August 1, 2015, the visits shall be overnight, from one hour and twenty minutes after sundown on Saturday *until twenty four (24) hours later on the following Sunday*. Pursuant to the calendar presented in Court by Defendant's counsel, the first visit on August 1, 2015, shall commence at 9:20 p.m. (which is slightly less than one hour and twenty minutes for this visit only). The visits shall be in Maryland.
>
> 4. Beginning on the first visit in January 2016, the overnight visits may be out of the State of Maryland. [Mr. Perlman] must inform [Ms. Magnas] where each visit will occur and must promptly answer the phone if she calls. The weekend visits out of the State of Maryland shall be from one hour and twenty minutes after sundown on Saturday until twenty four (24) hours later on the following Sunday.
>
> 5. Summer access. Beginning in 2016, [Mr. Perlman] shall have one week of summer access with the Minor Children, from Sunday at 12:00 p.m. until the following Sunday at 12:00 p.m. [Mr. Perlman] shall notify [Ms. Magnas] by April 1 of each year as to the week desired.
>
> * * *
>
> ORDERED, that [Ms. Magnas] shall promptly and regularly provide [Mr. Perlman] with calendars, or copies of calendars, indicating the daily times for sundown[.]

(Emphasis added).[3]

[3] On May 12, 2015, Ms. Magnas filed a *pro se* motion to hold Mr. Perlman in contempt and to revise the Amended Custody Order. She alleged that Mr. Perlman neglected and endangered the children during his visit by losing them at an amusement park, that Mr. Perlman used his cell phone while transporting the children in his car, and

D. Prior Contempt Proceedings

On March 29, 2016, Mr. Perlman filed a motion for contempt (in a series of contempt motions filed by the parties against each other),[4] as well as an emergency motion for access, alleging that Ms. Magnas denied him access to the children during the Seder of Passover on March 29, 2016, contrary to the Amended Custody Order. Ms. Magnas opposed Mr. Perlman's petition and filed a motion to reconsider the Custody Order, arguing that, as a follower of an Orthodox Jewish tradition, she wanted the children to participate on the actual day of the Seder with her, but because Mr. Perlman "does not adhere to this strict consideration," he would be fine to have the children on any day near the Seder. The court denied Mr. Perlman's motion for contempt without a hearing. In an order entered April 13, 2016, however, Judge Dugan ordered Ms. Magnas to allow Mr. Perlman to have access to the children for one of the two nights of the Seder Passover, either April 22 or April 23, 2016.[5] On April 22, 2016, Judge Dugan entered another order

several other more minor allegations. With respect to Ms. Magnas' motion to revise, she asserted that "twelve consecutive hours of visitation [with Mr. Perlman] is not in the best interests of the children." Mr. Perlman filed his opposition to the motions for modification and contempt on June 15, denying Ms. Magnas' allegations. Judge Burrell subsequently entered a custody order regarding visitation exchanges on October 2, 2015, which clarified that the parties should meet to exchange the children at the parking lot of the police station, rather than inside. The order also stated that Ms. Magnas must bring to the visitation exchange a third party, who would escort the children to Mr. Perlman's car while Ms. Magnas waited in her car.

[4] In addition to the motions for contempt filed on May 12, 2015, and March 29, 2016, in a petition dated August 24, 2015, Mr. Perlman sought to hold Ms. Magnas in contempt for denying him phone access to the children and for verbally disparaging him in front of the children.

[5] In another order entered that same day, Judge Dugan, *sua sponte*, instructed the Family Law Department Clerk to "not accept any further motions, petitions, requests or

denying Ms. Magnas' motion to reconsider without a hearing and, further, ordering that the parties "may arrange a mutually agreed upon alternative method for exchanging the children on the Seder nights of Passover" in order to accommodate Ms. Magnas' observance of the Jewish Sabbath.

Mr. Perlman filed another motion for contempt on April 27, 2016, alleging that Ms. Magnas refused him access to the children for a day of the Seder Passover, and requested incarceration. In opposing Mr. Perlman's motion, Ms. Magnas reiterated her argument that her faith required observance of the Seder on specific days, while Mr. Perlman's did not. The parties met before Judge Dugan on August 26, 2016; Mr. Perlman proceeded *pro se* and Ms. Magnas was represented by counsel. In his written order, entered on September 8, 2016, Judge Dugan found Ms. Magnas in contempt of court and sentenced her to five days in the Montgomery County Detention Center. Judge Dugan stated that "[t]hose five (5) days are suspended, provided that in 2017 and in each year thereafter, Ms. Magnas makes the children available to Mr. Perlman, for the first night of Seder during the holiday of Passover."

E. Motions Challenged on Appeal

On September 30, 2016, Ms. Magnas filed an emergency motion to modify the Amended Custody Order, requesting that the visitation schedule be modified to

letters for filing without prior review of said filings" unless Judge Dugan personally reviewed them, due to the "numerous duplicative and frivolous pleadings" concerning the court.

accommodate the observance of Jewish holidays, including the Sabbath.[6] Over the next few days, Mr. Perlman responded by filing several motions of his own. As relevant to this appeal,[7] Mr. Perlman moved to enforce the Amended Custody Order and to modify the visitation schedule so that he might have access to the children on the first night of Rosh Hashanah and Sukkot. During this time frame, Mr. Perlman also filed three additional petitions for contempt ("Three Contempt Petitions").[8] The petition contested on appeal is that Ms. Magnas refused him a Sunday visitation by failing to bring the children to Wheaton Police Station at the agreed upon time and seeking "maximum coercive action" against Ms. Magnas.[9] Attached to Mr. Perlman's motion was a letter from Ms. Magnas' counsel, indicating that Ad. was sick but that the twins could visit, and requesting that the children be picked up at the Young Israel Shomrai Emunah instead of the police station.

On February 21, Ms. Magnas filed her opposition to Mr. Perlman's motion to enforce the Amended Custody Order, her opposition to Mr. Perlman's Three Contempt

[6] On November 1, 2016, the Honorable Judge Salant entered an order granting in part Ms. Magnas's emergency motion to modify visitation so that Rosh Hashanah would not be disturbed.

[7] Mr. Perlman also filed an emergency motion for access to the children for the same day, to celebrate the holiday of Sukkot, on October 17, 2016. At trial, Judge Cho established that this motion was moot.

[8] Mr. Perlman filed two more motions for contempt on October 31, alleging that Ms. Magnas had denied him the children's school and medical records. The October 31 motions for contempt are not contested on appeal before this Court.

[9] Judge Dugan sent a note to the Family Department permitting the motions to be docketed, but in the ordinary course, rather than on an emergency basis.

Motions, and a renewed motion to amend visitation to accommodate her observance of Jewish holidays. The court denied Ms. Magnas' renewed motion to amend visitation on June 22, 2017.

F. The Hearing Before Judge Cho

On July 12, 2017, the circuit court held a hearing, the Honorable Jeannie Cho presiding, on Mr. Perlman's Three Contempt Motions, motion to enforce the Amended Custody Order, and emergency motion for access, as well as Ms. Magnas' emergency motion to amend visitation. Mr. Perlman appeared *pro se*, and Ms. Magnas was represented by counsel.

1. Expert Witness Testimony

Before the parties gave their opening statements, counsel for Ms. Magnas, Mr. Sloane, notified the court that he planned to designate and call Rabbi Devon Rosenbaum as an expert witness. Concerned that the Rabbi's testimony might concern the "validity of a religion and observance thereto[,]" the court reserved on the issue.

Later in the hearing, the court agreed to hear Mr. Sloane's proffer on the expert testimony. Mr. Sloane proffered that Rabbi Rosenbaum would testify about the "importance of granting Ms. Magnas . . . [h]er ability to comply with her religious observance and to raise the children, because it's in their best interest, on being raised according to Orthodox religious practice." When Judge Cho indicated that Mr. Perlman had already testified that he agrees to following the Jewish faith, Mr. Sloane proffered that Rabbi Rosenbaum would be able to "establish as a matter of law" that "it would be harmful to the children, not in their best interest, and also contrary to Ms. Magnas' legal rights . . .

to place the children in a position where they would be forced, not asked, ordered to violate their religious freedoms." Mr. Sloane proffered, further, "that the children have an independent right to be Orthodox Jew[.]" In response, Judge Cho indicated that she "d[id]n't know what the conflict [wa]s" and reminded Mr. Sloane: "when I ask[ed] the plaintiff [if]he had any difficulties accommodating the needs of . . . Yom Tov, by working around the time restrictions [] he said no." The court, again, elected to reserve on the issue.

The circuit court ultimately ruled that, considering Rule 5-702, it "d[id] not find that that the expert witness would assist the trier of fact to understand the evidence or to determine it if that's an issue." The judge reasoned:

> [t]here is no disagreement in this case as far as what the respective positions are concerning the holidays that are at issue in this case, the various Jewish holidays. It doesn't assist the court to have an expert opine as to the very holidays that are not in dispute. It just has to do with whether or not one party or the other party has the right to practice the faith during the time that the father has access rights to the child.

Mr. Sloane interjected, opining that Rabbi Rosenbaum could "assist the court in understanding a conflict that is currently in place between [the] orders" in the case: the contempt order entered on September 8, 2016, the Amended Custody Order, as well as the order entered by Judge Salant in November 2016 accommodating the observance of Rosh Hashana. The court rebuffed that reasoning, stating that "[t]he Rabbi's testimony is not admissible to testify as to perceived inconsistencies between various court orders."

2. Mr. Perlman's Testimony

Mr. Perlman testified as the only witness on his behalf. He offered the following characterization of events, beginning with the circumstances giving rise to his petition for

contempt. He related that October 15 and 16 was a regularly scheduled visitation weekend. Mr. Perlman testified that on October 10, the Monday prior to his visit, he noticed Ad. had a swollen eyelid during a Skype conversation. He explained that, as a result, he emailed Mr. Sloane later that same day and expressed his concerns regarding Ad.'s condition. Mr. Sloane responded on October 13, a Thursday, notifying Mr. Perlman that Ad. had been hospitalized. Mr. Perlman then responded to Mr. Sloane's email by requesting access to see Ad. in the hospital. Upon failing to hear back from Mr. Sloane, he "drove down to Maryland Friday morning seeking an emergency motion for access." Mr. Perlman related, over Ms. Magnas' hearsay objection, [10] that Judge Dugan's assistant informed him that the court "w[ould] not hear [his] emergency motion because Mr. Sloane [had] approved a visit to the hospital [for] that day."

Consequently, Mr. Perlman drove to the hospital, which was located in Washington, D.C., to see Ad. Mr. Perlman testified as to his version of what happened after he arrived at the hospital: "[A]round 6 o'clock[,]" he received an email from Mr. Sloane stating that "a visit will not be allowed." As a result, Mr. Perlman went to a hotel instead and "waited for the next morning [to go to] the hospital at 11:00 . . . that Saturday[.]" When he arrived at the hospital the next day, a security guard said, "sorry, but the mother is not allowing the visit[,]" and refused him access despite showing a copy of the court order indicating that this was a visitation weekend. The security guard showed the court order to a social worker, who subsequently restated that Ms. Magnas would not allow visitation with Ad.

[10] The trial court ruled that Mr. Perlman's testimony was "a textbook exception to the rule against hearsay to have an effect on [the] hearer."

When Judge Cho asked what Mr. Perlman did as a result of the social worker's denial of access, he testified, over "the same hearsay objection" from Ms. Magnas, that he indicated to the social worker that he would return that evening. According to Mr. Perlman, he subsequently returned later that night and another security guard refused his access again.

Mr. Perlman then testified that, at some point during that weekend, he had received permission by email from Mr. Sloane to pick up the twins on Sunday, October 16, 2016, at the police station at 9:30 a.m. According to Mr. Perlman, Ms. Magnas did not bring the twins to the police station that Sunday for their scheduled visitation. As a result, Mr. Perlman drove to the station to pick up the twins, but they were not there; he then drove to Ms. Magnas' home and left a gift and balloons for Ad. on her front door before driving back home to New Jersey. When the court asked if Mr. Perlman received any information from either Mr. Sloane or from Ms. Magnas that Sunday morning, Mr. Perlman related that Mr. Sloane and Ms. Magnas both sent emails "at 1:00 in the morning" on Sunday, October 16, offering a visitation with all three boys at the hospital's family room from 12:30 to 3:00 p.m., only if he agreed that "this is a visitation." Mr. Perlman later testified that he rejected this alternative proposal to the scheduled visitation because "[the] twins were not hospitalized." Mr. Perlman also confirmed that he did not receive any other communications from them alerting him that Ms. Magnas would not make the twins available for their scheduled 9:30 a.m. pickup on October 16.

Mr. Perlman testified that he agreed that the children should be raised in the Jewish faith and that it would be in the best interests of the children to be raised in the Jewish faith. He also clarified that he was seeking meaningful visitation with his children on the

following Jewish holidays: Shabbat, Rosh Hashanah, Yom Kippur, Sukkot, Yisrael Azarat, Simchat Torah, and Hanukkah. When asked whether he agreed with Ms. Magnas "regarding the importance of the faith, practicing your holidays as I just enumerated as being beneficial and important to the best interest of the children as they are . . . growing up[,]" Mr. Perlman responded, "I do." Mr. Perlman also related that he agrees with Ms. Magnas "concerning the importance of not having the children be driving around and . . . picked up or delivered" during those Jewish holidays. And that it would be in the children's best interests to pick the children up at different times to accommodate their observance of the Jewish holidays.

On cross-examination, Mr. Sloane elicited testimony from Mr. Perlman on his reasons for rejecting Ms. Magnas' proposals for visitation in the past. Specifically, Mr. Perlman confirmed that he exchanged several emails with Mr. Sloane on September 21 and 22, in which Ms. Magnas proposed visitation dates for the upcoming Jewish holidays but requested that he return the children sooner than the court-ordered 24 hours of visitation. Notably, Sukkot began October 16, so these emails arranging Mr. Perlman's visitation during Sukkot were beyond the court-ordered deadline for scheduling visitation more than one month in advance of the holiday.

When Mr. Sloane returned to the issue of Ad.'s hospitalization, the following interaction between Ms. Magnas, the court, and Mr. Sloane occurred:

THE COURT: Please don't laugh, ma'am.

MS. MAGNAS: I did not.

THE COURT: I just heard you.

* * *

> MS. MAGNAS: I need to leave. Your Honor, I'm going to excuse myself, because I'm cold. I'm moving around in my chair, because I'm freezing cold. Do you want to see?
>
> MR. SLOANE: No, I don't want to see.
>
> MS. MAGNAS: So, I'm going to leave now, okay? And I'm going to also check on my children, and sorry, Court, I (unintelligible).
>
> THE COURT: Are you asking for this Court –
> Your client elected to absent herself. You may proceed without your client.
>
> MR. SLOANE: Okay. Thank you, Your Honor.

Mr. Sloane subsequently continued to examine Mr. Perlman on the issue of medical and educational updates. Mr. Sloane then asked to call Ms. Magnas as a witness and the following colloquy ensued:

> MR. SLOANE: I'd like to call Ms. Magnas as a witness.
>
> THE COURT: Okay, but she's not here.
>
> MR. SLOANE: Is Your Honor planning on continuing this hearing until tomorrow?
>
> THE COURT: No. I said to you earlier and counsel unfortunately, through no fault of your own, your counsel has elected to walk out in the middle of Court –
>
> MR. SLOANE: My client.
>
> THE COURT: Your client, pardon me. She absented herself—
>
> MR. SLOANE: Well, could I ask for a five minute recess to –
>
> THE COURT: [] It is now 5:02 and without leave of Court and in contempt of Court frankly, she stormed out of here. So, do you have any other witnesses that you wish to call?

MR. SLOANE: No, Your Honor.

The parties then gave brief closing arguments.

3. Trial Court's Ruling

At the conclusion of the hearing, the trial judge delivered an oral ruling on Mr. Perlman's Three Petitions for Contempt. The judge concluded that the weekend of October 15 and 16 was a court-ordered visitation weekend. The judge found, further:

> There is no explanation for why on October the 16th at 9:30 in the morning the twins were not at the Wheaton Station for their meeting with their father. It is not up to [Ms. Magnas] to change the terms of the order when frankly even if it's completely understandable about [Ad.] and the child was in the hospital, has no bearing on . . . the other two children and why they failed to appear at all.
>
> Even if I don't credit the [Mr. Perlman's] testimony that he had confirmed an earlier e-mail exchange back in September about October the 16th. Whether or not that was a received confirmation or not, I am satisfied that based on the evidence that I have, [Mr. Perlman] was entitled pursuant to this Court['s] order to have access to at least the twins on that day. There is no legal defense to [her] failure and [her] decision by [Ms. Magnas] to not bring them to the allotted location.
>
> * * *
>
> There's been no evidence adduced showing that there was any change of plans. Only the testimony of [Mr. Perlman] that I credit. That on October the 16th he had information from counsel to . . . pick up the twins at 9:30 at the Wheaton Station.
>
> So, I do find that [Ms. Magnas] in this case is in contempt for preventing visitation with the twins. I certainly do not find that she is in contempt for preventing any meeting with [Ad.] as he was hospitalized on that weekend.

On this basis, the trial court found Ms. Magnas in contempt for preventing Mr. Perlman's visitation with the twins on October 16. The court imposed a sentence of 15 days' incarceration that "is suspended and the purge provision will be that the defendant

shall comply in every respect with the access schedule[.]" The court also stated that "if she fails to do that, the period of incarceration will simply be imposed. And it doesn't [matter] who the Judge is, [] [the] Judge can find that the purge provision has not been met if that should occur and impose that sentence."

The trial court also granted Mr. Perlman's motion for modification. The court found a material change in circumstances, as it was "absolutely clear that the parties are struggling for many reasons. But not the least of which has to do with understanding the clear parameters of what this order and the subsequent rulings mean." The court also factored in Ms. Magnas' "history where [she] was held in contempt by Judge Dugan." The court stated that "had the language of the purge [been] that she would comply in all respects with the access schedule," rather than addressing only one Passover Seder, then the court would have incarcerated Ms. Magnas that very day. Having found that there is a material change in circumstances, the trial court granted Mr. Perlman's request to have "the first night of Rosh Hashana in 2017 and every year thereafter. And the first night of Sukkot in 2017 and every year thereafter."

The trial court's comprehensive order containing its rulings on the motions for contempt and delineating the custody and visitation schedules was entered on July 26, 2017 ("July 2017 Order"). The order provided that it "shall supersede all previous orders." Ms. Magnas, proceeding *pro se*, filed her timely appeal to this Court on August 25, 2017.[11]

DISCUSSION

[11] Mr. Perlman did not file a brief with this Court in response to Ms. Magnas' appeal.

I.

Proceeding in Ms. Magnas' Absence

Ms. Magnas raises several complaints relating to the trial court's decision to proceed in her absence after she left the courtroom during the evidentiary hearing. Recognizing that Ms. Magnas is a *pro se* litigant, *Pickett v. Noba, Inc.*, 114 Md. App. 552, 554-55 (1997), we believe her contentions can best be framed as follows: the trial court's failure to grant a continuance violated her right to be present at trial and her right to counsel. We will address each in turn.

1. Right to be Present at Trial

Before this Court, Ms. Magnas argues that the trial court abused its discretion when it "terminated the two-day hearing" and made its determinations based solely on Mr. Perlman's testimony. In essence, Ms. Magnas argues that by failing to continue the hearing until the following day so that Ms. Magnas could testify as a witness, the trial court failed to "conduct an adversarial hearing" because the court "excluded all [of Ms. Magnas'] evidence" and issued a ruling solely on the basis of Mr. Perlman's testimony.[12] Ms. Magnas argues, further, that the trial court undermined her right to be present at the proceeding by failing to inquire into the voluntariness of her absence before exercising its discretion to proceed without her. "As a result of this literally one-sided hearing," Ms.

[12] We note that although counsel's request for a continuance "was not completely articulated, it is abundantly clear that counsel was attempting to seek [a] continuance because of the absence of his client, and it is equally clear that this request was denied by the court." *In re McNeil*, 21 Md. App. 484, 496 (1974). It is under this purview we shall address Ms. Magnas' contentions.

Magnas maintains, she was found in contempt and "the parties' visitation order was modified to the harm of the Appellant against the best interests of the parties' children."

A trial court's "decision to grant a continuance lies within the sound discretion of the trial judge. Absent an abuse of that discretion we historically have not disturbed the decision to deny a motion for continuance." *Touzeau v. Deffinbaugh*, 394 Md. 654, 669 (2006) (citations omitted). An abuse of discretion is defined as "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (internal quotations and citations omitted).

Ms. Magnas' argument arises out of the principle that "a party to civil litigation has a right to be present for and to participate in the trial of his/her case."[13] *Green v. North Arundel Hosp. Ass'n, Inc.*, 366 Md. 597, 618 (2001). The Court of Appeals has clarified that this right is rooted in Maryland common law, the Due Process clause of the Fourteenth Amendment, the "Maryland equivalent of that clause"—Article 24 of the Declaration of Rights—and in Article 19 of the Declaration of Rights. *Id*. at 618. The Court of Appeals has also made clear that this right is not absolute in a civil case: there are circumstances in which a trial court, in its discretion and with due regard to prejudice, "may proceed without the attendance of a party and, indeed, with the party excluded[,]" including a defendant *Id*. at 618-19; *see also Gorman v. Sabo*, 210 Md. 155, 167 (1956).

This Court recognized one such circumstance in *Exxon Corp. v. Yarema*, 69 Md. App. 124 (1986). In *Yarema*, this Court addressed, *inter alia*, whether the trial court erred

[13] We gather this from Ms. Magnas' reliance on *State v. Hart*, 449 Md. 246 (2016).

in communicating with the jury outside the presence of defense counsel. *Id*. at 143. Yarema, a property owner in Baltimore County, brought an action for tortious interference with use and enjoyment of properties against Exxon for alleged ground water contamination. *Id*. at 132-33. At the jury trial, "[b]ecause of the absence of certain counsel, Exxon requested, and other parties present agreed, that no counsel would be present in the courtroom when the trial judge assembled the jurors for the purpose of dismissing the alternates and explaining the special verdict sheets." *Id*. at 141. Before this Court, Exxon argued that the colloquy that took place between the trial judge and the jury "constituted reversible error because the trial judge invited and answered substantive questions without the presence of counsel." *Id*. at 143.

This Court acknowledged that Exxon's argument was premised on the "general rule [] that a judge shall not answer questions from the jury without first informing and then giving counsel an opportunity to address the court's proposed answers." *Id.* Discerning no reversible error in the trial court's decision, however, we held that "Exxon's voluntary withdrawal constituted a waiver of [its] right to be present at the time of the exchange between the trial judge and the jurors." *Id*. This Court explained, "[i]t was the duty of counsel to be present and the court's right to proceed with its business is not curtailed by the absence of counsel, if the opportunity to be present had been afforded and counsel voluntarily waived that right." *Id*. Finding the case to be analogous to a criminal defendant's waiver of his or her right to be present at trial where the defendant voluntarily absents himself after the commencement of trial, we concluded that "[a]ny possible errors

were waived by Exxon's affirmative act of absenting itself and thereby implicitly assenting to the court's proceeding without its presence." *Id*. at 143.

According to Ms. Magnas, however, *State v. Hart*, 449 Md. 246 (2016), requires a trial court to make an inquiry into a defendant's absence before exercising its discretion to proceed. We disagree and find *Hart* to be inapposite. In *Hart*, the Court of Appeals granted certiorari to answer, *inter alia*, whether Hart had a right to be present during the trial court's colloquy with the jury foreperson and the trial court's declaration of mistrial. *Id*. at 261. Hart stood trial for possession of controlled dangerous substances. *Id*. at 255. During jury deliberations, the trial judge received a jury note indicating the jury's deadlock on one count. *Id*. at 254. The trial judge informed the prosecutor and defense counsel and arranged for Hart to be brought to the courtroom. *Id*. at 255. While waiting for Hart, the trial judge learned that Hart was being transported to a hospital due to a medical emergency. *Id*. at 255-56. In the absence of Hart, but with his counsel's consent, the trial judge facilitated an exchange with the jury foreperson. *Id*. at 256-58. Over defense counsel's objection, the trial judge subsequently declared a mistrial on the deadlocked count and received a partial verdict on the other counts. *Id*. at 259.

On appeal, the Court of Appeals held, *inter alia*, that the trial court violated Hart's right to be present after the jury colloquy and that such error was not harmless. *Id*. at 273-75. The Court explained that the trial court abused its discretion because "the judge proceeded *in absentia* too hastily: *the facts on the record suggest that Hart was involuntarily absent*, and the judge did not inquire as to the seriousness of [] Hart's

condition or the expected length of his absence prior to exercising her discretion to proceed without him." *Id*. at 273 (second emphasis added).

Ms. Magnas was present for most of the day's hearing and chose to absent herself during Mr. Perlman's cross-examination, right before her attorney attempted to call her as a witness. Before leaving the courtroom voluntarily, Ms. Magnas proclaims only that she was "freezing cold" and was also going to check on her children. Unlike in *Hart*, nothing in the record suggests that Ms. Magnas' absence was involuntary or that the trial judge—after witnessing Ms. Magnas "storm[] out"—needed to inquire further. Therefore, we hold that it was within the sound discretion of the trial court to proceed without Ms. Magnas because she was afforded the opportunity to be present at trial and she ultimately waived that right by voluntarily "absenting [her]self and thereby implicitly assenting to the court's proceeding without [her] presence."[14] *Yarema*, 69 Md. App. at 143.

2. Right to Counsel

On appeal, Ms. Magnas contends that, pursuant to Rule 15-206(e), the trial court's refusal to continue the hearing undermined her right to counsel under the Due Process Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights

[14] We likewise reject Ms. Magnas' contention that the trial court's decision to proceed after she absented herself somehow prevented her from presenting evidence. In her absence, Ms. Magnas' lawyer thoroughly cross-examined Mr. Perlman and successfully moved into evidence 11 exhibits. The court also afforded her counsel the opportunity to present other evidence, asking expressly whether defense counsel had any other witnesses to call. Despite this, her counsel rested Ms. Magnas' case. There is nothing in the record indicating that Judge Cho based her decisions solely on Mr. Perlman's testimony; Judge Cho's oral ruling reflects her consideration of the defense exhibits. Magnas' contention is factually flawed and without merit.

by "terminating" the hearings "without permitting any evidence or testimony from [Ms. Magnas]" and "[b]y refusing to permit [Ms. Magnas's] attorney to leave the courtroom to check on his client[.]" The record does not show that she raised this issue before the trial court.

In general, the "Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a right to counsel, including appointed counsel for an indigent, in a criminal case involving incarceration." *Rutherford v. Rutherford*, 296 Md. 347, 357 (1983) (citations omitted). Although "the right to counsel under the Sixth Amendment and Article 21 is not directly involved" in civil contempt proceedings, the Court of Appeals has recognized that the right to counsel exists under the Due Process Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights when a defendant in a civil contempt proceeding faces a possibility of actual incarceration. *Id*. at 358, 363. Accordingly, the Court of Appeals enacted Rule 15-206(e) to implement this constitutional mandate in civil contempt proceedings. *Redmond v. Redmond*, 123 Md. App. 405, 416-17 (1998).

We find Ms. Magnas' argument to be without merit. She was indeed represented by counsel at the proceeding before the circuit court. Moreover, Ms. Magnas cites no legal authority on how her constitutional right to counsel applies to the trial court's decision to proceed after she left the courtroom and refused to allow a recess so that Mr. Sloane could "check on" her.[15] *See Dolan v. Kemper Independence Insurance Co.*, 237 Md. App. 610,

[15] We note that Ms. Magnas, herself, concedes in her brief that she hired counsel to represent her during the proceeding.

626 (2018) ("[t]he absence of authority is alone sufficient to deem the argument to have been waived and to decline to address it."). In any event, it was Ms. Magnas, not her lawyer, who was absent for a part of the hearing. After Ms. Magnas excused herself from the hearing, Mr. Sloane proceeded with his representation of Ms. Magnas and gave his closing argument.

For the foregoing reasons, we hold that the trial court did not abuse its discretion in refusing to continue the proceeding in the absence of Ms. Magnas.

II.

Consolidated Hearing

Ms. Magnas argues that the trial court committed reversible error by addressing the Three Contempt Motions and request to modify visitation in a single hearing, "without any separation of the issues." In our view, Ms. Magnas has not properly preserved her contention. Md. Rule 8-131(a) (providing that ordinarily, an appellate court will not decide issues unless "it plainly appears by the record to have been raised in or decided by the trial court"). When the trial court stated at the beginning of hearing that it would consider the petition for contempt and motion to modify, her counsel did not object to the nature of the proceedings, nor did he request a continuance or otherwise indicate that Ms. Magnas was unaware of the issues before the court.

Even assuming, *arguendo*, that Ms. Magnas had properly preserved this issue, we find her argument to be without merit. Ms. Magnas does not direct us to any legal authority—nor are we aware of any—that prohibits a trial court from addressing petitions for contempt and a request for modification at the same hearing. In any event, the trial

judge carefully addressed each legal matter before it and identified the appropriate docket numbers before issuing each respective ruling. Being that all these matters arose out of the same visitation order, it was in the interest of judicial economy for the trial court to have considered all matters in the same proceeding. *See Butler v. S&S Partnership*, 435 Md. 635, 660 (2013) (applying the principle that "a trial court has the discretion to control its docket") (citation omitted). We, therefore, discern no abuse of discretion by the trial judge.

III.

Contempt

Ms. Magnas challenges the trial court's decision to find her in contempt because Mr. Perlman failed to meet his burden of proof and the contempt order included an unreasonable purge provision.

This Court's standard of review with respect to civil contempt proceedings can be summarized as follows:

> [T]his Court will not disturb a contempt order absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed. But where the order involves an interpretation and application of statutory and case law, we must determine whether the circuit court's conclusions are "legally correct" under a *de novo* standard of review.

Kozwalczyk v. Bresler, 231 Md. App. 203, 209 (2016) (citations omitted); *see also Royal Investment Group, LLC v. Wang*, 183 Md. App. 406, 448 (2008) (an appellate court will only reverse a finding of civil contempt "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") (internal quotations omitted).

A. Finding of Contempt

After the evidentiary hearing, Judge Cho found Ms. Magnas in constructive civil contempt "for preventing visitation with the twins" but did not find that she was in contempt "for preventing any meeting with [A.] as he was hospitalized on that weekend."

Ms. Magnas argues that the "court committed reversible error in finding" her in contempt of a court order because there was insufficient evidence to show that she violated an actual and existing provision of the court order, that she was able to comply with the scheduled visitation on the weekend of October 15-16, 2016, and that she "purposefully acted in a manner contemptuous of the court's [o]rder." Lastly, Ms. Magnas contends that Mr. Perlman "failed to prove by 'clear and convincing evidence' that [she] had disobeyed the [o]rder" because Mr. Perlman's testimony was "riddled with impermissible hearsay and admittedly imagined conversations[.]"[16]

Contempt proceedings "are classified as civil or criminal and at least in theory either of these may be direct or constructive." *Dodson v. Dodson*, 380 Md. 438, 447 (2004) (internal quotations omitted). A party's "failure to obey a court order may precipitate the

[16] In her question presented on appeal, Ms. Magnas complains that "[t]he trial court based its decision solely on [Mr. Perlman's] testimony, which was rife with hearsay and lacked indicia of credibility." She argues that Mr. Perlman failed to prove by "clear and convincing evidence" that she had disobeyed the Amended Custody Order because his testimony was "riddled with impermissible hearsay and admittedly imagined conversations." She fails, however, to identify in her briefing any specific portions of Mr. Perlman's testimony that constituted impermissible hearsay. *See* Md. Rule 8-504(3). Ms. Magnas further posits that Mr. Perlman's testimony regarding an alleged "arrangement" or "understanding" was "not deemed hearsay" while she was present in the courtroom, but "was rendered into hearsay evidence" when she voluntarily absented herself from the hearing. She does not cite to any authority, nor are we aware any, that provides that her presence in the court room has any bearing on whether Mr. Perlman's testimony about the visitation arrangements constituted hearsay.

initiation of contempt proceedings." *Marquis v. Marquis*, 175 Md. App. 734, 746 (2007) (citation omitted). Before a party may be held in contempt of a court order, "[t]he order must be sufficiently definite, certain, and specific in its terms so that the party may understand precisely what conduct the order requires." *Id.* (internal quotations omitted). Moreover, a person subject to a court order may not be held in contempt unless the failure to comply with such order "was or is willful." *Dodson*, 380 Md. at 452. "[W]illful conduct is action that is voluntary and intentional, but not necessarily malicious." *Gertz v. Maryland Dept. of Environment*, 199 Md. App. 413, 430 (2011) (internal quotations and alterations omitted). Evidence showing a defendant's ability to comply, or evidence of purposeful conduct "rendering himself unable to comply, may, depending on the circumstances, give rise to a legitimate inference that the defendant acted with the requisite willfulness and knowledge." *Id*. at 431. Civil contempt in non-support cases must be proven by a preponderance of the evidence.[17] *Marquis*, 175 Md. App. at 746.

[17] Ms. Magnas asserts that the petitioner's burden of proof is clear and convincing evidence. However, movants must prove constructive civil contempt by clear and convincing evidence when the contempt is based on an alleged failure to pay child or spousal support. Md. Rule 15-207(e)(2); *see also Arrington v. Dept. of Human Resources*, 402 Md. 79, 97 (2007) ("Rule 15-207(e) applies only to constructive civil contempt proceedings based on the alleged failure to pay child support or spousal support. Rule 15-207(e)(2) permits a court to making a finding of contempt if the petitioner proves by clear and convincing evidence that the alleged contemnor has not paid amount owed[.]") (internal quotations and citations omitted)). In other civil contempt proceedings, such as the one in this case, the movant's burden of proof is a preponderance of the evidence. *See Marquis*, 175 Md. App. at 745 (stating in a contempt proceeding based on a default of a divorce decree that "[c]ivil contempt need be proved only by a preponderance of the evidence.") (internal quotations omitted). Mr. Perlman has not initiated a contempt proceeding based on a failure to comply with a support order.

There is ample evidence to support the trial court's conclusion that Ms. Magnas willfully prevented visitation on October 16 with respect to the twins. Judge Cho heard testimony from Mr. Perlman that he had notified Ms. Magnas, by email, that he would be driving to Wheaton police station on October 15 to pick up the kids. It was undisputed that the weekend of October 15 and 16 was a court-ordered weekend for visitation. Mr. Perlman's testimony, both on direct and cross-examination, as well as a defense exhibit revealed that Ms. Magnas, through her lawyer, proposed a visitation exchange with the children at the Wheaton police station on Sunday, October 16, at 9:30 a.m. Perlman thereafter testified, on both direct and cross examination, that Ms. Magnas did not arrive at the police station on October 16 with the children—a fact that Ms. Magnas has not contested.

Based upon this evidence, the trial court found, as a matter of fact, that October 15 and 16 was a court-ordered access weekend, and that whether or not Mr. Perlman confirmed the October 16 visitation, he was entitled to have access to *at least the twins* that day, and there was no evidence of any change in plans, nor any explanation or legal defense for why Ms. Magnas did not bring the twins on October 16 at 9:30 a.m. We note that Judge Cho's failure to orally state her finding of willfulness is irrelevant. *See Marquis*, 175 Md. App. at 755 ("[W]e presume judges know the law and apply it even in the absence of a verbal indication of having considered it.") (internal quotations omitted). Accordingly, we see no basis on which to disturb the circuit court's factual findings or its decision to hold Ms. Magnas in contempt.

We likewise reject Ms. Magnas' argument that the visitation order didn't require her to bring only two of the three children to a visitation exchange or require her to comply with a visitation exchange on the morning of October 16, 2016. We find *Marquis*, 175 Md. App. 734 (2007), to be instructive on this point. In *Marquis*, the parties divorced by a consent judgment of absolute divorce, which ordered the wife to receive "a 50 percent portion of the marital share of Husband's military retirement benefits." *Id*. at 740. Following the divorce, the husband repeatedly failed to sign and return the wife's proposed Constituted Pension Order ("CPO"),[18] which prompted the wife to file a petition for contempt. *Id*. at 741-42. After holding a contempt hearing, and upon the master's recommendation, the court signed an order finding the husband in contempt "for his failure to authorize Wife's proposed CPO." *Id*. at 744.

On appeal to this Court, the husband argued, *inter alia*, that the trial court erred in finding him in contempt because "the judgment for absolute divorce did not compel him to consent to a CPO or to cooperate in the drafting [and signing] of a CPO" and that the wife "used contempt proceedings to force him to consent to an order that was not required by the divorce decree." *Id*. at 752-53. In rejecting the husband's argument, this Court noted that "[i]t is well settled that, where cooperation is necessary to the performance of a condition [in a contract], a duty to cooperate will be implied[.]" *Id*. at 753. On the basis of this contract principle, this Court rejected the husband's argument because, pursuant to the consent judgment, the "[h]usband has an obligation to act in good faith and to deal fairly

[18] The CPO implemented the terms of the divorce judgment. *Id* at 741.

with the other party . . . and an obligation to cooperate when necessary to the performance of a condition." *Id*. at 753-54 (internal quotations omitted).

Similarly, here, the Amended Custody Order imposed on Ms. Magnas "an obligation to act in good faith and to deal fairly with [Mr. Perlman] . . . and an obligation to cooperate when necessary to the performance of a condition"—namely, granting Mr. Perlman visitation. *Marquis*, 175 Md. App. at 753-54. During the weekend of Ad.'s hospitalization, the parties had agreed that Mr. Perlman would pick up the twins on Sunday, October 16, at the police station at 9:30 a.m. Although Ms. Magnas argues that she attempted to act in good faith by offering visitation with all three children at the hospital on October 16 from 12:30 p.m. to 3:00 p.m., the trial court found that she failed to explain her failure to make *the twins* available at 9:30 a.m. on October 16, as planned. Because of this failure, Mr. Perlman went to the police station expecting to pick up the twins, who were not there. As the trial court found, "even if it's completely understandable about [Ad. because] the child was in the hospital, [that] ha[d] no bearing on the . . . other two children and why they failed to appear at all."

We find no error or abuse of discretion in the circuit court's finding that Ms. Magnas was in constructive civil contempt of the visitation order.

B. Purge Provision

Ms. Magnas also argues that the trial court abused its discretion in imposing the "purge" provision because it was not reasonable and was a punishment that "would extend into the future, while holding a jail sentence over the head of [Ms. Magnas]." She suggests that the uncertainty of the order, in light of several past modifications, potential future

modifications, and Mr. Perlman's additional *pro se* motions for contempt, demonstrates an inability to comply with the order and thereby purge herself of contempt. She also asserts that "[t]here is no doubt that such a provision is not in the best interests of the three little children[.]"

As we explained, civil contempt proceedings are intended to "coerce present or future compliance with a court order[.]" *Dodson*, 380 Md. at 448 (citation omitted). Such proceedings are typically "remedial in nature and are intended to coerce future compliance." *Marquis*, 175 Md. App. at 746 (internal quotations omitted) (citation omitted). Accordingly, "[i]n order for a penalty for civil contempt to be coercive rather than punitive, it must provide for purging that permits the defendant to avoid the penalty by some specific conduct that is within the defendant's ability to perform." *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016) (citation omitted).

In *Jones v. State*, this Court addressed, *inter alia*, "whether the circuit court imposed an illegal disposition for civil contempt" against Jones for failure to pay court-ordered child support. 351 Md. 264, 268-69 (1998). The circuit court found Jones in contempt of court and "sentenced him to the Division of Corrections for two years, suspended on the condition that he pay $75.00 per week in support and $35.00 per week towards arrears of $3675.00 as of February 21, 1997." *Id*. at 270. The court ordered, further, that should Jones fail to make any payment, the full balance would be due and Jones would have to report to the Division of Corrections to serve his sentence. *Id*. at 270, 277. The trial judge noted that, in the event he missed one payment, "I'm not going to have him make a purge amount[.]" *Id*. at 270.

On appeal, this Court held that that the sanction was illegal for civil contempt because "(1) the sentence is a determinate two-year sentence which does not include a purge clause, and (2) the order did not provide [Jones] with the opportunity, before incarceration, to show his inability to comply with the court-ordered payments." *Id*. at 278. In concluding that the sanction imposed was punitive and not coercive, we reasoned:

> Although the sentence, conditioned on compliance in the future, when first imposed certainly was coercive, *upon non-compliance, the sentence was a determinate one, lacking any purge provision*. Remarkably, the trial judge announced that he was not going to have Jones make a purge amount. In determining whether the sanction was coercive, we look at the time the sentence actually may be executed, and not only at the time it is first imposed. We conclude that [Jones'] sentence providing for a determinate period of incarceration upon his failure to pay was not coercive and was, in fact, punitive.

Id. at 279. (Emphasis added). *See Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 120 ("Following a find of contempt, the court must issue a written order specifying (1) the coercive sanction imposed for the contempt; and (2) *how the contempt may be purged*.") (emphasis added) (citation omitted).

In the instant case, the order imposed a suspended sentence with a definite jail term of 15 days, conditioned on Ms. Magnas' future compliance with the modified visitation order:

> **ORDERED**, that the Defendant will be incarcerated for fifteen (15) days. This sentence will be suspended provided that the Defendant complies in every respect with all provisions of the access schedule set forth in this Order[.]

Here, the order is not definite as to when and how the contempt can be purged. The July 2017 Order does not have a time limitation, and therefore, there is no certain or defined

way Ms. Magnas can purge the contempt finding and sanction (even if the sanction is suspended). We held in *Marquis* that a contempt order "must be sufficiently *definite*, certain, and specific in its terms." 175 Md. App. at 746 (emphasis added). Here, the only thing that is certain is that Ms. Magnas will serve 15 days jail time if she fails to comply with any provision of the access schedule in the July 2017 Order. The contempt order also does not contain a means of purging the contempt once the definite jail sentence of 15 days is imposed upon non-compliance with the July 2017 Order. *Jones*, 351 Md. at 282.

We hold, therefore, that the contempt sanction lacked an appropriate purge provision. This holding should not be read as to suggest that Ms. Magnas was not, in fact, in contempt. Rather, the contempt sanction—in the absence of an appropriate purge provision—must be vacated. *See Arrington*, 402 Md. at 107 (holding that the findings of contempt may stand, but the sanctions must be vacated because they imposed a determinate jail sentence and inappropriate purge provisions). Accordingly, we remand this case to the Circuit Court for Montgomery County to issue a written order that specifies the sanction imposed for the contempt and an appropriate purge provision.

IV.

Exclusion of Expert Testimony

At the beginning of trial, Ms. Magnas informed the court that she sought to designate Rabbi Rosenbaum as an expert witness. Concerned that the Rabbi's testimony might concern the "validity of a religion and observance thereto[,]" the court reserved on the issue. Later, the trial court agreed to hear Ms. Magnas' proffer on Rabbi Rosenbaum's testimony. Ms. Magnas proffered that she sought to designate Rabbi Devon Rosenbaum

as "an expert witness in Jewish law[,]" who would testify on the importance of granting Ms. Magnas' right to comply with her religious observance and "raise[] the children according to Orthodox religious practices." When the court responded that Mr. Perlman had already testified that he agreed it would be in the children's best interest to be raised in the Jewish faith, Ms. Magnas' lawyer proffered that Rabbi Rosenbaum would establish that it is not in the best interest of the children to be put in a position where they would be "forced" to violate their religious freedoms, and also explain the "similarities and differences between the Yamim Tovim and the Jewish satyr[.]" The judge reserved on ruling to "give [the issue] more consideration." Judge Cho ultimately ruled that the expert testimony of Rabbi Rosenbaum would not assist the trier of fact because "[t]here is no disagreement in this case as far as what the respective positions are concerning the holidays that are at issue in this case, the various Jewish holidays." Ms. Magnas' lawyer then asked the court to reconsider its decision, offering that Rabbi Rosenbaum could assist the court in interpreting inconsistencies between the September 8, 2017 contempt order, the Amended Custody Order, as well as the order entered by Judge Salant. Judge Cho explained that "[t]he Rabbi's testimony is not admissible to testify as to perceived inconsistencies between various court orders" and denied the request to reconsider by restating its previous ruling.

Ms. Magnas contends that the trial court abused its discretion in refusing to hear "unopposed expert testimony, which would have informed the court about the importance of family religious observance" during certain Jewish holidays. She argues, for the first

time on appeal, that the expert would have also explained that "sundown is a reliable indicator that can be (and is) measured and preserved in calendar form[.]"

Pursuant to Md. Rule 5-702, "[e]xpert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." Accordingly, "Rule 5-702 entrusts the trial court with the task of determining whether an expert is qualified to give testimony about an issue, whether there is a foundation for the expert's proffered testimony, and the relevance of the proffered testimony." *Bomas v. State*, 412 Md. 392, 418 (2010). It is settled principle that "the admissibility of expert testimony is within the sound discretion of the trial court, and its action will seldom constitute a ground for reversal." *Brown v. Contemporary OB/GYN Associates*, 143 Md. App. 199, 252 (2002) (internal quotations and citations omitted). The trial court's determination will be reversed only "if it is founded on an error of law . . . or if the trial court clearly abused its discretion." *Id.* (internal quotations and citation omitted).

In his testimony, Mr. Perlman agreed that it was in the best interests of the children to be brought up in the Jewish faith and related that he would be willing to pick the children up at different times in order to accommodate the children's observance of Jewish holidays. Accordingly, the objective evidence demonstrates that the importance of family religious observance was not a disputed issue that the court needed to resolve in order to decide whether Mr. Perlman was entitled to more access on the requested Jewish holidays. The circuit court was well within its discretion in excluding Dr. Rosenbaum's expert testimony under Rule 5-702 because it was not relevant to any disputed issues in the case. We,

therefore, affirm the trial court's decision to exclude expert testimony from Dr. Rosenbaum.

V.

Modification of Visitation Order

A. Material Change in Circumstances

Next, Ms. Magnas argues that "[t]he lack of a material change in circumstances and paucity of evidence that the modification would be in the best interests of the children, marks the modification of the [o]rder as clearly erroneous and reversible." She says there was "no evidence that the modification of the holiday provision was in the best interests of the children." Rather, she contends that "it is extreme and *harmful* to the best interests of the children that the [c]ircuit [c]ourt [o]rder now grants [Mr. Perlman] every single Passover . . . Sukkot . . . and Rosh Hashana holiday observance – every year until the children reach the age of majority." (Emphasis in original). Additionally, Ms. Magnas argues that the trial court erroneously found contempt as a material change in circumstances.

Appellate review of custody and visitation determinations consists of three, interrelated standards of review. *Gillespie v. Gillespie*, 206 Md. App. 146, 170 (2012); *McCarty v. McCarty*, 147 Md. App. 268, 272-73 (2002). "Decisions concerning visitation generally are within the sound discretion of the trial court [ ] and are not to be disturbed unless there has been a clear abuse of discretion." *Meyr v. Meyr*, 195 Md. App. 524, 550 (2010) (quoting *In re Billy W.*, 387 Md. 405, 447 (2005)). "There is an abuse of discretion where no reasonable person would take the view adopted by the [trial] court . . . or when

the court acts without reference to any guiding rules or principles." *Id*. at 550 (internal quotations omitted). Moreover, we review a court's factual findings under the clearly erroneous standard. *Reichert v. Hornbeck*, 210 Md. App. 282, 303-04 (2013) (alteration omitted). "[I]f it appears that the court erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless." *Id*. at 304 (citing *In re Yve S.*, 373 Md. 551, 586 (2003)).

This court explained in *McMahon v. Piazze*, that Maryland courts utilize a "two-step analysis" when presented with a request for a change of custody or visitation:

> First, the circuit court must assess whether there has been a "material" change in circumstance. If a finding is made that there has been such a material change, the court then proceeds to consider the best interests of the child as if the proceeding were one for original custody.

162 Md. App. 588, 593-94 (2005) (applying two-step analysis to request for modifications to a shared custody schedule, which the court explained "is analogous to a request for a change in visitation") (internal citations omitted). We noted, however, that "[t]hese two analyses [] often are interrelated[,]" with "'the question of "changed circumstances" [] infrequently be[ing] a threshold question, but is more often involved in the "best interest" determination[.]'" *Id*. at 594 (quoting *McCready v. McCready*, 323 Md. 476, 482 (1991)). "A change in circumstances is 'material' only when it affects the welfare of the child." *Id*. at 594 (citing *McCready*, 323 Md. at 482). Accordingly, "the test of materiality is whether the change is in the best interest of the *child*. Consequently, if a court concludes, on sufficient evidence, that an existing provision concerning custody or visitation is no longer in the best interest of the child and that the requested change is in the child's best interest,

the materiality requirement will be satisfied." *Id*. at 596 (emphasis added) (citation omitted).

In *Montgomery Cty. Dep't of Soc. Servs. v. Sanders*, this Court recognized that the "best interest standard is an amorphous notion, varying with each individual case," and "[a]t the bottom line, what is in the child's best interest equals the fact finder's best guess." 38 Md. App. 406, 419 (1977) (distinguished on other grounds). We established that the court must examine "numerous factors and weigh[] the advantages and disadvantages of the alternative environments." *Id*. at 420 (citation omitted). Accordingly, "[t]he criteria for judicial determination includes, but is not limited to[:]"

> [1] fitness of the parents,
> [2] character and reputation of the parties,
> [3] desire of the natural parents and agreements between the parties,
> [4] potentiality of maintaining 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

Id. (internal citations omitted).

Returning to the case at bar, the visitation schedule in place at the time of the hearing was the Amended Custody Order, which provided in relevant part:

> A. Regular Visitation
>
> * * *
>
> 3. Beginning on August 1, 2015, the visits shall be overnight, from one hour and twenty minutes after sundown on Saturday *until twenty four (24) hours later on the following Sunday*. Pursuant to the calendar presented in Court by Defendant's counsel, the first visit on August 1, 2015, shall commence at 9:20 p.m. (which is slightly less

than one hour and twenty minutes for this visit only). The visits shall be in Maryland.

* * *

B. Holidays

1. Defendant is to notify Plaintiff *no later than one month in advance of Sukkot* as to the dates that he can participate with her and the Minor Children.

* * *

ORDERED, that a parent shall notify the other parent *immediately* if any of the Minor Children has a medical emergency[.]"

(Emphasis added).

We are persuaded that the circuit court had sufficient evidence to conclude that there had been a material change in circumstances sufficient to warrant modifying the visitation schedule. There was evidence that Mr. Sloane, on behalf of Ms. Magnas, emailed Mr. Perlman on September 22, later than one month in advance of Sukkot informing him what day(s) he could have visitation during Sukkot. In another email exchange, Mr. Sloane requested that Mr. Perlman return the children from his visits on Rosh Hashana and Sukkot sooner than the court-ordered 24 hours of visitation. With respect to the October 16 visitation—the first day of Sukkot—there was evidence that Ms. Magnas failed to drop off the children at the police station, as she'd agreed to do. The trial court also noted that, since entry of the original order, Ms. Magnas was held in contempt in 2016 for refusing Mr. Perlman access to the children for a day of the Seder. Based on these repeated instances in which Ms. Magnas failed to comply with the visitation schedule contained in the Amended Custody Order, we cannot say that the trial court abused its discretion in finding that there had been a material change in circumstances. *See Bienenfield v. Bennett-*

White, 91 Md. App. 488, 502 ("The importance to children of significant contact with both parents is well recognized.").

B. Freedom of Exercise of Religion

Ms. Magnas also complains that the modified "holiday provision" in the visitation order impinges on her constitutionally-protected right to direct the religious upbringing of her children. As we did in *Bienenfeld*, we find this contention to be without merit.

The parties in *Bienenfield* had three children during their marriage. 91 Md. Ap. at 493. Initially, both parties were members of the Episcopal faith; later in the marriage, the mother and the children converted to Orthodox Judaism. *Id*. The parties strongly disagreed over the religious upbringing of their children, ultimately leading to their divorce. *Id*. at 493. At the trial on the merits, the trial court concluded that it was in the best interests of the children to grant the father physical and legal custody and grant the mother liberal visitation rights. *Id*. at 495. The court also ordered a detailed schedule for visitation during certain Jewish holidays and required the father to permit the children to continue attending Beth Tfiloh, a Jewish school.[19] *Id*. at 496. Following the divorce, the court held a hearing on the father's motion for permission to enroll their son at a public school, and on the mother's motion for contempt.[20] The court concluded "that the best interest of [the son]

[19] *See Beth Tfiloh Congregation of Baltimore City, Inc. v. Glyndon Community Ass'n, Inc.*, 152 Md. App. 97, 101 (2003) (explaining that the Beth Tfiloh Congregation operates a school and synagogue).

[20] The mother's motion for contempt "was premised on the father's refusal to pay half the costs of a mathematic tutor for [their daughter] . . . and on the father's contacts with [the public school] prior to his filing of the motion for permission to enroll [their son] there." *Id*. at 497.

required that he be allowed to transfer to a public school" and also dismissed the mother's motion for contempt. *Id*. at 497. The court, additionally, modified the visitation schedule of shared holidays as to provide that the son "could miss no more than one school day in connection with religious observances for each of four Jewish holidays for which the mother had visitation rights." *Id.*

On appeal, this Court held, *inter alia*, that the custody decision did not infringe upon the mother's right to free exercise of religion:

> We are not convinced that the chancellor in the instant case interfered with the mother's right to free exercise of religion. This is not a case in which limitations were placed upon a parent's religious activities with children during visitation periods. The mother in the case before us retained unlimited prerogative to direct the children's religious upbringing during visitation periods.

Id. at 509-510.

We held, further, that

> [e]ven assuming that the chancellor did interfere with the mother's right to free exercise of religion by considering evidence of her views regarding the religious upbringing of the children in making his custody determination, we could conclude that such interference was justified. . . . While a parent has the right to inculcate religious beliefs in a child, *that right is not immune from interference where, as here, there is evidence that the chosen method of such inculcation poses a threat to the child's secular well-being.*

Id. at 510 (emphasis added). Most important, and relevant to the instant case, was this Court's recognition that:

> If the court must choose between meaningful visitation and the full benefits of a desired program of religious indoctrination, *the religious indoctrination must yield to the greater interest in preserving the parent-child relationship*.

Id. at 510 (emphasis added) (citation omitted).

Returning to the matter before us, we are satisfied, as was the case in *Bienenfeld*, that the trial court's modification of the order does not present a situation in which "limitations were placed upon a parent's religious activities with children during visitation periods." *Id*. at 509. Nothing in the order prohibited Ms. Magnas' right to direct the children's religious upbringing while they were in her custody. Moreover, Mr. Perlman testified at trial that he agreed with Ms. Magnas that raising the children in the Jewish faith was in their best interests and that he was willing to accommodate visitation times so as not to interfere with the timing restrictions of the Jewish holidays. Thus, the trial court's decision to grant Mr. Perlman visitation on the first night of Rosh Hashana and Sukkot does not in any way affect the children's observance of those religious holidays. Even assuming this decision interfered with Ms. Magnas' right to free exercise of religion, we note that "religious indoctrination must yield to the greater interest in preserving the parent-child relationship." *Id*. at 510. Given that there is evidence of Ms. Magnas' previous failures to abide by the visitation order with respect to access on certain Jewish holidays, *supra* Part.VII.A., "we could conclude that such interference was justified." *Bienenfeld*, 91 Md. App. at 510. Accordingly, we find no error or abuse of discretion in the circuit court's decision to modify the visitation order.

For the foregoing reasons, we affirm the circuit court's decision to modify the visitation order. We will, however, vacate the circuit court's contempt sanction and remand to the Circuit Court for Montgomery County to issue a written order that specifies the sanction imposed for the contempt and an appropriate purge provision.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART; JUDGMENT RELATING TO THE CONTEMPT SANCTION VACATED.
CASE REMANDED IN PART AS IT RELATED TO THE CONTEMPT SANCTION FOR THE CIRCUIT COURT TO ENTER AN ORDER CONSISTENT WITH THIS OPINION.
APPELLANT TO PAY 90% OF COSTS; APPELLEE TO PAY 10% OF COSTS.