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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2020-2021

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Jada Vivian Willis n/k/a Jada Vivian Stinson

v.

Gary Evan Willis

**Appeal from Madison Circuit Court
(DR-14-900035.02)**

DONALDSON, Judge.

Jada Vivian Willis, now known as Jada Vivian Stinson ("the mother"), appeals from a judgment of contempt entered against her by the

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Madison Circuit Court ("the trial court") in an action initiated by Gary Evan Willis ("the father") seeking to have the mother found in contempt of court for making derogatory remarks about him that violated certain orders entered by the trial court. We affirm in part, reverse in part, and remand.

Facts and Procedural History

The parties were divorced by a judgment entered by the trial court on December 2, 2014. The divorce judgment granted the parties joint legal and physical custody of their minor child, who was born in 2008 ("the child"). The judgment provided that the child would live with each parent during alternating weeks and that neither parent would owe child support to the other. The judgment further provided as follows:

"(b) The parties hereto are further directed and restrained:

"(1) that each shall refrain from any and all words, conduct, deeds and activities which are intended or calculated to interfere with, abuse, embarrass or intimidate the other; and

"(2) that each will respect the privacy of the other from and after the date hereof; and

"(3) that each will refrain from any activity, words, or deeds intended or calculated to interfere with the employment of the

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other, or calculated or intended to interfere with the family or social life of the other."

At some time before September 17, 2017, the father filed a petition for a modification of custody, alleging that a material change in circumstances had occurred and seeking sole physical custody of the child. The mother counterclaimed, also alleging that a material change in circumstances had occurred and seeking sole physical custody. On September 17, 2017, the trial court entered a judgment awarding sole physical custody of the child to the father, allowing the parties to continue to exercise joint legal custody, awarding standard visitation to the mother, and ordering the mother to pay child support.

On September 21, 2017, the father filed a petition for contempt against the mother. He also filed a motion for a temporary restraining order ("TRO") and a preliminary injunction, alleging that the mother had violated the divorce judgment by making derogatory remarks about the father to personnel at the child's school and by posting derogatory remarks about the father on social media. The trial court scheduled a hearing on the father's motion for a TRO and a preliminary injunction on

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September 29, 2017. Neither the mother nor her counsel was present at the hearing. The father testified that the mother's remarks embarrassed him and his family, damaged his reputation and business opportunities, and embarrassed the child and damaged her relationships with her friends. The trial court entered an order on the motion for a TRO and a preliminary injunction on October 2, 2017, providing as follows:

"The [mother] is temporarily restrained from publishing in any form any remarks, photographs, or other communication about the [father], his past or present actions, criminal history, parenting abilities which could in any way be embarrassing to him, or interfere with his employment or social or family life, or which could reflect negatively on the [father] or his current family.

"The [mother] is temporarily restrained from publishing in any form information on a public site identifying the parties' child, the school she attends, or her father's criminal history or parenting abilities.

"The [mother] is ordered to immediately remove such remarks, photographs, or other communication about the [father], his past or present actions, criminal history, parenting abilities which could in any way be embarrassing to him, or interfere with his employment or social or family life, or which could reflect negatively on the [father] or his current family from any public forum or social media, whether public or private.

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"The [mother] is ordered to immediately remove any information on a public site identifying the parties' child, the school she attends, or her father's criminal history or parenting abilities."

The mother immediately filed a motion to set aside the October 2, 2017, order. The trial court set her motion to be heard on October 12, 2017, and appointed a guardian ad litem for the child. On November 2, 2017, the trial court denied the motion to set aside. The mother then filed a petition for a writ of mandamus with this court, which we treated as an appeal. On September 26, 2018, this court dismissed the mother's appeal as untimely. Temples v. Willis (No. 2170187), 285 So. 3d 790 (Ala. Civ. App. 2018) (table).¹

The trial court scheduled a hearing on the father's contempt petition for March 4, 2019. On February 27, 2019, the father filed a motion to continue the hearing because the mother had failed to attend her scheduled deposition. The motion stated that the mother had notified her counsel that she would be unable to attend the deposition

¹In that appeal, the mother was identified as "Jada Vivian Temples f/k/a Jada Vivian Willis."

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because, she said, she was sick. The trial court rescheduled the hearing for August 26, 2019. On June 25, 2019, the mother's counsel filed a motion to withdraw. Counsel stated in the motion to withdraw that the mother was aware of the scheduled hearing. The motion to withdraw was granted.

On August 9, 2019, the mother failed to appear for her rescheduled deposition. The same day, the father filed a motion for a default judgment against the mother as a sanction for her failure to attend the deposition. On August 12, the trial court entered an order setting the motion for a default judgment to be heard along with the contempt petition on August 26, 2019, and notifying the mother that she was eligible to apply for a court-appointed attorney in the contempt matter. The mother filed an affidavit of indigency, and the trial court appointed an attorney to represent her on the issue of contempt only. The mother's newly appointed counsel filed a motion to continue the hearing scheduled for August 26. The trial court granted that motion only as to the issue of contempt. The trial court held a hearing as scheduled on August 26 on the father's motion for a default judgment as a sanction.

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On September 12, 2019, the trial court entered a default judgment against the mother as a sanction for discovery violations, but it set a hearing for October 21, 2019, "for consideration of the relief to which [the father] is entitled."

On October 21, 2019, the trial court conducted a final hearing on the father's contempt petition. At that hearing, the father testified about remarks he alleged the mother had posted on the Facebook social-media web site about his criminal history. He also testified that because the mother had blocked him from seeing her posts on Facebook, he had created a "fake" account under an assumed name in order to be able to access more of the mother's Facebook posts. The father stated that his current wife also had a "fake" account on Facebook that she used to monitor the mother's Facebook account. The father testified that the mother had created a Facebook page called "We Are Good Moms" in 2017 together with her mother, but he said at the hearing that he could not tell who currently administrated that Facebook page.

The child's guardian ad litem testified at the hearing that she was able to access the We Are Good Moms page on Facebook but that she

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could not access everything on the mother's Facebook page because she and the mother were not "friends" on social media.

When the mother took the stand to testify, she attempted to refuse to answer questions from the father's counsel by asserting her rights under the Fifth Amendment to the United States Constitution. The following exchange took place between the mother and the father's counsel:

"Q. And then you were a party to a petition for modification of custody that was tried on -- in September of 2017, correct?

"A. Yes.

"Q. Or the order was entered on September 17th, 2017, correct?

"A. Yes.

"Q. And you read that order, correct?

"A. I plead the Fifth Amendment.

"Q. You plead the Fifth Amendment if you read the order?

"A. I don't recall, I've had so many -- so many orders, I'm not sure if I read that one completely in its entirety.

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"Q. You're telling the court under oath that you don't know if you read the order in which you lost custody of your [child]?

"A. I'm sure I did, but I don't recall reading it word for word.

"Q. Okay. Well, do you know what the order dated September 17th, 2017, says?

"A. I have -- like I said, I've read it but I don't remember exactly what it says word for word.

"Q. Well, what does it say about custody, just what's your recollection?

"A. I think it said that he was awarded the physical custody but we were to continue to share legal custody.

"Q. Okay.

"A. I believe.

"Q. And what does it say about child support?

"A. I plead the Fifth Amendment."

The following exchange between the mother's counsel and the trial court then took place:

"THE COURT: ... [L]et me be very clear. You cannot plead the Fifth Amendment in this case. This is not a criminal prosecution, you may not plead the Fifth Amendment in this case.

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"[COUNSEL FOR THE MOTHER]: Judge, if I may object. There's some caselaw, and I can brief it for you, this is a quasi -- I mean it's --

"THE COURT: It's quasi criminal, but nobody is charging her with a crime and this isn't going to lead to any sort of criminal prosecution. She may have incarceration to serve, but this is not a criminal prosecution and she's still going to have to answer the question.

"[COUNSEL FOR THE MOTHER]: Judge, you can plead the Fifth Amendment in a civil or a criminal case.

"THE COURT: If it leads to criminal prosecution, which this will not.

"[COUNSEL FOR THE MOTHER]: Judge, any incarceration, any liberty that can be taken away from her, I argue, allows her to plead the Fifth Amendment.

"THE COURT: Not in this proceeding She's going to have to answer the question or she's going to be incarcerated for her failure to answer the question, so -- I mean this is not going to lead to a criminal prosecution. It may lead to some incarceration, but she's not going to be prosecuted for a crime. If you have a case to the contrary, let me see it. But I have researched this and I do not think that's right.

"[COUNSEL FOR THE MOTHER]: Well, Judge, if I may, to fully brief this, if we can have a recess and let me fully brief this issue --

"THE COURT: No, we're not. We're going today. But if you have a case right now, then please give it to me and I'll study it. And, [counsel for the mother and the guardian ad litem,] I'd

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invite your input on this as well. She's not going to be prosecuted for a crime. This is a civil matter, this is contempt. And so I'm ordering her to answer the question. But if you have authority now I'll see it."

After a brief recess, the hearing continued with the mother's testimony.

The mother testified that she created the We Are Good Moms page on Facebook and that she and her mother were the initial administrators of that page. The mother stated that she removed herself as an administrator of the page after the trial court entered the October 2, 2017, order and that, because she no longer had access to the page, she was unable to take it down. The mother testified that, after the entry of the October 2, 2017, order, she removed all posts she had made to the We Are Good Moms page and that she had asked her mother, as the page administrator, to remove the page from Facebook. However, the mother said, her mother had refused to do so.

On October 29, 2019, the trial court entered the following judgment addressing the pending contempt claims:

"This cause comes to be heard on the [father's] Petition for Contempt and Motion for Temporary Restraining Order and Preliminary Injunction pursuant to Rule 65 of the Alabama Rules of Civil Procedure, and the [mother's] Answer thereto.

The Court had previously entered a default against the [mother] for her refusal to comply with discovery requests. Based upon the testimony and evidence presented in court at the hearing on the Motion for Temporary Restraining Order and on the final hearing, the Court does hereby ORDER as follows:

"1. The [mother] is found to be in willful civil and criminal contempt for her violation of the provision of the Decree of Divorce which directed that the parties are restrained from any and all words, conduct, deed and activities which are intended or calculated to interfere with, abuse, embarrass or intimidate the other, or intended to interfere with the family life, employment or social life of the other.

"2. The [mother] is found to be in willful civil and criminal contempt for her violation of this Court's Order dated October 2, 2017, which temporarily restrained the [mother] from publishing in any form any remarks, photographs, or other communication about the [father], his past or present actions, criminal history, parenting abilities which could in any way be embarrassing to him, or interfere with his employment or social or family life, or which could reflect negatively on the [father] or his current family; which temporarily restrained the [mother] from publishing in any form information on a public site identifying the parties' child, the school she attends, or her father's criminal history or parenting abilities; which ordered the [mother] to immediately remove such remarks, photographs, or other communication about the [father], his past or present actions, criminal history, parenting abilities which could in any way be embarrassing to him, or interfere with his employment or social or family life, or which could reflect negatively on the [father] or his current family from any public forum or social media, whether public or private; and which ordered the [mother] to immediately

remove any information on a public site identifying the parties' child, the school she attends, or her father's criminal history or parenting abilities.

"3. The Court finds that, inter alia, the [mother] took no steps as the administrator of the We Are Good Moms Facebook page to remove the [father's] mug shot or other embarrassing and/or derogatory information about him as ordered and that as of the date of the final hearing, such information is still on the Facebook page, some 700 days after the entry of the Court's Order. The Court further finds that rather than follow the Court's Order, the [mother] continued to disseminate the [father's] mug shot and other embarrassing and/or derogatory information about him to other groups and persons on Facebook and asked those groups to share said information as well.

"4. The [mother] is hereby sentenced to 104 days' incarceration in the Huntsville Madison County Jail, which shall be served as follows: On the second and fourth weekends of each month from Friday at 6:00 p.m. until Sunday at 6:00 p.m. (the second Friday of each month is the second weekend of each month), until 104 days has been served. The [mother] shall report to the [Huntsville] Madison County Jail on November 8, 2019, at 6:00 p.m. to begin her sentence as set forth herein. In the event the [mother] refuses to appear at the Huntsville Madison County Jail as ordered herein in a timely manner, then the entire 104 days of incarceration shall be served consecutively.

"5. The [mother] is hereby ordered to pay the [father's] attorney fees for services rendered in this case. Counsel for [the father] has filed with the Court the Bill for Services Rendered to the [father] in this case. The [mother] may request a hearing on the reasonableness of the fees by

requesting the same within 5 days of the date of this Order. If she does not file such a request, the Court will accept the Bill for Services Rendered as a reasonable fee and judgment will be entered in favor of the [father] and against the [mother] in the amount of \$11,007.20, for which execution may issue.

"6. The [mother] is hereby ordered to pay the Guardian Ad Litem's attorney fees for services rendered in this case. The Guardian Ad Litem has filed with the Court the Bill for Services Rendered in this case. The [mother] may request a hearing on the reasonableness of the fees by requesting the same within 5 days of the date of this Order. If she does not file such a request, the Court will accept the Bill for Services Rendered as a reasonable fee and judgment will be entered in favor of the Guardian Ad Litem, Hon. Page Banks, and against the [mother] in the amount of \$3,650.00 for which execution may issue.

"7. The [mother is] restrained from publishing in any form any remarks, photographs, or other communication about the [father], his past or present actions, criminal history, parenting abilities which could in any way be embarrassing to him, or interfere with his employment or social or family life, or which could reflect negatively on the [father] or his current family.

"8. The [mother] is restrained from publishing in any form information on a public site identifying the parties' child, the school she attends, or her father's criminal history or parenting abilities.

"9. The [mother] is ordered to immediately remove such remarks, photographs, or other communication about the [father], his past or present actions, criminal history, parenting abilities which could in any way be embarrassing to

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him, or interfere with his employment or social or family life, or which could reflect negatively on the [father] or his current family from any public forum or social media, whether public or private.

"10. The [mother] is ordered to immediately remove any information on a public site identifying the parties' child, the school she attends, or her father's criminal history or parenting abilities.

"11. All other claims are denied.

"12. Costs are taxed to the [mother]."

The mother filed a timely notice of appeal with this court. We have jurisdiction over an appeal from a judgment containing a finding of contempt, whether civil or criminal, if the finding of contempt arises out of a domestic-relations case. Shonkwiler v. Kriska, 780 So. 2d 703, 705 (Ala. Civ. App. 2000).

Standard of Review

"The two types of contempt-- criminal and civil -- are governed by different standards of review. In the case of civil contempt, we have often explained that

" 'whether a party is in contempt of court is a determination committed to the sound discretion of the trial court, and, absent an [excess] of that discretion or unless the judgment of the trial court

is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm.'

"Stack v. Stack, 646 So. 2d 51, 56 (Ala. Civ. App. 1994); see also Hammock v. Hammock, 867 So. 2d 355, 359–60 (Ala. Civ. App. 2003).

"Unlike civil contempt, criminal contempt requires proof beyond a reasonable doubt of the alleged contemnor's guilt. See Ex parte Ferguson, 819 So. 2d 626, 629 (Ala. 2001).

" '[T]he standard of review in an appeal from an adjudication of criminal contempt occurring in a civil case is whether the offense, i.e., the contempt, was proved beyond a reasonable doubt. Hicks v. Feiock, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988); Combs v. Ryan's Coal Co., 785 F.2d 970 (11th Cir. 1986); and United States v. Turner, 812 F.2d 1552 (11th Cir. 1987) In Turner, the Court, in discussing the standard of review in a criminal-contempt case, said:

" ' "The essential elements of the criminal contempt for which punishment has been imposed on [the defendant] are that the court entered a lawful order of reasonable specificity, [the defendant] violated it, and the violation was wilful. Guilt may be determined and punishment imposed only if each of these elements has been proved beyond a reasonable doubt."

" Turner, 812 F.2d at 1563. ...

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"Ex parte Ferguson, 819 So. 2d at 629."

Kizale v. Kizale, 254 So. 3d 233, 237–38 (Ala. Civ. App. 2017).

Analysis

The mother first argues that the trial court erred when it refused to allow her to plead the Fifth Amendment privilege against self-incrimination during the contempt hearing. She cites Ex parte Rawls, 953 So. 2d 374, 378 (Ala. 2006), in which our supreme court held that the "' fact that the privilege is raised in a civil proceeding rather than a criminal prosecution does not deprive a party of its protection" ' (quoting Ex parte Baugh, 530 So. 2d 238, 241 (Ala. 1988), quoting in turn Whelting v. Columbia Broad. Sys., 608 F.2d 1084, 1086 (5th Cir. 1979)). The Fifth Amendment to the United States Constitution provides, in pertinent part, that a person shall not "be compelled in any criminal case to be a witness against himself." ²

²We note that the Alabama Constitution also contains a privilege against self-incrimination. Article I, § 6, Ala. Const. of 1901, states: "That in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself" Although the mother invoked the Fifth Amendment to the United States Constitution, she points out in her appellate brief that our supreme court has held that " 'despite the

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The mother relies on State ex rel. Payne v. Empire Life Insurance Co., 351 So. 2d 538 (Ala. 1977), in which our supreme court discussed the application of constitutional principles in a criminal-contempt proceeding. Payne states that a "proceeding in contempt for noncompliance with a lawful court decree is sui generis and not a 'criminal prosecution' as that term is commonly understood." 351 So. 2d at 542 (citing Blackmer v. United States, 284 U.S. 421 (1932)). Payne further states that

"[b]ecause the sanctions employed by the court, pursuant to a criminal contempt adjudication, partake so heavily of a criminal nature (i.e., the actual or potential restraint of the body), however, it is essential in all but a narrow category of cases that constitutional principles be applied to this process to assure substantial due process is afforded the accused."

Id. In discussing the guarantee of substantial due process, Payne concludes:

difference in language the Alabama privilege against self-incrimination offers the same guarantee as that contained in the Federal Constitution.' " Ex parte Rawls, 953 So. 2d 374, 378 (Ala. 2006) (quoting Hill v. State, 366 So. 2d 318, 322 (Ala. 1979)).

"Substantial due process requires that the accused shall be given proper notice, advised of the charges and given a reasonable opportunity to be heard. It also entails the assistance of counsel, if requested, the right to be present, give testimony and call witnesses. The notice must contain sufficient information to advise the accused of the nature and particulars of the conduct charged."

Id. at 543. The mother then argues, without citation to any further authority: "The application of these constitutional principles to criminal contempt proceedings includes the Fifth Amendment right against self-incrimination."

This is a civil case in which the mother was facing both civil- and criminal-contempt allegations; it is not a "'criminal prosecution' as that term is commonly understood." Payne, 351 So. 2d at 542. We are not directed to Alabama authority recognizing a witness's right to assert the Fifth Amendment privilege against self-incrimination in civil proceedings unless there is evidence that the witness anticipates that criminal prosecution could result from his or her testimony. "Although 'there does not have to be an existing criminal investigation to stay a civil proceeding on Fifth Amendment grounds, there must be some evidence presented from which the trial court can determine that the person claiming the

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privilege has a reasonable apprehension of criminal prosecution.'" Ex parte Antonucci, 917 So. 2d 825, 830 (Ala. 2005) (quoting Braden v. Jim Bishop Chevrolet, Inc., 897 So. 2d 1040, 1047 (Ala. 2004)). We also are not directed to Alabama authority that would support a holding that a criminal-contempt allegation in a civil action is the equivalent of a criminal prosecution for purposes of asserting the privilege against self-incrimination.³

Here, the trial court clearly stated in overruling the mother's attempt to invoke the privilege that there did not appear to be any indication that the mother would be subject to criminal prosecution based on her testimony, and, therefore, the trial court ruled, the mother would

³We also observe that Alabama draws a distinction between the effect of the invocation of a claim of privilege in civil and criminal cases. Under Rule 512A(a), Ala. R. Evid., a witness's refusal to testify based on a claim of privilege in a civil case "is a proper subject of comment" and "[a]n appropriate inference may be drawn from the claim." See also Langley v. Langley, 617 So. 2d 678, 680 (Ala. Civ. App. 1992) (claiming privilege against self-incrimination may be brought to trial court's attention and creates presumption that operates against party claiming privilege). Compare Rule 512, Ala. R. Evid. (prohibiting comments or a negative inference arising from the invocation of a privilege in criminal cases).

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be required to answer the questions posed to her by the father's counsel. The mother's counsel presented no authority to the contrary when provided the opportunity to do so, and, therefore, no reversible error is established on this issue.

The mother also argues that the trial court's sentence of imprisonment was excessive and that the court improperly ordered her to pay the attorney fees of the father's counsel and the fees of the guardian ad litem. In its contempt judgment, the trial court found the mother guilty of both civil and criminal contempt. This court examined the differences between civil and criminal contempt in Davenport v. Hood, 814 So. 2d 268, 272–73 (Ala. Civ. App. 2000):

"Our supreme court discussed civil and criminal contempt in [State v. Thomas], 550 So. 2d 1067, 1072 (Ala. 1989), and stated:

"Contempts are characterized as either civil or criminal. Civil contempt seeks to compel or coerce compliance with orders of the court, while a criminal contempt is one in which the purpose of the proceeding is to impose punishment for disobedience of orders of the court.

" "The sanction for civil contempt continues indefinitely until the contemnor performs as ordered. A critical distinction is that the sanction for criminal contempt is limited in Alabama district and circuit courts to a maximum fine of \$100 and imprisonment not to exceed five days."

" (Citations omitted.)

" Our supreme court also stated in [State v. Thomas], 550 So. 2d 1067, 1073:

" "The line between civil and criminal contempt can sometimes become blurred....

" "Confusion arises in attempts to classify civil and criminal contempts, because the elements often overlap. In appropriate circumstances, however, a party's actions can support a finding of both civil and criminal contempt."

" (Citations omitted.)

" '....

" The question of whether this is civil contempt or criminal contempt becomes important in this case because a contemnor must be in a position to purge himself from the contempt. Mims v. Mims, 472 So. 2d 1063 (Ala. Civ. App. 1985). In order to purge himself in a criminal contempt case,

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the contemnor must pay the fine imposed, serve the authorized time, or do both. Kalupa v. Kalupa, 527 So. 2d 1313 (Ala. Civ. App. 1988). In order to purge himself in a civil contempt case, the contemnor must comply with the court's order. Rule 33.4(b), [Ala.] R. Crim. P.'

"Hill v. Hill, 637 So. 2d 1368, 1370 (Ala. Civ. App. 1994)."

As a consequence of finding the mother guilty of civil and criminal contempt, the trial court ordered her to serve 104 days' imprisonment and to pay the attorney fees of the father's counsel and the fees of the guardian ad litem. The trial court could have found from the evidence that the mother had repeatedly disseminated derogatory remarks about the father to personnel at the child's school, to parents of the child's friends, to "friends" on Facebook, and to others. Despite the prohibition in the divorce judgment against such activity and the more detailed prohibitions in the October 2, 2017, order on the father's motion for a TRO and a preliminary injunction, the mother continued to make remarks and publish Facebook posts about the father after the trial court entered the order modifying the physical custody of the child in September 2017. In an attempt to impress upon the mother the importance of stopping the

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remarks and posts about the father, especially the remarks and posts that identified the child, the trial court found the mother in contempt and sentenced her to 104 days in jail. This is the essence of criminal contempt. Pate v. Guy, 934 So. 2d 1070, 1072 (Ala. Civ. App. 2005). See also Ex parte Sheffield, 120 So. 3d 1091, 1094 (Ala. Civ. App. 2013). Thus, the trial court's order properly found the mother in criminal contempt.

Civil contempt is a party's failure to perform an act for the benefit of the opposing party that is required by the court. J.K.L.B. Farms, LLC v. Phillips, 975 So. 2d 1001, 1012 (Ala. Civ. App. 2007). By the time of the October 2019 contempt hearing, despite the trial court's orders, the trial court found that the We Are Good Moms Facebook page with its derogatory allegations against the father had been active on Facebook for "some 700 days" after the entry of the October 2, 2017, order and was still visible. "The purpose of a civil contempt proceeding is to effectuate compliance with court orders and not to punish the contemnor." Watts v. Watts, 706 So. 2d 749, 751 (Ala. Civ. App. 1997). The judgment of contempt ordered the mother to "immediately" remove the Facebook page and any remarks, photographs, or other derogatory communications

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about the father and to "immediately" remove information on any public site that could identify the child. The trial court ordered the mother to do what she previously had refused to do -- that is the purpose of civil contempt. Thus, the trial court's order also found the mother in civil contempt.

The mother argues that the sentence of imprisonment in the contempt judgment is excessive, relying on Lowe v. Lowe, 561 So. 2d 240 (Ala. Civ. App. 1990), in which a trial court sentenced the husband in that case to 30 days' imprisonment for criminal contempt. The trial court in Lowe found that the husband had violated the parties' divorce judgment and held him in contempt for the "'many separate and distinct prohibited telephone contacts or communication with [the wife].'" Id. at 241. On appeal, the husband argued that § 12-11-30(5), Ala. Code 1975, allows for a maximum punishment of five days' imprisonment for "contempts." Based on the facts contained in the record and the language in the trial court's judgment, this court agreed, stating:

"Strictly construing the limitation embodied in § 12-11-30(5), we find that [the husband's] contemptuous

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behavior was amenable to punishment up to a maximum of a \$100 fine and five days' imprisonment.

"... [T]he trial court issued one judgment of contempt, and one punishment was ordered. ... Thus, while the trial court's order states 'separate and distinct,' it is unclear exactly how many violations [the husband] is being punished for, and how many days of imprisonment are being meted out per violation. Without a specified number of separate citations of contempt, based upon the evidence, we cannot ascertain whether the trial court exceeded the limitation upon its power to punish for contempt under § 12-11-30(5). Additionally, without specific findings, we are unable to review the judgment for excessiveness.

"....

"In view of what we have said above, we must conclude that [the husband's] behavior constituted a single act of contempt for which only the statutory limit of punishment was authorized, i.e. five days in jail and a \$100 fine. The failure of the trial court to limit the punishment to the statutory maximum requires reversal of the court's order."

561 So. 2d at 242.

Similar to the finding of the trial court in Lowe of "many separate and distinct" instances of contempt, the trial court in this case found that the "the [mother] continued to disseminate the [father's] mug shot and other embarrassing and/or derogatory information about him to other groups and persons on Facebook and asked those groups to share said

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information as well." The mother argues that, although the trial court found her in contempt for violating its previous orders, it is not clear how many instances of contempt the trial court intended to punish her for committing and it is not clear how the trial court calculated 104 days of incarceration. The mother maintains that, pursuant to Lowe, without a specified number of contempt violations, her contempt should be treated as a single act for which the maximum incarceration allowed by statute is five days.

We note that the trial court also expressly found that the mother had permitted the prohibited information to remain "some 700 days after the entry of the Court's [October 2, 2017,] Order." We have upheld punishments exceeding five days for criminal contempt when we were able to ascertain from the orders that the trial court had found more than one instance of criminal contempt. For example, in Wilmore v. Wilmore, 91 So. 3d 701, 707 (Ala. Civ. App. 2011), the trial court specifically found a party to be in criminal contempt for each week the party failed to comply with an order -- i.e., for 20 weeks -- and sentenced the party to 5 days of incarceration for each instance of contempt. Likewise, in Shonkwiler v.

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Kriska, supra, the order of the trial court specifically found a party to be in criminal contempt on 6 occasions, permitting us to review the sentence of 30 days' incarceration. The judgment in this case does not specify the number of instances of criminal contempt the trial court found to have occurred, nor does it reflect the basis on which the trial court calculated 104 days' imprisonment. If the trial court found the mother was in criminal contempt for a single instance, it could not impose a period of incarceration of more than five days. We note that the father did not file a brief with this court and, thus, did not present an argument to us in support of the length of incarceration imposed. Therefore, we reverse this portion of the trial court's judgment and remand the cause for the trial court to specify the number of instances of criminal contempt it found and the corresponding period of incarceration imposed for each finding of criminal contempt.

The mother also argues that, pursuant to § 12-11-30(5), the trial court could fine her only a maximum of \$100 and that the trial court's ordering her to pay the father's attorney fees and the guardian ad litem's fees was not permitted under the statute. The mother contends that this

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court has held that an award of attorney fees is improper in a criminal-contempt action, citing Kent v. Herchenhan, 215 So. 3d 1079, 1084 (Ala. Civ. App. 2016). Therefore, the mother concludes, the trial court's award of attorney fees in this case is improper and should be reversed.

As a general rule, in the absence of a specific provision in a contract or a statute, attorney fees cannot be recovered as a cost of litigation or as an element of damages. State v. Alabama Pub. Serv. Comm'n 293 Ala. 553, 307 So. 2d 521 (1975); Hartford Accident & Indem. Co. v. Cosby, 277 Ala. 596, 173 So. 2d 585 (1965); and Taylor v. White, 237 Ala. 630, 188 So. 232 (1939). There are exceptions to the general rule, however, one of which is that in certain circumstances a reasonable attorney fee can be awarded to the prosecuting party who prevails in a civil-contempt proceeding. Such an award is within the discretion of the trial court so as to allow a party to be compensated for injuries sustained as a result of the alleged contemptuous acts. Moody v. State ex rel. Payne, 355 So. 2d 1116, 1119 (Ala. 1978). Therefore, attorney fees incurred in civil-contempt proceedings can be recovered. Here, the trial court found the mother to be in civil contempt, and the record would support a finding that the

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mother's actions caused the father to seek the assistance of the trial court for more than two years in an effort to accomplish his goal, i.e., the cessation and removal of derogatory remarks and Facebook posts that were harmful and embarrassing to him and to the child. Under these circumstances, we conclude that the trial court did not exceed its discretion in ordering the mother to pay attorney fees to the father's counsel as a result of the mother's civil contempt. Therefore, we affirm the contempt judgment insofar as it ordered the mother to pay attorney fees to the father's counsel as a sanction.

As for the portion of the judgment requiring the mother to pay the fees of the guardian ad litem, the mother does not challenge the authority of the trial court to appoint the guardian ad litem in the proceedings, the services rendered by the guardian ad litem, or the amount of the fees awarded. She argues only that she could not be ordered to pay the fees based on a finding of criminal contempt. It is well established that the fees of a guardian ad litem may be assessed as costs in civil litigation without the necessity of a finding of contempt. See, e.g., Townsend v. Hogan, 73 So. 3d 702, 706 (Ala. Civ. App. 2011). The trial court could

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have ordered the mother to pay the costs of the guardian ad litem as costs in the proceeding. The mother does not address this basis supporting the trial court's judgment ordering her to pay the fees of the guardian ad litem, and, therefore, she has not established reversible error as to the award of the guardian ad litem's fees. " ' This court is required to affirm a judgment if the appellant has waived any arguments regarding an alternative basis for the judgment.' " Ex parte Sikes, 218 So. 3d 839, 847 (Ala. Civ. App. 2016) (quoting Drake v. Alabama Republican Party, 209 So. 3d 1118, 1122 (Ala. Civ. App. 2016)).

Conclusion

We conclude that the portion of the contempt judgment sentencing the mother to 104 days of incarceration must be reversed and the cause remanded for the trial court to specify the number of instances the trial court found the mother to be in criminal contempt and the corresponding period of incarceration for each finding of criminal contempt. We affirm the remainder of the judgment.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.