No. 2D17-4837

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

SANDRINE MARIE AKRÉ-DESCHAMPS,

Appellant,

v.

BRENDAN SMITH,

Appellee.

On Appeal from the Circuit Court of the Tenth Judicial Circuit
in and for Polk County, Florida
L.T. No. 15-DR-11112, Hon. Reinaldo Ojeda

INITIAL BRIEF OF SANDRINE MARIE AKRÉ-DESCHAMPS

Thomas A. Burns (FBN 12535)
Arda Goker (FBN 1004378)
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com
agoker@burnslawpa.com

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Rules **Page(s)**

STATEMENT OF THE CASE AND FACTS

Nature of the case

This is a family law dispute that resulted in a contempt order, which is the subject of this appeal. Appellant, Sandrine Marie Akré-Deschamps, is a French citizen who lives in France. Appellee, Brendan Smith, is a U.S. citizen who lives in Lakeland, Florida. They are the parents of a lovely and talented nine-year-old girl who is fluent in French, loves to dance and study mathematics, is very social, and has many friends. Their daughter has dual French and U.S. citizenship and had been splitting her time between the United States and France.

By way of background, the father had successfully petitioned to domesticate and modify a custody order entered by a Canadian court. Afterwards, the mother and father had a dispute at an airport in Paris. Specifically, after the child spent spring break with her mother in France, the girl refused to board a return flight to the United States with her father and his new girlfriend. Upon his return, the father moved to hold the mother in contempt. After an evidentiary hearing at which the trial court concluded Florida law categorically forbade it from taking a nine-year-old girl's preference into consideration, the trial court found the mother in contempt. On appeal, the mother contends the trial court conflated the intent of its orders with their express directives, disregarded case law about taking into account the preferences of children, and denied the mother due process.

Course of the proceedings

The father petitioned to domesticate and modify a Canadian custody order. App. 11-20. The mother responded. App. 21-23. After some procedural rigmarole (*see, e.g.*, App. 24-26) and an evidentiary hearing (App. 27-277), the trial court granted the petition, domesticated the Canadian custody order, and modified its time-sharing provisions (App. 278-90).

Thereafter, the father filed two motions for contempt. App. 291-96, 305-07. The mother opposed. App. 297-304, 308-10. After another evidentiary hearing, the trial court orally ruled in favor of the father and held the mother in contempt. App. 311-31. That oral ruling was reduced to a written order. App. 337-40.[1] This appeal followed. App. 341.

Disposition in the lower tribunal

A. The trial court domesticates and modifies the Canadian custody order

After an extensive hearing, the trial court domesticated and modified the Canadian custody order. App. 262. The trial court noted complications with the mother's postgraduate studies and immigration status in the United States and

[1] The contempt order (App. 337-40) does not indicate whether the trial court was holding the mother in civil contempt or criminal contempt. Nevertheless, because the order was not "prosecuted under rule 3.840" and afforded the mother an opportunity to purge the contempt, it appears the trial court held the mother in civil contempt. *Sauriol* v. *Sauriol*, 79 So. 3d 204, 206 (Fla. 2d DCA 2012) (citing Fla. R. Crim. P. 3.840)).

Canada. App. 262-63. For that reason, although the child had lived with her mother for the first few years of her life, she had been living with her father since the entry of the Canadian custody order in 2012. App. 263. The trial court further found the mother's move from Canada to France was a substantial change of circumstances, so it modified the Canadian custody order. App. 264.

In particular, it modified the Canadian custody order to provide full time-sharing to the father during the school year, full time-sharing to the mother during spring break and summer, and rotating time-sharing for Thanksgiving and Christmas. App. 265. In doing so, the trial court cautioned the father, "I hope you understand that it is absolutely imperative that this child maintain a good close relationship with her mother. From what I heard today, and I've been hearing you-all since nine in the morning, you have both a very special lovely gifted intelligent little girl and you want to foster that." App. 265-66. The oral ruling did not address how the parties should respond if the child refused to board a plane to a designated time-sharing location. *See* App. 261-76.

The trial court reduced that oral ruling to a written order. App. 278-90. Relevant here, that order addressed the transportation and exchange of the child. App. 288-89. In particular, the order stated, "The parties shall have the Minor Child ready on time with sufficient clothing packed, and ready at the agreed upon time of exchange." App. 288. Additionally, the order provided, "If the child is flying ac-

companied by a party, the party picking up the Minor Child shall exchange the Minor Child with the other party at the entrance of the airport security line, and the party returning the Minor Child shall exchange the Minor Child at the baggage claim." App. 289. Again, the written order did not mandate a specific course of conduct in the event of adamant protest by the child. *See* App. 288-89. Nor did it make any provisions regarding physically forcing or stopping someone from physically forcing the child to board a plane. *See* App. 288-89.

B. The father moves to hold the mother in contempt

Thereafter, the child spent spring break with her mother in France. *See* App. 292. In his motion for contempt, although the father acknowledged the mother brought the child to the airport, he asserted the child would not board the plane to return to the United States with her father. App. 292. In that regard, the father alleged upon information and belief that the mother had "wrongfully manipulated and exerted undue influence on the minor child which resulted in the minor child's refusal to board the plane." App. 292. The father did not assert that the mother had physically prevented him from retrieving the child. *See* App. 291-92.

In a subsequent motion, the father complained that the mother "refused to require the child to board the aircraft and instead allowed the minor child to decide whether to board the aircraft" and "enrolled the child in a French school and continues to refuse to require the child to return to Florida." App. 305. Again, the fa-

ther did not assert that the mother had physically prevented him from retrieving the child. *See* App. 305-06.

C. The mother responds in opposition

The mother opposed the motions. App. 297-304, 308-10. In doing so, the mother explained that the factual scenario was more complicated than the father's motions had indicated. *See* App. 297-304, 308-10.

For instance, in response to the first motion (App. 291-96), the mother explained that, when the child refused to board the plane, the father initially "grabbed the child by her wrists and pulled her violently at which point the child began kicking and screaming" (App. 298). At that point, the father "released the child and called for security/police." App. 298. But French law enforcement "refused to use force to make the child board the plane." App. 298. Additionally, the mother noted that the father's verified motion (App. 291-96) contradicted the statement he gave to French police (App. 298, 302, 304). In that statement, the father explained, "Her mother also tried to convince her [to board], but to no effect." App. 304.

In response to the second motion (App. 305-07), the mother explained the "Father was also present at the exchange and declined to physically force the minor child to board the plane but somehow expects Mother to do so" (App. 308). She further explained the "Father even admitted to French law enforcement that Mother encouraged the minor child to get on the plan[e] with Father." App. 308. Finally,

she also explained that the "Father chose to leave France when a French judge ruled that French authorities would not physically force the minor child to board the plane with Father." App. 308.

In that response, the mother also explained that the child pick-up order merely allowed the father to present it to law enforcement who may then place the child in the father's custody; it did not require her to physically force the child to board the plane. App. 309.

D. The trial court convenes an evidentiary hearing, at which it orally rules in favor of the father and holds the mother in contempt

To address the contempt motions, the trial court convened an evidentiary hearing. App. 311-332. At that hearing, the trial court acknowledged it was "very obvious" and "very clear" that the child preferred to remain with the mother, not the father. App. 314. Nevertheless, the trial court asked whether the mother was "aware of any case law where the opinions of a nine-year-old have been allowed and have been found relevant as it pertains to timesharing?" App. 314. The trial court further stated, "If there's not then essentially they are essentially worthless as far as this case is concerned. *It's not something I can take into consideration.*" App. 315 (emphasis added).

After categorically disregarding the child's preference, the trial court found that the mother's "intent" was "my child doesn't want to go, and I'm not going to force her to go, and if she doesn't want to go, she doesn't have to go. *And that is*

contrary to the court's order, and it's also contrary to case law here in the State of Florida involving a nine-year-old." App. 319 (emphasis added). As such, the trial court found the mother's "attitude is one of well, this is what my daughter wants, in France she would be allowed to have her way, she would be allowed to state her wishes, and this is what she wants, and this is what she should get, I'm not going to stand in the way of my daughter's wishes, if she wants to live here in France, let her." App. 324. The trial court acknowledged that if the girl were 15 or 16 years old, it "may very well agree," and if she were 17, it "would almost guarantee." App. 324. But it would not agree here because "more often than not a nine-year-old" girl would "not have the maturity or the life experience to make" that decision. App. 324. The trial court did not, however, consider whether this particular nine-year-old girl had the maturity or life experience to make that decision. *See* App. 324.

At any rate, the trial court found the mother in willful contempt. App. 326. It gave "her 45 days to purge that contempt by insuring that the child is allowed to board the plane in Paris to be returned back to Florida." App. 326. Although the trial court did not "expect the mother to pick her up and throw her into the plane," it explained "the mother at the very least should not stand the way when the father attempts to retrieve her if necessary and take her into the plane." App. 326 Alt-

hough the transcript excerpt[2] does not identify any such competent, substantial evidence, the trial court also found the mother "physically precluded" or "physically prevented" the father and his new girlfriend from "retriev[ing]," "cajol[ing]," or "convinc[ing]" the child to board the plane. App. 324.

E. The trial court reduces its oral ruling to a written order, and this appeal follows

The trial court reduced its oral ruling to a written order. App. 337-40. In relevant part, the trial court ruled "as a matter of law" that any nine-year-old child is "of an age of insufficient maturity," so the girl's "wishes regarding time-sharing and parental communication *carry no legal significance* upon this Court's determination of the best interests of the Minor Child." App. 339.

Additionally, the trial court explained the mother was in willful contempt of the January 11, 2017 oral ruling and May 5, 2017 written order for three specific reasons. App. 339. First, she "physically and intentionally prevented" the father from "causing the Minor Child to board the airplane." App. 339. Second, she "intentionally prevented" the father's new girlfriend from "speaking to, coaxing and convincing the Minor Child to willingly board the airplane." App. 339. Third, she made no subsequent attempt to reschedule the pickup. App. 339.

[2] Given her present financial circumstances, the mother cannot afford to purchase that entire transcript.

The order gave the mother 45 days to purge the contempt "by ensuring that the Minor Child is allowed to board an airplane from France back to Florida" and making "best efforts" to "aid" the father in "retrieving" the child and "ensuring" she boards the plane. App. 339. Again, the contempt order did not require the mother to use physical force to place the child on an airplane. *See* App. 337-40.

SUMMARY OF ARGUMENT

The trial court abused its discretion in finding the mother in contempt of court by committing three errors of law to which no deference is owed. Each error independently requires this Court to reverse or vacate the contempt order.

First, the trial court erred when it concluded the mother willfully violated the January 11, 2017 and May 5, 2017 orders. *See infra* Argument I.A. These orders did not explicitly set forth the conduct that would be expected of the parties if the child were to refuse to board the plane to Florida with her father. They also did not contain clear language prohibiting the mother from preventing the father's girl-friend from persuading the child to board. Nor did they require the mother to make future attempts to transfer custody in the event of a failed time-sharing transfer. Accordingly, the trial court erred by improperly basing its contempt order on con-duct that did not violate the express directives of the January 11 and May 5 orders.

Second, the trial court erred when it concluded that Florida law categorically forbade it from taking into account the preference of a nine-year-old girl. *See infra*

Argument I.B. To the contrary, Florida law requires trial court's to take children's points of view into consideration of the best interests of the child so long as that specific child is sufficiently mature. There is no clear black line regarding specific ages. The trial court erred when it disregarded that case law.

Third, the trial court trial denied the mother procedural due process when it partially based its contempt order on her use of physical force against the father and her conduct toward the father's girlfriend, which the father's motions never addressed. *See infra* Argument I.C. In motion practice, due process requires, among other things, fair notice of the charges and allegations mounted against the opposing party. As such, the trial court erred when it found her in willful contempt based on such grounds.

ARGUMENT

I. Did the trial court err when it concluded the mother willfully violated its January 11, 2017 oral ruling and May 5, 2017 judgment?

The trial court erred when it found the mother in contempt. First, its prior orders did not explicitly set forth the conduct that would be expected of the parties if the child were to refuse to board the plane to Florida with her father. Second, the trial court erred when it concluded that Florida law categorically forbade it from taking into account the preference of a nine-year-old girl. And third, the father's contempt motions did not allege the mother physically prevented the father or his new girlfriend from retrieving the child.

Standard of review

A contempt order should be overturned whenever a trial court "either abused its discretion or departed so substantially from the law that fundamental error occurred." *Reder* v. *Miller*, 102 So. 3d 742, 744 (Fla. 2d DCA 2012) (citing *DeMello* v. *Buckman*, 914 So. 2d 1090, 1093 (Fla. 4th DCA 2005)). But "a trial court's discretion is limited by rules, statutes, and case law," so it "abuses its discretion when its ruling is based on an erroneous view of the law." *Id.* (citing *McDuffie* v. *State*, 970 So. 2d 312, 326 (Fla. 2007)). When a trial court bases a contempt finding "upon noncompliance with something an order does not say," however, "the standard of review is de novo, not abuse of discretion." *Wilcoxon* v. *Moller*, 132 So. 3d 281, 286 (Fla. 4th DCA 2014) (citation omitted).

Merits

A. The trial court erred when it concluded the mother willfully violated its January 11, 2017 oral ruling and May 5, 2017 judgment

The trial court erred when it held the mother in willful contempt based on conduct that was not explicitly prohibited by its orders.

1. A party may not be held in contempt for conduct that was not expressly prohibited by a trial court's prior directive

Contempt is "'[a]n act which is *calculated* to embarrass, hinder, or obstruct a court in the administration of justice, or which is *calculated* to lessen its authority or dignity.'" *Garcia* v. *Pinellas County*, 483 So. 2d 443, 444 (Fla. 2d DCA 1986)

(quoting *Thomson* v. *State*, 398 So. 2d 514, 517 (Fla. 2d DCA 1981)). Regardless "whether a contempt sanction is civil or criminal, '[w]hen a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority to enter the initial order, but it is also seeking to give effect to the law's purpose of modifying the contemnor's behavior to conform to the terms required in the order.'" *Parisi* v. *Broward County*, 769 So. 2d 359, 364 (Fla. 2000) (quoting *Int'l Union, Utd. Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 828 (1994)).

Moreover, "'[f]or a person to be held in contempt of a court order, the language of the order must be clear and precise, *and* the behavior of the person must clearly violate the order.'" *Reder*, 102 So. 3d at 743 (quoting *Paul* v. *Johnson*, 604 So. 2d 883, 884 (Fla. 5th DCA 1992)). A trial court cannot make a finding of contempt for violation of a court order based upon its intent in issuing the order when the court's "intent was not plainly expressed in the written order." *Id.* (quoting *Minda* v. *Ponce*, 918 So. 2d 417, 421 (Fla. 2d DCA 2006)). In other words, a finding of contempt for violating a court order cannot be based upon something the order does not say. *Id.*; *accord Menke* v. *Wendell*, 188 So. 3d 869, 871-72 (Fla. 2d DCA 2015).

2. The trial court based its finding of willful contempt on conduct that did not violate its orders' express provisions

The trial court held the mother in willful contempt of its January 11, 2017 and May 5, 2017 orders for three specific reasons. App. 339. It found the mother

had: (1) "physically and intentionally prevented [the father] from causing the Minor Child to board the airplane back to Florida from France"; (2) "intentionally prevented [the father's] girlfriend from speaking to, coaxing and convincing the Minor Child to willingly board the airplane"; and (3) "made no attempt to arrange pick-up of the Minor Child by [the father] subsequent to the failed Paris, France airport transfer." App. 339. None of these findings were legally sufficient to establish willful contempt of the trial court's oral ruling or written order.

In *Marcus* v. *Marcus*, the Fourth District addressed a civil contempt order very similar to the one involved here. 902 So. 2d 259 (Fla. 4th DCA 2005). *Marcus* involved the dissolution of a marriage that had produced four marital children (Rachel, age 13, David, age 12, Daniel, age 11, and Rebecca, age 5). *Id.* at 260. After the husband filed for divorce, the parties initially "occupied the marital home together." *Id.* Eventually, however, "they agreed on an order of temporary relief," and the husband vacated the marital home. *Id.* at 260-61. The order established that if the husband did not have overnight weekend visitation with the children on a given week, he was entitled to overnight visitation with them on the Wednesday of that week. *Id.* at 261.

During the first weekend visitation, the husband chose to pick the children up from school. *Id.* Although three of the children came without incident, David, like a little rascal, tried to escape. *Id.* The husband found him and took the children

home. *Id.* "At the home, David started a path of destruction," so David's religious instructor took him to the wife's house. *Id.* The husband called her "and told her that he expected David to spend the evening with him and that he expected the wife to try to make that happen." *Id.* The wife replied, "'I'm never going to force the children to do anything they don't want to do.'" *Id.* Later, the instructor brought David back to the husband's home, where the husband told David "he could not physically stop him from leaving." *Id.* David then went back to the wife's home on his own accord. *Id.* He did not spend that evening, Saturday evening, or Sunday evening at the husband's house. *Id.*

On Wednesday, the husband again tried to pick the children up from school. David protested and was picked up by the wife, who dropped David off at the husband's home later that day. *Id.* David again returned to his mother's house, this time convincing his brother Daniel to come with him. *Id.*

"Shortly thereafter, the husband filed a motion for contempt alleging that the wife was orchestrating David's bad behavior, and she was refusing to have the children comply with the visitation schedule." *Id.* At the motion hearing, a neighbor testified that although "the wife was doing everything in her power to get the boys to the husband's house," she did not "physically force the children to return." *Id.* The hearing testimony also revealed that the children had conflicted preferences regarding with which parent they wanted to live. *Id.* at 262. The trial court held the

wife in contempt for "'not taking adequate steps to insure that when it is the husband's time with the children, the father gets to exercise his visitation.'" *Id.*

On appeal, *Marcus* reversed. *Id.* at 263. It held the wife's conduct "could not be deemed willful," because "the temporary relief order was not specific enough to put [her] on notice of the conduct expected of her when one of the children simply refuses to stay with the husband and runs away when he is sent there." *Id. Marcus* noted that although "[t]he husband wanted the wife to physically force the child to go with him," he would not do the same. *Id.* Ultimately, it reasoned, "'holding one party in contempt based upon aspirational directives as to what ideal visitation conditions should be is error because 'the law also imposes upon the court the requirement to be explicit and precise in its commands if strict compliance is to be exacted in the form of a contempt sanction.'" *Id.* (citation omitted).

Here, as in *Marcus*, neither the parenting plan nor the trial court's oral ruling specified what conduct was expected of the mother if the child refused to get on the plane with the father. Accordingly, it was not precise enough to put her on notice of her obligations under the time-sharing transfer provisions of the parenting plan. Indeed, both the father and the mother were unwilling to physically force the child onto the plane (as were French authorities). App. 308. To the contrary, the mother complied with the express provisions of the parenting plan by "hav[ing] the

Minor Child ready on time with sufficient clothing packed, and ready at the agreed upon time of exchange." App. 288.

Additionally, there was no evidence that she "disparage[d] [the father] in front of the Minor Child." App. 282. Rather, the father "even admitted to French law enforcement that Mother encouraged the minor child to get on the plan[e]." App. 308. *Marcus* held the father's unproven accusation "that the wife must have made disparaging remarks and was somehow undermining his visitation privilege" was insufficient to sustain a finding of willfulness because it "suggest[ed] the wife only 'indirectly' violated the order." 902 So. 2d at 263. Indeed, the wife's "statement that she would never force the children to do anything they did not want to do," which "was said in the context of David's … adamant refusal to return to his [father's] home," did not evince a willful violation of the trial court's order. *Id.* Thus, in this case, the father's allegation that the mother "wrongfully manipulated and exerted undue influence on the minor child which resulted in the child's refusal to board the plane" (App. 292) is likewise insufficient to sustain a finding of willful contempt.

In sum, under *Marcus*, the trial court could not have held the mother in willful contempt for physically preventing the father from causing the child to board

the plane, because the ruling and order did not contemplate a situation where the child herself adamantly refuses to board.[3]

Also relevant is this Court's decision in *Cooley* v. *Moody*, 884 So. 2d 143 (Fla. 2d DCA 2004), on which *Marcus* had relied. Under *Cooley*, the mother could not have willfully violated the trial court's oral ruling or written order by preventing the father's girlfriend from convincing the child to get on the plane or by not making further attempts to turn the child over after the failed Paris transfer. In *Cooley*, the trial court had ruled the mother was required to turn the child over to the father at a designated law office at a specific time. *Id.* at 144. The mother timely "appeared at the law office with the child." *Id.* The father did not. *Id.* Instead, his

[3] The contempt order in *Marcus* stated, in part: (1) "Even though the children express a desire to be with one parent over the other, that parent must insist that the child go see the other party"; (2) "If necessary, the parties must close the door to their own home to the children and require them to visit the other party"; and (3) "The court is not telling the wife to drag the children by the arm or hair out of the house as that would not be good parenting, but to do what she has to do as a parent to get the children to see their father." 902 So. 2d at 262. Although *Marcus* reversed the contempt order, it concluded the parties had "sufficient notice of what is expected regarding their future conduct in facilitating visitation." *Id.* at 263.

Here, the contempt order required the mother to: (1) "ensure[] that the Minor Child is allowed to board an airplane from France back to Florida"; (2) "make best efforts to aid [the father] in retrieving the Minor Child and ensuring that Minor Child boards the airplane"; and (3) refrain from interrupting or impeding the father's "retrieval of the Minor Child." App. 340. These instructions are sufficient to put the mother on notice of the conduct that is expected of her during future time-sharing exchanges. As such, this Court can, like *Marcus*, reverse the contempt order without creating an environment in which the airport incident can be repeated without legal recourse.

wife came to pick up the child. *Id.* "The Mother refused to leave the child" with the father's wife, "and the transfer of custody failed." *Id.*

The trial court in *Cooley* held the mother in contempt. *Id.* at 145. It noted its prior ruling did not expressly require the mother to turn the child over to the father's wife, so its willful contempt finding could not be based on the mother's failure to do so. *Id.* at 145. Nevertheless, it still found the mother in willful contempt because "the order was specific that [the mother] turn over *custody* on a particular date and time, [and] she did not do that based on [the father's wife] being there." *Id.* (emphasis added). The trial court in *Cooley* also found the mother in willful contempt for making no attempts since the failed transfer "to effectuate the custody that" had been ordered. *Id.*

Cooley reversed. *Id.* It explained, "The trial court correctly concluded that the Mother could not be held in contempt for failing to leave the child with [the father's wife] because the order did not direct her to do so." *Id.* Here, neither the trial court's oral ruling nor its written order required the mother to allow the father's girlfriend to coax and convince the child to board the plane. Accordingly, the trial court erred in holding the mother in willful contempt for preventing the father's girlfriend from doing so. *See id.* ("[o]ne may not be held in contempt of court for violation of an order or a provision of a judgment which is not clear and definite so as to make a party aware of its command and direction"); *accord Minda*, 918

So. 2d at 421 (father could not be held in contempt for allowing his five-year-old daughter to fly unaccompanied because, although the trial judge may have "inten[ded] that the child not fly unaccompanied … before the child was eight years old," the "final judgment [did] not explicitly say that").

Additionally, *Cooley* held the trial court erred when it held the mother in willful contempt for not making "attempts to effectuate the transfer of custody after" the failed attempt at the law office. *Cooley*, 884 So. 2d at 145. It reasoned that even if the trial court had "inten[ded] that the Mother find an alternative method to transfer custody if [the initial attempt] failed," the temporary custody order contained no language "direct[ing] the Mother to do so." *Id.* Thus, in this case, the mother could not have been held in contempt for not making future attempts to turn the daughter over to the father after the failed Paris transfer.

B. The trial court erred when it concluded Florida law categorically forbade it from taking a nine-year-old girl's preference into consideration

When it concluded Florida law categorically forbade it from taking a nine-year-old girl's preference into consideration, the trial court committed an error of law to which no deference is owed.

To the contrary, Florida law makes clear that trial courts may always choose to consider the testimony of children. For instance, the commentary of Florida Family Law Rule of Procedure 12.407 prohibits an absolute ban on child testimo-

ny. *See* Fla. Fam. L. R. P. 12.407 cmt. ("While due process considerations prohibit an absolute ban on child testimony, this rule requires that a judge determine whether a child's testimony is necessary and relevant to issues before the court prior to a child being required to testify.").

And for over a century, Florida cases have taken into consideration the preferences of young children as they concern time-sharing. "The decisions in this country do not fix any definite number of years when the age of discretion begins, but mental capacity is the test; and when the minor shows sufficient capacity mentally to exercise an intelligent choice, and no objection can be made to the, person chosen, the court will ordinarily allow such choice to prevail." *Marshall* v. *Reams*, 32 Fla. 499, 504 (1893). Subsequently, the Florida Supreme Court made clear that courts may also consider the views of a child as young as seven. *See Epperson* v. *Epperson*, 101 So. 2d 367, 370 (Fla. 1958) ("In some measure, but in lesser degree perhaps, the wishes of the younger [seven-year-old] boy should also be considered. The preference of the children is not absolutely controlling but it should be given considerable weight as between parents of relatively equal fitness, as the instant case appears to present."). Ultimately, when deciding the weight to give a child's preference, the trial court should make an individualized determination whether he or she has "sufficient maturity" to know what his or her best interest is. *Greene* v. *Kelly*, 712 So. 2d 1201, 1202 (Fla. 5th DCA 1998).

Here, the trial court did not make any individualized determination whether the nine-year-old girl had sufficient maturity to understand her own best interest, so it never considered how much weight to give her preference. Instead, the trial court incorrectly believed that Florida law categorically prohibited it from taking the girl's preference into consideration at all. The appellate remedy is to vacate the order and remand for reconsideration in light of the correct legal framework.

C. The trial court denied the mother procedural due process when it partially based its contempt order on her conduct toward the father's girlfriend and her use of physical force, which the father's motions did not address

The trial court denied procedural due process to the mother because it partially based its contempt order on her supposed use of physical force in preventing the father from carrying the child onto the plane and her interaction with his girlfriend, which were not addressed in the father's motions.

Motions "must be made in writing unless made during a hearing or trial, must *state with particularity the grounds for it*, and must set forth the relief or order sought." Fla. R. Civ. P. 1.100(b) (emphasis added). "The purpose of rule 1.100 is to put the opposing party on notice of the grounds which will be asserted against it." *Jaffrey* v. *Baggy Bunny, Inc.*, 733 So. 2d 1140, 1141 (Fla. 4th DCA 1999). Put otherwise, "[i]n motion practice, due process requires, among other things, 'fair notice of the charges and allegations' mounted against the opposing party.'" *Em-*

pire World Towers, LLC v. *CDR Creances, S.A.S.*, 89 So. 3d 1034, 1044 (Fla. 3d DCA 2012) (citation omitted).

Here, the father's contempt motions (App. 291-96, 305-07) never addressed the mother's use of physical force. Nor did they even mention his new girlfriend. As such, the trial court deprived the mother of due process when it based its ruling in part on the mother's use of physical force against the father and her conduct toward his new girlfriend. *See* App. 339.

CONCLUSION

The Court should vacate the Order of October 27, 2017 and remand for further proceedings.

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns (FBN 12535)
Arda Goker (FBN 1004378)
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com
agoker@burnslawpa.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 14, 2018, I electronically served the following via eDCA and email:

Adam G. Russo, Esq.
Myers & Eichelberger, PL
5728 Major Boulevard, Suite 735
Orlando, FL 32819-7977
adam@themelawfirm.com
service@themelawfirm.com
Counsel for Appellee

Susan J. Best, Esq.
Best Law, PLLC
1869 North Crystal Lake Drive
Lakeland, FL 33801-5955
susan@polkattorney.com
edocs@polkattorney.com
Trial counsel for Appellant

February 14, 2018

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

February 14, 2018

/s/ Thomas Burns
Thomas A. Burns