STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1172

In re the Marriage of:
Teresa Corinne MacNabb, petitioner,
Respondent,

vs.

John Michael Kysylyczyn,
Appellant.

Filed August 23, 2021
Appeal dismissed and vacated in part
Ross, Judge

Ramsey County District Court
File No. 62-FA-08-2020

Victoria A. Elsmore, Sarah Peterson, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for respondent)

Carl A. Blondin, Oakdale, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

The daughter of John Kysylyczyn and Teresa MacNabb has been the subject of a parenting-time order since the parties' 2010 divorce, but she has refused to spend the designated time with her mother. The district court concluded that Kysylyczyn's failure to discipline the then 17-year-old daughter or take other action to coerce her to go to

MacNabb's home as scheduled constituted constructive civil contempt of court and warranted time in jail. Kysylyczyn appeals, arguing that the district court improperly refused to allow the daughter to testify at the contempt hearing and inappropriately held him responsible for the nearly adult daughter's decision to avoid her mother. Since the time of the district court's order, the daughter has become an adult and graduated high school, and is no longer subject to a parenting-time order. We therefore dismiss the appeal as moot and vacate the contempt orders.

FACTS

Appellant John Kysylyczyn and respondent Teresa MacNabb divorced in 2010 under a judgment and decree that assigned them joint legal and physical custody over their children—a daughter born in March 2003 and son born in 2005. The children have been the subject of a consequent parenting-time order. In March 2019 MacNabb moved the district court to hold Kysylyczyn in civil contempt of court for failing to ensure that their daughter adhered to the parenting-time schedule. She asked the district court to order Kysylyczyn to serve time in jail and pay her attorney fees and costs.

The district court held a contempt hearing at which it refused to allow Kysylyczyn to call the daughter to testify. Kysylyczyn testified about the personal conflict between mother and daughter affecting daughter's refusal to spend time with MacNabb and that he encouraged their daughter to discuss her feelings with MacNabb. He told the court that he said or did nothing to discourage daughter from going to her mother's home as scheduled. The district court questioned Kysylyczyn about whether he had punished the daughter for her refusal and expressed disapproval when Kysylyczyn said he had not. The district court

held Kysylyczyn in constructive civil contempt of court and ordered him to be confined to jail for 30 days. The district court stayed execution of the confinement conditioned on Kysylyczyn's complying with the parenting-time order.

Five weeks later MacNabb moved the district court to vacate the stay, arguing that Kysylyczyn had failed to satisfy the conditions. The district court held another hearing, where Kysylyczyn testified that he told his daughter about the order, directed her to go to MacNabb's home during her scheduled parenting time, and forbade her from staying in his house during that parenting time. Kysylyczyn said that he believed that, rather than going to her mother's home, the daughter would just go to the nearby home of her grandparents—Kysylyczyn's parents. Again the district court expressed its disapproval of Kysylyczyn's failure to engage in more disciplinary actions to compel the daughter to go to MacNabb's home as scheduled. The district court issued an order for writ of attachment and warrant of commitment. The order directed that Kysylyczyn "may be released from [jail] after he" agrees in writing to various behavior to force the daughter's parenting-time compliance, including

> corrective measures and disciplinary efforts against [her], such as restricting or limiting [her] privileges to drive, to use her cell phone, to make recreational use of computer or internet access (including access relating to [her] YouTube channel), to schedule and attend social events with friends, to play with toys or Legos, and to attend extracurricular events (including events related to [her] involvement in scouts, band, music, [the] junior explorers club, among others),

and to "prevent" her from spending time with Kysylyczyn's parents during her scheduled time with MacNabb. Kysylyczyn appeals.

DECISION

During the pendency of this appeal, we asked the parties to update us about the daughter's status as a minor and to address any resulting question of mootness. For the following reasons, we hold that the appeal is mooted by daughter's adulthood, we dismiss the appeal without deciding whether the district court's orders were appropriate, and we vacate the contempt orders.

The questions presented in the appeal are moot. We decide only justiciable controversies, which are those involving a definite and concrete assertion of a legal right threatened in a genuine conflict between parties having adverse interests. *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 336–37 (Minn. 2011). If the issues raised fail to continue throughout the case, they become moot. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005). An appeal of a contempt order is moot when the contemnor purges his contempt or the controversy underlying the contempt ends. *See Seaver v. Indep. Sch. Dist. No. 166 of Cook Cty.*, 281 N.W.2d 198, 199 (Minn. 1979); *Clement v. Clement*, 204 N.W.2d 819, 819 (Minn. 1973). The controversy underlying the contempt order here ended when the parties' daughter turned 18 and graduated high school.

District courts have the power to enforce parenting-time orders by holding a party in civil contempt of court. Minn. Stat. § 518.175, subd. 6(h) (2020). The purpose of a civil-contempt order is to end a party's ongoing failure to comply with a court order, not to punish the party for past failures. Minn. Stat. § 588.12 (2020); *Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989). The district court here began the hearing on MacNabb's motion for contempt explaining to the parties, "[W]e're here today on a

contempt motion concerning allegations regarding your daughter [] and [Kysylyczyn's] interfering with [MacNabb's] parenting time." The basis for finding Kysylyczyn in contempt was his failure to encourage or compel the parties' daughter to comply with the parenting-time order. And the order specifically concluded that Kysylyczyn was "in contempt of court for failure to comply with the Parties' March 26, 2018, Stipulated Agreement regarding parenting time." But since then, Kysylyczyn's contempt can no longer occur because the parties' daughter is no longer the subject of either parties' enforceable parenting time.

The parties' daughter can no longer be the object of the parenting-time order. Only a child can be the subject of court-ordered parenting time. *See* Minn. Stat. § 518.175, subd. 1(a) (2020). For the purposes of such an order, a "child" is a person younger than 18 years, a person who is between 18 and 20 years old and still attending secondary school, or a person who has a mental or physical condition that prevents her from supporting herself. Minn. Stat. § 518A.26, subd. 5 (2020). The parties have informed us that their now 18-year-old daughter graduated from high school shortly after oral argument in this appeal. And the record does not suggest that she is incapable of self-support. She is no longer a child whose habitation is based on the parenting-time order that the district court intended to enforce by jailing Kysylyczyn. A party may not be compelled through a civil-contempt order after the point he no longer has the ability or duty to comply with the underlying order for which he has been found to be in contempt. *In re Welfare of Kg.E.H.*, 542 N.W.2d 658, 662 (Minn. App. 1996). Assuming Kysylyczyn engaged in contempt, his contempt ended when his daughter ceased being a child.

The circumstances here moot the issues Kysylyczyn raises on appeal. He challenges the district court's refusal to allow his daughter to testify at the contempt hearing, its holding him in contempt, and its denial of his motion to amend the warrant-of-commitment order. These decisions no longer affect Kysylyczyn's legal interests.

MacNabb argues against mootness on theories that do not change our mind. She argues that Kysylyczyn remains in contempt because of communication failures the district court identified in its contempt order and purge conditions. But those communication failures relate only to parenting-time issues concerning the parties' daughter. The daughter no longer being the subject of the parenting-time order, Kysylyczyn no longer bears any duty to communicate with MacNabb about parenting time concerning the daughter. MacNabb also argues that the fact that the parties' son remains subject to the parenting-time order prevents us from deeming the appeal moot. But a contempt order cannot preemptively compel a party to avoid speculative, future noncompliance. Minn. Stat. §§ 588.01, subd 3, 588.12 (2020); s*ee Mahady*, 448 N.W.2d at 890. The district court's decisions at issue in this appeal arise from a contempt order designed to remedy Kysylyczyn's alleged failure to facilitate MacNabb's parenting time only with the daughter, not the son. And the parties' hearing testimony informs us that MacNabb raised no concerns about her parenting time involving their son.

Conceding mootness, Kysylyczyn urges us not to dismiss the appeal because he will suffer collateral consequences from the challenged orders. An appeal is not moot if the challenged order, remaining intact, creates collateral consequences. *In re McCaskill*, 603 N.W.2d 326, 329 (Minn. 1999). Collateral consequences are those that may impose

"real and substantial disabilities" on the challenging party. *Id.* (quotation omitted). A party can show a "real and substantial" impairment with evidence and explanation of how a judgment could harm him. *See State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 360 (Minn. 1980). Kysylyczyn argues that he is a political figure whom the district court's decisions will harm by inhibiting his work. He does not explain how this is so, and his assertions are too vague for us to consider. We conclude that Kysylyczyn fails to identify a collateral consequence.

The parties cite no Minnesota civil case addressing whether or when dismissing an appeal as moot includes vacating the order or orders being appealed, and we are aware of none. We may look for insight into how other jurisdictions have addressed issues that we have not considered, *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 629 (Minn. 2007), and in this case we find the Supreme Court's reasoning on the issue for federal courts particularly informative. When an appeal becomes moot in the federal courts through mere happenstance rather than through the appealing party's conduct, the appellate court should vacate the appealed-from judgment or order. *Alvarez v. Smith*, 558 U.S. 87, 94, 130 S. Ct. 576, 581 (2009) (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40, 71 S. Ct. 104, 107 (1950)). The federal courts base this approach on a federal statute that authorizes federal appellate courts to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (2018). This broad authorization is akin to the applicable state procedural rule, which states in

relevant part that "[t]he appellate courts may reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require." Minn. R. Civ. App. P. 103.04.

Relying on the federal statute, the Supreme Court reasons that vacating based on mootness by happenstance is preferred because it "clears the path for future relitigation of the issues between the parties, . . . [ensures] the rights of all parties are preserved, . . . [and] prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences." *Munsingwear*, 340 U.S. at 40–41, 71 S. Ct. at 107. By contrast, if an appeal becomes moot because of the intentional actions of the appellant (like declining to pursue the appeal or settling the case), the appellate court will not vacate the underlying decision because the appellant has willingly surrendered the option for appellate review of the judgment, and so that party is not entitled as a matter of fairness to the appellate court's vacating that judgment. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24–25, 115 S. Ct. 386, 391–92 (1994); *Karcher v. May*, 484 U.S. 72, 82–83, 108 S. Ct. 388, 395 (1987). Indeed, "the reference to 'happenstance' in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Bancorp*, 513 U.S. 18, 25, 115 S. Ct. 386, 391.

The states that have considered the federal approach all seem to follow it, most treating happenstance as a bright-line basis for vacating the underlying decision and a few others adding the requirement that the appellant also make some showing of fairness in

vacating. More specifically, the cases in the majority position either implicitly or explicitly reason that vacatur is fair for the appellant when the case is mooted by happenstance, without requiring further showing from the appellant, while the minority cases require a further showing by the appellant before concluding that vacatur is fair. Today we will follow the majority, bright-line approach.

Most state courts that have considered *Bancorp* and *Munsingwear* follow a bright-line approach when addressing a case mooted on appeal by circumstances beyond the appellant's control. *See Young's Realty, Inc. v. Brabham*, 896 So. 2d 581, 583 (Ala. Civ. App. 2004) ("where, as here, mootness on appeal results from the unilateral action of the party who prevailed below," fairness to the appellant requires vacatur under *Munsingwear* and *Bancorp* (quotation omitted)); *Davidson v. Comm. for Gail Schoettler, Inc.*, 24 P.3d 621, 624 (Colo. 2001) (vacating judgment interpreting a statute when the legislature repealed the statute, preventing review through happenstance); *Tyson Foods, Inc. v. Aetos Corp.*, 818 A.2d 145, 148 (Del. 2003) (concluding that *Bancorp* agrees with Delaware's interests of justice standard for vacatur because that "standard is no doubt met where the party seeking appellate review is *thwarted* by some event beyond its control." (emphasis in original)); *Lewis v. Hotel & Rest. Emps. Union, Local 25, AFL-CIO*, 727 A.2d 297, 299–302 (D.C. 1999) (vacating judgment when the D.C. Council amended legislation at issue, mooting the issues through happenstance); *Garces v. Legarda*, 86 So. 3d 602, 605–07 (Fla. Dist. Ct. App. 2012) (vacating a custody order when father who prevailed in district court returned children to Ecuador, mooting the appeal through his unilateral action); *Babies Right Start, Inc. v. Georgia Dep't of Pub. Health*, 748 S.E.2d 404, 406–07

(Ga. 2013) (vacating a judgment disqualifying appellant from participating in a welfare program when the disqualification expired after a year, mooting the appeal through happenstance); *Goo v. Arakawa*, 321 P.3d 655, 665–66, 69 (Haw. 2014) (reasoning that *Bancorp* preserved happenstance as a sufficient reason to vacate, but remanding for the district court to determine the cause of mootness in the case); *State v. Barclay*, 232 P.3d 327, 330 (Idaho 2010) (vacating a court of appeals opinion on a criminal jurisdictional issue when the respondent completed his sentence, mooting the case through happenstance); *Felzak v. Hruby*, 876 N.E.2d 650, 657–59 (Ill. 2007) (vacating a lower court decision in a case with facts similar to this one after determining the issue on appeal is moot and citing the happenstance discussion from *Munsingwear*); *Windstream Ky. W., LLC v. Ky. Pub. Serv. Comm'n*, 362 S.W.3d 357, 360–61 (Ky. Ct. App. 2012) (vacating judgment affirming state agency's ability to investigate utility's rates when agency closed its investigation, unilaterally mooting the utility's appeal); *Aquacultural Research. Corp. v. Austin*, 41 N.E.3d 318, 321–23 (Mass. App. Ct. 2015) (vacating judgments denying appellant's standing to contest wind turbine's certification when respondent mooted the issue by granting restriction which forbade it from constructing the turbine); *Anglers of AuSable, Inc. v. Dep't of Env't Quality*, 796 N.W.2d 240, 240 (Mich. 2011) (order opinion vacating judgments on issue of riparian rights when respondent surrendered the physical and legal means to discharge water, mooting the appeal); *Asher v. Carnahan*, 268 S.W.3d 427, 432 (Mo. Ct. App. 2008) (quoting *Bancorp* that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment" (alteration in original)); *Byerly v. S.C. Nat.*

Bank Corp., 438 S.E.2d 233, 233 (S.C. 1993) (vacating a judgment when party that prevailed in district court died, mooting the case through happenstance); *Bd. of Supervisors of Fairfax Cty. v. Ratcliff*, 842 S.E.2d 377, 379 (Va. 2020) (quoting *Bancorp* that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance . . . ought not in fairness be forced to acquiesce in that ruling."); These courts have tended to vacate underlying decisions mooted on appeal through happenstance as fair to the appellant, without requiring more.

We have found that several states apply the federal approach by reading *Bancorp* to require an appellant to also make a showing of entitlement to vacatur even when the appeal is mooted by happenstance. *See In re Emma F.*, 107 A.3d 947, 957–58 (Conn. 2015) (instructing that appellant must show equitable entitlement to vacatur, which it failed to do in this case); *Thanks But No Tank v. Dep't of Envtl. Prot*., 86 A.3d 1, 4 (Me. 2014) ("We agree with [*Bancorp*] and conclude that even if [the appellant] could demonstrate that review of this case was prevented through happenstance, it has not met its burden of demonstrating an entitlement to vacatur."); *Kerr v. Bradbury*, 131 P.3d 737, 742 (Or. 2006) ("[T]his court will be guided by the principles from [*Bancorp*] quoted above and the observation in that case that vacatur is an extraordinary remedy to which a party must show an equitable entitlement." (quotations omitted)). Those states therefore require an appellant to show unfairness caused by the moot judgment's preclusive effect, demonstrate an impact to the appellant's job prospects, or establish that vacatur would serve the public interests.

We align with the majority approach to the federal standard and conclude that an appellant demonstrates equitable entitlement to vacate by showing that the appeal is

mooted through happenstance rather than by the appellant's voluntary acts. Vacating the underlying, challenged orders is appropriate here because the appeal is mooted by the happenstance of the parties' daughter reaching adulthood and no longer being the subject of the parties' parenting-time dispute. Dismissing the appeal without vacating the conditional contempt order and final order for the warrant of commitment would foreclose Kysylyczyn's opportunity to obtain review of those challenged orders through no act or fault of his own. We therefore vacate the district court's November 1, 2019 "Order for Writ of Attachment and Warrant of Commitment" and the August 2, 2019 contempt order, captioned "Amended Order Following Motion Hearing," which is the basis of the November 2019 order.

We do not vacate the district court's order awarding attorney fees because that order is not before us. An appeal begins with a notice of appeal "specifying the judgment or order from which the appeal is taken." Minn. R. Civ. App. P. 103.01, subd. 1(a). While we liberally construe a notice of appeal, the notice must alert the parties to the issues to be litigated. *Kelly v. Kelly*, 371 N.W.2d 193, 195–96 (Minn. 1985). The order identified in Kysylyczyn's notice of appeal is the order for the writ of attachment and warrant of commitment. The district court's order granting the award of attorney's fees is not identified in or attached to Kysylyczyn's notice of appeal and is not the subject of any argument in the parties' briefing on the merits. Kysylyczyn's brief simply requests in conclusory fashion that we reverse the fee order as we reverse the contempt order, which is not enough to alert the parties to any issues with the fee order and make this an appeal of the fee order. It is true that we "may review any order affecting the order from which

the appeal is taken," Minn. R. Civ. App. P. 103.04, but the fee order does not fit within this caveat. The fee order is not specifically tied to attorney services accrued during the contempt proceedings but rather expressly covers fees generated because of Kysylyczyn's noncompliance with the parenting-time order beginning one year before the August 2019 fee order. Nor does the final contempt order rely on the fee order in any way.

Appeal dismissed and vacated in part.