



ROBERT BURTON COONIN  
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER  
500 N. KING STREET, STE 9400  
WILMINGTON, DELAWARE 19801-3732

April 17, 2019

Staci Pesin, Esq.  
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**LETTER, DECISION  
AND ORDER**

Patrick Boyer, Esq.  
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RE: D----- F----- v. A----- D-----  
File No.: CN06-03860; Petition Nos.: 16-36418 and 17-03224  
**Motion for Stay and Affidavit for Attorney's Fees**

Dear Ms. Pesin and Mr. Boyer:

This is the Court's decision regarding the Motion for a Stay filed on March 8, 2019 by A----- D----- ("Mother"), represented by Patrick Boyer, Esquire, regarding the Court's Order issued on February 25, 2019 concerning the sanctioning of Mother for her contempt of the Court's prior orders concerning the custody of D----- F----- Jr. ("DJ") born June 17, 2006 and V----- F----- born July 31, 2007 (collectively "Children"). On March 22, 2019, D----- F----- ("Father"), represented by Staci Pesin, Esquire, filed a Response to Mother's Motion. Also before the Court is the Affidavit for Attorney's Fees filed on March 25, 2019 by Father and the Mother's Response filed on April 8, 2019.

**Procedural History**

On November 22, 2016, Father filed a Petition – Rule to Show Cause ("RTSC") against Mother wherein he alleged that Mother violated the Court's custody modification Order of April 25, 2016. On March 30, 2017, the Court issued an Order finding Mother in contempt of the Court's

prior Order but deferred judgment on how Mother could purge herself of this contempt and what sanctions were warranted until the Court concluded a full hearing on Mother's Petition to Modify Custody Order which she had filed on February 8, 2017. The Court held a consolidated three-day final hearing on February 8, February 9 and October 26, 2018 regarding Father's Petition RTSC and Mother's Petition to Modify Custody. Following the conclusion of the testimony, the Court took the matter under advisement and issued a twenty-eight-page Order on the consolidated Petitions dated February 25, 2019. Especially pertinent to this Order, on page 28 paragraph 19 the Court ordered as follows:

Father's request for attorney's fees is granted. The Court shall consider Father's request for attorney's fees, pursuant to 13 *Del. C.* § 728(b), upon his attorney's submission of an affidavit attesting to her fees. Mother shall have 10 days thereafter to respond to the request for fees.

Apart for the award of attorney's fees to Father, the Court will not outline that decision in detail but will only refer to specific aspects of the Order below as raised in the two Motions.

#### **Applicable Law**

A Motion for Stay pending an appeal to the Supreme Court of Delaware is governed by Supreme Court Rule 32(a) which states in relevant part that: "[a] stay or an injunction pending appeal may be granted or denied in the discretion of the trial court, whose decision shall be reviewable by this Court." When considering whether to grant or deny a motion for a stay, the Family Court must consider these four factors: (1) the "likelihood of success on the merits of the appeal," (2) "whether the petitioner will suffer irreparable injury if the stay is not granted, (3) "whether any other interested party will suffer substantial harm if the stay is granted," and (4) "whether the public interest will be harmed if the stay is granted."<sup>1</sup> Rather than give exclusive weight to the probability of success on appeal, the Court must "balance all of the equities."<sup>2</sup> The following analysis will consider each of the four factors.

An award of attorney's fees following a finding that a party has violated a Court order on custody and/or visitation is governed by 13 *Del. C.* § 728(b) which states in relevant part that "the Court shall order such person to pay the costs and reasonable counsel fees of the parent applying

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<sup>1</sup> *Kirpat, Inc. v. Del. Alcoholic Beverage Control Com'n*, 741 A.2d 356, 357 (Del. 1998) (citing *Evans v. Buchanan*, 435 F.Supp. 832, 841-42 (D. Del. 1977)).

<sup>2</sup> *Id.*

for relief under this section.” Delaware Rule of Professional Conduct 1.5 sets out eight factors to be considered in determining the reasonableness of a fee.

### Stay

#### **1. Mother’s Appeal is Likely to Fail on the Merits**

Mother raises several arguments for why she thinks her appeal of the Court’s decision will succeed on the merits. First, she believes the Court’s sanctions are criminal rather than civil in nature. Second, she believes the Court’s indefinite transfer of custody and suspension of visitation is contrary to the plain language of 13 *Del. C.* § 728(a) and (b). Third, she believes the Court’s sanctions violate Mother’s procedural due process rights. The Court rejects each of Mother’s three arguments and finds that Mother’s appeal is not likely to succeed on the merits.

The Supreme Court of Delaware has found in *DiSabatino v. Salicete* that “whether a contempt is civil or criminal turns on the ‘character and purpose’ of the sanction involved. Thus, a contempt sanction is considered civil if it ‘is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.’”<sup>3</sup> In *DiSabatino*, the Supreme Court also found that:

“‘paradigmatic coercive, civil contempt sanction’ in the form of incarceration: involves confining a contemnor indefinitely until he complies with an affirmative command such as an order ‘to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.’ ... Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies.... In these circumstances, the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus ‘carries the keys of his prison in his own pocket.’”<sup>4</sup>

The character and purpose of the sanctions in this case are coercive and remedial and not punitive. The Court structured the provisions of the Order to serve two purposes. First, to provide a remedy for Mother’s ongoing contempt of the Court’s prior Orders of preventing Father from reunifying with D----- Jr for over two years. Second, to coerce Mother to comply with the current Order. Although the Court admits that, rather than expressly lay out in paragraph 4 which provisions of the current Order Mother could be found in violation of, it generally noted that if “Mother fails to

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<sup>3</sup> 671 A.2d 1344, 1349-50 (Del. 1996) (citing *United Mine Workers v. Bagwell*, 512 U.S. 821, 827-28 (1994)).

<sup>4</sup> 671 A.2d at 1350 (citing to *United Mine Workers*, 512 U.S. at 828).

comply with the other express provisions of this Order” that she would face the prospect of imprisonment, the implication of the Court was only to use the threat of incarceration to coerce Mother to (1) immediately return DJ to Father’s care under paragraph 3 and (2) not attempt to prematurely resume visitation and exercise of custodial decision-making authority regarding Children or interfere with Father’s reunification efforts contrary to the recommendations of the psychologist and counselor. Should Mother be incarcerated for her failure to comply with either of these two conditions, then she would have sole control over her ability to purge the contempt and obtain her release. First, she could obtain her release by facilitating her paramour J--- F----- or another designee to physically transfer the custody and care of DJ over to Father. Second, she could obtain her release by filing an affirmative representation with the Court she would henceforth agree to not prematurely resume visitation and custodial decision-making authority regarding Children or inappropriately interfere with Father’s reunification efforts, and by facilitating her paramour or another designee to transfer the custody and control of Children back to Father if they were in her care during her attempt to subvert the express reunification process set out in the Court’s Order. In putting express language here to the Court’s implied purpose of the Order of February 25, 2019, the Court makes clear once Mother gains her release from incarceration under either of the two above scenarios, she will also still need to comply with all the provisions of the Order before she can purge herself of the Court’s March 30, 2017 finding of contempt and resume unsupervised contact and joint custodial decision-making authority with Children.

The Court’s sanctions are not outside the statutory limit of 13 *Del. C.* § 728(a) and (b). 13 *Del. C.* § 728(a) requires no finding that one parent “would endanger the child’s physical health or significantly impair his or her emotional development” before the Court restricts that parent’s contact under 728(b). The Court is not limited in such cases as this to a temporary transfer of custody of “up to 30 days” as set out in 13 *Del. C.* § 728 (b)(5). The Court’s remedies and sanctions are in response to actions by Mother taken subject to 13 *Del. C.* § 728 (b) and not solely to protect Children from future harm. The Court also interprets the five express provisions of 13 *Del. C.* § 728 (b) to be sanctions or remedies for past offenses based on the past tense verbs used in the paragraph preceding the numbered provisions. However, here the Court not only seeks to provide a remedy for Father for Mother’s past violations. The Court also has reasonable concern about Mother’s future attempts to sabotage Father’s reunification efforts. The Court has relied on the

general language of 13 *Del. C.* § 728 “such other sanctions or remedies as the Court deems just and proper to ensure the maintenance *in the future* of frequent and meaningful contact” between Father and Children. (Emphasis mine). Contrary to Mother’s argument that the specific language of 13 *Del. C.* § 728 (b)(5) should override the later “such other sanctions or remedies” general language, the Court believes the purpose of the statute is to bifurcate sanctions or remedies meant to remediate past violations and sanctions or remedies meant to coerce future compliance. Furthermore, Mother does not provide case law to either support her interpretation or refute the Court’s statutory interpretation.

Mother’s procedural due process rights were not violated. Mother’s reliance on *Hammond v. Douglas* to support her argument is misplaced.<sup>5</sup> The facts in the two cases clearly differ. In *Hammond*, the Court *sua sponte* gave guardianship to a grandmother during a RTSC hearing wherein she alleged that she was not getting her required third party visitation. Here, the Court is operating under the remedies and sanctions of 13 *Del. C.* § 728(b) to transfer custody in a case involving findings that Mother has violated the Court’s previous orders on custody. In determining what sanctions or remedies to impose, the Court is not limited to those sanctions or remedies expressly requested by Father. Even if the Court was so limited, Mother was on notice that transfer of custody and suspension of visitation was possible based on Father’s express testimony on February 9, 2018. Mother had ample notice to prepare a defense to that request prior to her testimony of October 26, 2018. Mother was also on notice that the Court might require her to complete a psychological evaluation because the Court ordered Mother and Father to complete a custodial evaluation as part of the March 30, 2017 Order (which never occurred). One part of a custodial evaluation is the psychological evaluation that the Court is now ordering Mother only to complete.

**2. Mother will Not Suffer Irreparable Injury if the Stay is Not Granted and Father will Suffer Substantial Harm if the Stay is Granted**

Under factors 2 and 3, Mother claims she has “no objection to beginning the reunification process” and that “[t]he appropriate balance of these factors should involve the stay of incarceration, transfer of custody to Father, and the suspension of Mother’s visitation,” ending her prior obstruction of implementation of the Court’s Order resulting in her being found in contempt.

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<sup>5</sup> 994 A.2d 744 (Table) at \*2 (Del. 2010).

Therefore, the Court is unclear whether Mother believes factors 2 and 3 collectively support granting or denying the stay. Regardless, the Court finds that both factors support denying Mother's Motion.

In the Order of February 25, 2019, the Court has ordered a stay of incarceration unless Mother violates the Order. Although Mother asks the Court to speculate she will suffer some small short-term injury to her relationship with Children during the time her visitation with them is suspended, the Court issued its Order upon the conclusion that Children's long-term relationship with parents will collectively improve, not suffer irreparable injury, if Mother completes a psychological evaluation and seeks reunification counseling prior to resuming contact with Children. The only injury Mother may suffer in her relationship with Children may occur if she continues to act as she has since issuance of the Court's April 2016 Order on custody without seeking assistance from mental health professionals.

Mother only seeks a stay as to the "coercive sanction" of the Court's order and is not requesting a stay of paragraphs 1 – 3 of the Court's Order that require the immediate return of D----- Jr to Father's primary care. While Father was granted primary residency with both children as of April 2016, that fact has not stopped Mother from keeping DJ in her near exclusive care since January 2017. Without the coercive effect of the threat of incarceration, there is no reason to believe Mother will now comply with the current Order in light of her repeated unwillingness to comply with past orders. Based on her past behavior, this Court has real concern Mother will continue to either withhold D----- Jr from Father or sabotage Father's efforts at engaging in reunification therapy with Children if the Court grants Mother's Motion. Nowhere in Mother's Motion does she state she will immediately turn D----- Jr over to Father as ordered.

### **3. Harm to the Public Interest if the Stay is Granted**

Mother argues that it is not in the public interest to remedy one parent's deprivation of contact with a child by depriving the other parent of contact with that same child. The Court agrees that such a response would rarely be preferable. However, the Court still finds that, on the facts of this case, the public interest favors denying the stay. In so doing, the Court finds Father's argument persuasive that it does a disservice to families in Delaware if parents can willfully disregard existing Court orders and use Supreme Court appeals as a basis to continue to disregard those orders. The Court restates what it noted above that the Court does not believe that Children can repair their relationship with Father so long as Mother remains in control over them.

#### 4. Conclusion

Therefore, the Court finds that all four *Kirpat* factors support denying Mother's Motion for a Stay. First, Mother's appeal is likely to fail on the merits. Second, Mother will not suffer irreparable injury if the stay is not granted. Third, Father will suffer substantial harm if the stay is granted. Fourth, the public interest will be harmed if the stay is granted.

#### Attorney's Fees

In the Affidavit, Father sets out that his attorney incurred \$22,749.65 in legal fees related to her representation of Father from August 18, 2017 through March 21, 2019. Mother does not challenge the hourly rate of \$275.00 as unreasonable. However, Mother raises several arguments in opposition to the full request for \$22,749.65. First, she argues that Father should not be able to "bootstrap" fees related to his attorney's representation on the custody modification matter into the Court's award for fees on the RTSC matter alone. On this point, Mother further argues that the "bulk of the evidence" presented during the three-day hearing related to custody modification and not how to sanction Mother under 13 *Del. C.* § 728 (b), and therefore that Father's attorney should only be able to recover 10% of her requested fees. In support of this position, Mother cites to *J.M.R. v. K.J.R* where the Court only granted 20% of the fees requested based on the percentage of time used during the hearing to address the single issue upon which fees had been granted.<sup>6</sup> Second, she argues that Father has not presented any evidence that Mother can afford to pay back over \$22,000 in attorney's fees in addition to the other fees and costs associated with the Court's Order of February 25, 2019. Mother cites to *Watson v. Givens*, 758 A.2d 510, 512 (Del. Fam. Ct. 1999), in support of the principal that "[a]n essential element in any contempt finding is the violating party must have the ability to comply with the Order."

Mother's arguments are not persuasive. First, in *J.M.R.*, the Court reduced the fees request by 80% after reviewing the testimony and recordings from the hearing and finding that "approximately twenty percent (20%) of the hearing was devoted towards" the issue upon which the fee award had been granted. Mother has given the Court no indication that she came to her conclusion that the Court should reduce Father's request by 90% after similarly reviewing the testimony and recordings from the three-day hearing and finding that only 10% of the hearing was devoted to the RTSC sanctions. Rather, Mother's suggestion that the request be reduced by 90% appears to be little more than "pulling a number out of the air." In an ancillary hearing, separate

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<sup>6</sup> 2013 WL 8181542, at \*3-4 (Del. Fam. Ct. Sept. 23, 2013).

issues such as the dissipation of assets at issue in *J.M.R.* are often more easily divisible from the rest of the testimony than in a custody case. In the case at bar, the Court deferred judgement on sanctions until it had heard all the testimony on the custody modification issue because the Court's sanctions are inextricably intertwined with the issues presented by Mother's request to modify custody. The Court considered all of the testimony during the three days of hearing in determining how to appropriately sanction Mother. Since the underlying order violated by Mother related to her interference with Father's relationship with his children and how this was to be remedied, had the Court reached a different verdict on the modification of custody, the Court would have adjusted the appropriate sanctions based on those findings to be consistent with its decision as to modification of custody. For example, the sanctions of requiring Mother to complete a psychological evaluation and engage with a reunification counselor directly relate to not only the Court's findings from the Order of March 30, 2017 when it found her in contempt but also to the Court's findings that came out of the three-day consolidated testimony on RTSC sanctions and custody modification. Second, the only case that Mother cites to with regard to her other argument is related to a RTSC hearing in response to an ancillary matter wherein the Court previously awarded the wife \$64,721 in assets from the marital estate and counsel fees. The RTSC issue before that Judge was then whether the husband had the ability to pay that award to the wife and thereby abide by the Court's prior Order. Here, the issue is only whether the fees awarded are reasonable as guided by Delaware Rule of Professional Conduct 1.5, and the argument that Mother cannot financially comply with the fees and expenses imposed on her by the Court in the Order of February 25, 2019 is premature.

However, despite rejecting initial Mother's arguments for why the requested fee amount should be reduced by 90%, the Court finds that reducing Father's attorney's request by 55% is reasonable based on the Court's detailed examination of his counsel's billing hours as described below.

First, following an October 26, 2017 case management conference, the Court initially only allotted one full day of hearing time in February 2018 to address the RTSC and custody modification matters, which should have been adequate, yet reserved a second full day as a precaution. After the parties did not conclude testimony after two full days, the Court permitted the use of a third day to conclude testimony that ended up lasting more than half the day in October 2018. It is the Court's firm belief that the issues presented did not necessitate three days of



testimony as much of the testimony was repetitive. Rather, it would have been reasonable to conclude all the testimony in February 2018 after one or two days at most. Therefore, without passing sole blame on Mother or Father for unnecessarily prolonging this matter, the Court will not assess Mother for the 14.6 hours Father's attorney billed from February 10, 2018 to October 26, 2018 and thereby reduce Father's attorney's award by \$4,015.

Second, it is unreasonable to award Father's attorney 15.7 hours related to the written closing argument. Had the case concluded after two consecutive days in February 2018 as originally scheduled, the Court may not have even required written closings, allowing oral presentations instead. As a result, the Court will only award Father's attorney 1 hour for closings as if the closings were given orally at the conclusion of the two days of testimony. Thereby, the Court further reduces Father's attorney's award by \$4,042.50.

Third, the Court agrees with Mother's argument that Father's attorney should not be awarded fees for the 2.7 hours spent on the preparation of her Affidavit and her review of the Court's Order of February 25, 2019. As such, the Court further reduces the award by \$832.50.<sup>7</sup>

Finally, the Court will generally review the remainder of Father's attorney's request. The Court finds the hours billed in August and September 2017 to be reasonable. The Court will reduce the hours billed in October by 1.5 hours in part because the case management conference was only 30 minutes and did not necessitate 0.9 hours in preparation. The Court finds the hours billed in November and December 2017 to be reasonable. As to January and February 2018, Father's attorney billed 12.6 general hours in February for trial preparation and 2.8 general hours at the end of January. The Court will reduce those total hours from 15.4 hours to 12 hours in part because Father's attorney spent considerable other hours in January dedicated to specific trial preparation tasks. Thereby, the Court reduces Father's attorney's award by \$1,347.50 for the months of August 2017 through February 2018.

In conclusion, instead of awarding Father's attorney 100% of her requested \$22,749.65 in legal fees, the Court reduces her fee award by \$10,237.50 to \$12,512.15, or 55% of the requested amount.

**ACCORDINGLY, IT IS HEREBY ORDERED AS FOLLOWS:**

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<sup>7</sup> 0.9 of those billable hours were charged to Ms. Pesin's colleague who bills at \$375 per hour.

1. Mother's Motion for a Stay filed on March 8, 2019 is ***DENIED***.
2. Mother shall pay legal fees and costs on behalf of Father in the amount of \$12,512.15 to Staci Pesin, Esquire. Until such time as Mother's debt to Ms. Pesin is paid in full Mother shall be required to pay at least \$250 per month on the first of each month starting on June 1, 2019. Any outstanding balance shall carry interest at the legal rate.

**IT IS SO ORDERED.**

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/s/ **Robert Burton Coonin, Judge**

RBC/plr

Cc: File, parties

Mail Date: \_\_\_\_\_