



ROBERT BURTON COONIN  
JUDGE

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

July 16, 2019

Patrick Boyer, Esq.  
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**LETTER, DECISION  
AND ORDER**

Marta Dybowski, Esq.  
2001 Baynard Boulevard  
Wilmington, DE 19803

RE: K---- W----- v. S---- W-----  
File No.: CN12-03289; Petition No.: 18-12481  
File No.: CN12-03289; Petition No.: 18-14655  
**Motion for Reargument and Affidavit for Attorney's Fees**

Dear Mr. Boyer and Ms. Dybowski:

This is the Court's decision regarding the Motion for Reargument and/or for the Correction of Clerical Errors filed on May 23, 2019 by K---- W----- ("Mother"), represented by Patrick Boyer, Esquire, regarding the Court's Order issued May 13, 2019 concerning custody modification in the interest of the minor child B----- W----- born December --, 2006. S---- W----- ("Father"), represented by Marta Dybowski, Esquire, did not file a response to Mother's Motion. Also before the Court is the Affidavit for Attorney's Fees filed on June 3, 2019 by Mother and Father's Response filed on June 25, 2019.

**Procedural History**

On October 27, 2015, the Court issued a Letter, Decision and Order wherein it granted Mother and Father joint legal custody and shared residency of B-----. Provision 7 of that Order addressed the holiday schedule and reads in relevant part as follows:

***Holidays:*** Mother shall have Children on the holidays in Column 1 in odd-numbered years and the holidays in Column 2 in the even-numbered years.

Father shall have Children on the holidays in Column 1 in the even-numbered years and the holidays in Column 2 in odd-numbered years:

**Column 1**

Easter or other religious holidays  
Fourth of July  
Halloween  
Christmas Day

**Column 2**

Memorial Day  
Labor Day  
Thanksgiving Day  
Christmas Eve

On May 1, 2018, Mother filed a Petition for Modification of Custody. On May 13, 2019, the Court issued a final Letter, Decision, and Order regarding Mother’s Petition which modified the order of October 27, 2015. Provision 9 of the May 2019 Order set out that Mother and Father “shall alternate on a weekly basis residential placement of Child” during B-----’s summer vacation from school. Provision 12 of that Order addressed the holiday schedule and reads in relevant part as follows:

*Holidays:* Holidays shall be shared on a mutually agreed upon schedule. If the parties cannot reach agreement, regardless of whose day it is supposed to be, Father shall have Child on holidays in Column 1 in odd-numbered years and holidays in Column 2 in even-numbered years. Mother shall have Child on the holidays in Column 1 in even-numbered years and the holidays in Column 2 in odd-numbered years:

**Column 1**

Easter or other religious holidays  
Fourth of July  
Halloween  
Christmas Day

**Column 2**

Memorial Day  
Labor Day  
Thanksgiving Day  
Christmas Eve

Finally, the Court set out in Provision 3 of that Order as follows:

Mother’s counsel shall, within 20 days, submit an affidavit and supporting documentation regarding the request for attorney’s fees. The request shall set out the cost and legal fees incurred for these three consolidated proceedings, a breakdown of that portion counsel believes relates solely to the Rule to Show Cause and counsel’s rationale for the breakdown. Fathers counsel shall respond within 20 days thereafter. The response shall include a breakdown of the costs and legal fees incurred by Father in these consolidated proceedings. The Court will thereafter consider what amount if any shall be an appropriate award of counsel fees to Mother.

### **Applicable Law**

Pursuant to Fam. Ct. Civ. Rule 59, a motion for reargument and/or a motion to alter or amend a judgment may be filed within ten (10) days of the entry of an order. This shall not be used to raise new arguments or to re-litigate old matters.<sup>1</sup> “[A] motion for reargument is the proper device for seeking reconsideration by the Family Court of its findings of fact, conclusions of law, or judgment.”<sup>2</sup> A motion for reargument “is appropriate where it is shown that the court overlooked a precedent or legal principle that would have controlling effect, or that it misapprehended the law or the facts such as would affect the outcome of the decision.”<sup>3</sup> Additionally, “the Court will not grant reargument where one parent is simply unhappy with its rulings, makes the same arguments that he or she made at trial, or attempts to [submit] evidence which could have been, but was not [introduced] at trial.”<sup>4</sup>

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 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.

Additionally, pursuant to 13 *Del. C.* § 731, the Court may order an award of attorney’s fees in other situations as follows:

The Court from time to time, after considering the legal and factual basis for the action, the results obtained, the financial resources of the parties, and such other factors as the Court deems just and equitable, may order a party to pay all or part of the cost to another party of maintaining or defending any proceedings under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of such proceedings. The Court may order that the amount be paid directly to the attorney, who may enforce the order in his or her name.

### **Reargument and/or Correction**

In Mother’s Motion for Reargument and/or Correction, she noted that the Court changed the rotation of the holidays from the prior Order. The Court admits that was a clerical mistake. The Court intended to maintain the holiday rotation as it existed in the Order of October 27, 2015

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<sup>1</sup> *Pan v. Shak*, 2008 WL 2898669, at \*1 (Del. Fam. May 6, 2008).

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

<sup>3</sup> *G.G. v. T.Q.*, 2015 WL 9485202, at \*2 (Del. Fam. Jan. 9, 2015).

<sup>4</sup> *Id.*

whereby Mother shall continue to have B----- on the holidays in Column 1 in odd-numbered years and the holidays in Column 2 in the even-numbered years, and Father shall continue to have B--- -- on the holidays in Column 1 in the even-numbered years and the holidays in Column 2 in odd-numbered years. The Court will accordingly revise the May 13, 2019 Order.

However, instead of simply asking the Court to maintain the pre-existing holiday rotation, Mother asks the Court to remove the 4<sup>th</sup> of July holiday from the holiday rotation because the parties share residential placement of B----- during the summer on a week on and week off arrangement. Mother never previously argued for this change to the holiday rotation in her Petition or during the three-day hearing on the matter despite requesting the week on and week off schedule. Therefore, the Court concludes that Mother is inappropriately attempting to raise a new argument and denies Mother's request. Even if this was not a new argument, the Court would still be inclined to deny the request. Mother's only basis for arguing this change is the week on and week off summer residential schedule. However, she does not present any evidence that simply permitting the residential parent for any given year to keep B----- in his/her care that day will effectively maintain the every other year rotation for the holiday, or that neither party really celebrates the 4<sup>th</sup> of July, or that she is aware of Father's position on the issue. Therefore, as the Court understands that many people enjoy celebrating the holiday, the Court declines to revise the Order in a way that might cause the 4<sup>th</sup> of July holiday to fall inequitably during one parent's summer weeks more than the other's in the coming years. That said, the Court's May 13, 2019 Order already provides for the parties to share holidays "on a mutually agreed upon schedule." The every other year holiday rotation is only provided when the parents cannot come to an agreement. So, if the parties want to mutually agree in writing on which parent gets to celebrate the 4<sup>th</sup> of July holiday with B----- on any given year, they are free to do just that.

#### **Attorney's Fees**

In the Affidavit, Mr. Boyer sets out that Mother incurred \$31,393 in legal fees and \$2,117 in costs related to litigating both the Petition – Rule to Show Cause and Petition to Modify Custody, as well as \$11,500 in costs related to Dr. Romirowsky's custodial evaluation. Mr. Boyer argues that 13 *Del. C.* § 731 favors a global fee award in Mother's favor in part because the "record clearly established" that Mother was primarily motivated to file her Petitions because of Father's continued use and possession of alcohol. Mr. Boyer also argues that Father's financial circumstances favor such a global award. Ms. Dybowski argues that Father should not have to pay

any of Mr. Boyer's fees under either 13 *Del. C.* § 728(b) or 13 *Del. C.* § 731. As to 13 *Del. C.* § 728(b), she argues that Father's alcohol possession did not violate, interfere, or impede the rights of Mother or B----- with regard to joint custodial authority and residence. As to 13 *Del. C.* § 731, she argues there is no legal or equitable basis for such a fee. However, if the Court is inclined to award a fee, Ms. Dybowski believes an award of \$3,217.75 would be reasonable.

Although the Court admits that it did not expressly state in the Order of May 13, 2019 that it was limiting any possible award of fees to the issue of the Petition – Rule to Show Cause, that was the Court's implied intent when it asked Mr. Boyer to provide the Court with both his full costs and legal fees related to the three consolidate proceedings and "a breakdown of that portion counsel believes relates solely to the Rule to Show Cause." Furthermore, the Court declines to accept Mr. Boyer's rationale for awarding a global fee award. This was a close case. Both sides presented strong arguments with regard to why the Court should or should not modify the Court's prior order on custody of October 2015. The Court finds it disingenuous for Mr. Boyer to cast the custody case as focused in large part on Father's continued use of alcohol. That was the focus of the Rule to Show Cause. The Court understood the purpose for the Petition to Modify Custody to be far more nuanced than that involving issues of the relocation of one parent and the creation of a more stable residential arrangement for B-----. The Court also finds it disingenuous for Mr. Boyer to argue that Father can afford to pay \$45,010 in fees and costs when he only makes \$50,000 annually and only had \$11,000 in his bank account. Mr. Boyer also attempts to cite to a contemporaneous child support modification order as evidence in favor of Mother, even though Mother was ordered to pay Father \$170 per month in support at the time that the parties had shared residential placement of B-----. Therefore, the Court can easily conclude that Mother is in a better financial position than Father to pay her own fees.

Therefore, the Court will limit the award of fees only to the narrow issue covered under 13 *Del. C.* § 728(b). Although the Court acknowledges Ms. Dybowski's position, the Court interprets 728(b) to permit an award of fees in such a case as this. The Court did not previously order Father to abstain from possessing or consuming alcohol in his home for Mother's sake but for B-----'s sake. As such, Father's continuing possession and use of alcohol in the home has violated and impaired B-----'s rights. In order to determine what percentage of the consolidated case revolved around Father's prohibition from having alcohol in his home, the Court will consider the method used in *J.M.R. v. K.J.R* whereby 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>5</sup> Like in *J.M.R.*, where the Court had to divide discussion of the dissipation of assets from the rest of the testimony, the testimony regarding Father's use and/or possession of alcohol in the home is easily divisible from the rest of the testimony. In finding that Father had violated the October 2015 Order by having alcohol in the home, the Court only considered evidence demonstrating Father's conduct since June 7, 2017. Most of the testimony on this issue was from Mother on direct and cross and focused on the text messages and pictures she recovered from H---- B----'s phone. Neither Father nor Ms. B---- testified at length about this issue or at all about the specific messages exchanged between Father and Ms. B----.

On October 10, 2018, the Court heard testimony for about five hours. On October 11, 2018, the Court heard testimony for about five hours and twenty minutes. On February 8, 2019, the Court heard testimony for about one hour and forty-five minutes. Therefore, the Court heard about twelve hours of testimony. On October 10, 2018, Mother presented relevant testimony on direct examination from about 2:27 until about 2:33, and then from about 3:02 until about 3:10. On October 11, 2018, Mother also presented relevant testimony on cross examination from about 3:17 until 3:22. Between Father and Ms. B----, they spent about four minutes presenting relevant testimony on cross examination on February 8, 2019. All told, the Court heard about twenty-two minutes out of twelve hours on testimony admitted for the purpose of calculating an award of fees under 13 *Del. C.* § 728(b). The time spent at trial limited to the Rule to Show Cause did not exceed 3% of the total. Therefore, the Court finds it reasonable, consistent with *J.M.R.* and Delaware Rule of Professional Conduct 1.5, to require Father to pay 3% of Mr. Boyer's fees and costs, or \$1,005. This case was overwhelmingly about custody modification and this award of minimal fees is designed to reflect that conclusion by the Court.

Finally, the Court declines to require Father to pay for any part of Dr. Romirowsky's custody evaluation. The Court previously ordered on May 21, 2018 that the parties were to bear their own expenses as to obtaining custody evaluations. The Court finds no reason to alter that decision.

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

1. Mother's Motion for Reargument of the Court's May 13, 2019 Letter, Decision and Order on Custody Modification is **GRANTED in part** and **DENIED in part**.

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<sup>5</sup> 2013 WL 8181542, at \*3-4 (Del. Fam. Ct. Sept. 23, 2013).

2. The Court shall revise the Order on Custody Modification as it relates to the holiday schedule rotation shared by Mother and Father.
3. All other conclusions and provisions of the Court's May 13, 2019 Letter, Decision and Order on Custody Modification shall continue to remain in effect.
4. Father shall pay legal fees and costs on behalf of Mother in the amount of \$1,005 to Patrick Boyer, Esquire. Until such time as Father's debt to Mr. Boyer is paid in full, Father shall be required to pay at least \$250 per month on the first of each month starting on August 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: \_\_\_\_\_