NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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Rebecca Bricken Kinsel
Protorae Law, PLLC
1921 Gallows Road, 9th floor
Tysons Corner, VA 22182
*Counsel for Plaintiff*

Sharon Voyles Filipour
Kinsey, Lynch, Filipour
4120 Leonard Drive
Fairfax, VA 22030
*Counsel for Defendant*

RE: *Michael Powell v. Melanie Knoepfler-Powell*
Case No. CL-2015-6475

Dear Counsel:

The Court in this opinion addresses two issues for resolution in the context of a broader ruling respecting modification of a child custody and support order entered in the parties' divorce incorporating the terms of a property settlement agreement ("PSA"). The Court is called upon to decide whether the PSA term delineating a specific percentage split obligation to pay unreimbursed child medical expenses is subject to modification,

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and whether a clause regulating the introduction of the parties' romantic partners to their child may be deemed unenforceable.

The Court holds the statutory default presumption that division of reasonable and necessary unreimbursed medical expenses between the parents in a disputed child support proceeding is to be in proportion to their income, was not rebutted by the parties' PSA setting fixed percentages. Such agreement is not within the statutorily-addressed deviation in a subsequent child support modification action as it no longer amicably resolves the entirety of the current child support dispute. Further, in this case, there is no other equitable basis that dictates the propriety of such a deviation. Thus, the child support order entered in this cause shall reflect the parties are obligated to pay reasonable and necessary unreimbursed medical expenses in proportion to their income as determined at trial.

The Court further holds the PSA custodial term that the parties are to exercise "great care prior to introducing" their "boyfriends or girlfriends with whom they may have a romantic relationship" to their child, is void as against public policy and unenforceable. The clause is unduly vague and calls upon the Court to unreasonably limit the freedom of association and speech of the parties interacting with their child into and throughout her adulthood.

**BACKGROUND**

This matter came before the Court on Father's petition for modification of child custody and support. At the conclusion of trial, the Court made an oral ruling on the modification of custody addressing each of the statutory factors as more fully stated in

the record. The Court also received evidence of the parties' incomes and other facts relevant to a proper determination of child support. The parties were directed to submit an order incorporating the Court's rulings, and if in disagreement as to language, to submit competing orders for the Court to draft its own as might be required. Before the Court entered its order, Father filed a motion to reconsider the Court's ruling of the custodial time afforded. Because of the motion to reconsider and other details that were in dispute in the competing orders, the Court set the matter for hearing on entry of an order to give the parties a full opportunity to be heard, and further to entertain Father's motion for reconsideration.

At issue with respect to the matters addressed in this opinion are two clauses in the parties' PSA previously incorporated into their final order of divorce. The first was how unreimbursed medical bills are to be paid, and the second clause at issue regulates the parties' introduction of romantic partners to their child. The clause respecting unreimbursed medical bills sets a fixed percentage obligation for each parent, as opposed to having it track the parties' relative income. The clause respecting regulating the parties' romantic partners in relation to when their child was in their custody has two parts. In the first sentence, the parties are to exercise "great care prior to introducing" their "boyfriends or girlfriends with whom they may have a romantic relationship" to their child, who is addressed by name rather than as a "child." The second sentence prohibits the parties from having overnight guests of the opposite sex who are not "related" to the parents when the child is present in their home. At the modification of custody trial the evidence adduced included that Father was in a committed relationship with another woman with

whom he resided. When Father exercised his custodial time with the parties' child, Father's girlfriend played a generally supportive and appropriate role with respect to the child. The Court queried the parties at trial whether, considering this development, they might have interest in agreeing to eliminate the restrictive clause, and opined it is unrealistic to expect either party to be hampered from moving on in their lives including by exploring new romantic relationships. Mother averred at the custodial hearing that it was Father who insisted on incorporating the clause in question, and that she was willing to void fully the same. Although she would have been in her right to do so, she did not bring a contempt proceeding against Father for his apparent derogation of the Court's custodial order incorporating this clause. Father indicated that the parties could agree to terminate the clause in question. After the hearing on custody but before entry of the order, Father married his girlfriend. At the hearing on the entry of the final order, Father's position was that the first sentence of the restrictive clause, regulating introduction of romantic boyfriends or girlfriends to the parties' child, should remain in force, but agreed the second sentence preventing certain overnight guests could be discontinued.

At the conclusion of the hearing on entry of a final order, the Court undertook to finalize all issues by a written order, including resolving the disputes addressed herein.

## ANALYSIS

### I. The Court May Modify Its Previous Child Support Order Incorporating a Fixed Percentage Delineation From the Parties' Property Settlement Agreement Regarding Payment of the Child's Unreimbursed Medical Expenses Pursuant to the Court's Statutory Authority

Father maintains that the parties contracted for payment of a fixed percentage of unreimbursed medical bills to be borne by each of the parties, and that the Court should

thus not modify such term. The question is whether the law of contract restricts application of the Court's statutory power to determine which parent and in what proportion is to bear the cost of the child's unreimbursed medical expenses.

The Court has the power to order "cash medical support" within the confines of a child support order. Va. Code § 20-107.2. "[T]he statutory Child Support Guidelines . . . prescribe a presumptive level of need." *Byrne v. Shay*, No. CL-2010-8541, 2018 WL 3814638, at *6 (Va.Cir.Ct. Aug. 08, 2018). Such presumptive level of need includes the child's unreimbursed medical expenses.

> The applicable statutes do nothing more than set forth a default rule for allocating unreimbursed medical expenses. That default rule is incorporated as a part of the child support guidelines. *See* Code § 20-108.2(D). The presumption, however, that the guidelines provide "the correct amount of child support to be awarded" may be rebutted upon a finding that such award "would be unjust or inappropriate in a particular case as determined by relevant evidence pertaining to the factors set out in § 20-108.1." Code § 20-108.2(A). The factors to be considered pursuant to Code § 20-108.1 include "[a]ny special needs of a child resulting from any . . . medical condition." Code § 20-108.1(B)(8). Therefore, none of the guidelines' provisions remove a trial court's discretion to deviate from the child support guidelines, including, when warranted, awarding a monetary award for expenses that would be considered unreimbursed medical expenses.

*Ridenour v. Ridenour,* 72 Va. App. 446, 453-454 (2020). The default rule about how unreimbursed medical expenses are to be treated is well-delineated by statute:

> *Except for good cause shown or the agreement of the parties*, in addition to any other child support obligations established pursuant to this section, *any child support order shall provide that the parents pay in proportion to their gross incomes*, as used for calculating the monthly support obligation, any reasonable and necessary unreimbursed medical or dental expenses. The method of payment of those expenses shall be contained in the support order. Each parent shall pay his respective share of expenses as those expenses are incurred. Any amount paid under this subsection shall not be adjusted by, nor added to, the child support calculated in accordance with subsection G. For the purposes of this section, medical or dental expenses

> shall include but not be limited to eyeglasses, prescription medication, prosthetics, orthodontics, and mental health or developmental disabilities services, including but not limited to services provided by a social worker, psychologist, psychiatrist, counselor, or therapist.

Va. Code § 20-108.2(D) (emphasis added).

Father relies on the parties' right to contract and enforcement thereof, to maintain the unreimbursed medical percentages should remain undisturbed from the Court's previous order incorporating the parties' PSA. Indeed, the common law right to contract is a strong pillar of Virginia jurisprudence that favors leaving agreements between persons unhindered from court intervention. It is true that

> [g]enerally speaking every adult person has a right to contract with respect to his property rights and when they have done so, courts are without authority to annul their obligations thus assumed unless they have been entered into under such circumstances as to indicate that their procurement had been brought about by fraud.

*Moore v. Gregory*, 146 Va. 504, 523 (1925).

However, in the context of child support family cases where the State has a compelling interest in ensuring the welfare of children, the Virginia General Assembly regulates by statute how agreements are to be considered in the context of child support proceedings. Specifically, the Virginia Code sets forth how the default presumption that parents are to pay for unreimbursed child medical expenses in proportion to their incomes is to be evaluated in juxtaposition to a deviating agreement.

> In order to rebut the presumption, the court shall make written findings in the order, which findings may be incorporated by reference, that the application of such guidelines would be unjust or inappropriate in a particular case. The finding that rebuts the guidelines shall state the amount of support that would have been required under the guidelines, shall give a justification of why the order varies from the guidelines, and shall be determined by relevant evidence pertaining to the following factors affecting

> the obligation, the ability of each party to provide child support, and the best interests of the child:
>
> . . . .
>
> 14. A *written agreement*, stipulation, consent order, or decree between the parties *which includes the amount of child support*;
>
> 15. Such other factors as are necessary to consider the equities for the parents and children.

Va. Code § 20-108.1(B) (emphasis added).

The parties' PSA respecting a child support term can thus be considered for a deviation with respect to the proportionality of unreimbursed medical expenses, but is only of significant statutory weight when such agreement "includes" and thus resolves the entirety of a child support dispute or when equity dictates such a deviation. Other than relying on the divorce PSA itself, Father has placed before the Court no compelling equitable reasons to deviate from the presumptive rule that unreimbursed medical expenses are to be divided between the parents in proportion to their incomes as proven at trial. As such, the Court finds it would abuse its discretion to order otherwise, and therefore, the child support order entered in this cause shall reflect the parties are obligated to pay reasonable and necessary unreimbursed medical expenses in proportion to their income as determined at trial.

**II. The Custodial Term in Their Property Settlement Agreement Regulating the Parties' Introduction of Romantic Partners to Their Child Is Unenforceable**

The parties entered into a PSA addressing introduction of the parties' romantic partners to their child, incorporated into the previous child custody order, which the Court is called upon to modify. The first sentence of the applicable provision requires the parties to exercise "great care prior to introducing" their romantic "boyfriends or girlfriends" to their child, who is addressed by name rather than as a "child" in such sentence. The second sentence prohibits the parties from having overnight guests of the opposite sex

who are not "related" to the parents when the child is present in their home. The parties agree that the Court can void the second sentence going forward by their agreement, and so the Court is not called upon to rule on the current enforceability of such part of the restrictive clause.[1]

Whether the first sentence is enforceable as a custodial term is revisited in this child custody modification action, as now in dispute rather than agreed. The parties may voluntarily choose to agree to restrictions on their associations or speech not imposed on them by their government. On the other hand, when government seeks to interfere with the freedom of association or speech of persons without the consent of those affected, such imposition may be constitutionally circumscribed.

The Supreme Court of the U.S. has held within the recognized fundamental right of privacy there is a guarantee of the freedom to associate in several types of intimate relationships. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (constitutional protection of marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (right to choose whether to bear children); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (right to cohabitate with certain family members); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (parents' right to send children to private school); *Meyer v.*

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[1] The evidence at trial was that Father by conduct disregarded the restriction in the second sentence of the restrictive clause he had asked to be included in the Court's prior order, and that Mother, having not sought the clause herself, did not seek to enforce it. Thus, if Father now chose to enforce it against Mother, the Court would have to determine whether the doctrine of unclean hands would foreclose such enforcement.

> Under the equitable doctrine of "unclean hands," . . . a party is denied relief because of his own inequitable conduct. . . . The withholding of equitable relief to punish a wrongdoer has been approved in other cases involving issues of family law but not where the rights of children were prejudiced by the result.

*Brown v. Kittle,* 225 Va. 451, 456-457 (1983).

*Nebraska*, 262 U.S. 390, 399-400 (1923) (parents' right to have children instructed in foreign language). However, when government action restricts a personal right but not one deemed fundamental, the evaluative test is lessened. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997) (when legislation does not burden a fundamental right, it will be upheld "so long as it bears a rational relation to some legitimate end").

Provisions in which both parents in a child custody setting voluntarily enter into a mutual agreement as to whom they may introduce or what they may say to their child appear frequently in the Virginia family law setting. Less clear is to what extent it is appropriate for a court to restrain the associations or speech of a parent in the context of what is in the best interests of a child. "While the rights of freedom of speech and assembly are fundamental, they are not absolute and must be exercised in subordination to the general comfort and convenience and in consonance with peace, good order and the rights of others." *York v. City of Danville,* 207 Va. 665, 669 (1967).

The Court is part of government and as such, is restricted from unduly interfering with fundamental rights. The Virginia Code calls upon judges presiding in disputed custody and visitation cases to consider the best interests of subject children in application of a number of listed factors "for purposes of determining custody or visitation arrangements," which may empower the Court to a limited extent to regulate associations and speech when harmful to the child. *See* Virginia Code § 20-124.3. For instance, when one parent seeks to alienate a child from the other parent by disseminating lies about the other parent, courts can intervene even to the extent of restricting interaction by the offending parent with their child. *See Canedo v. Canedo,* 13 Vap UNP 0851124 (2013)

(In a case of parental alienation, the court did not err in ordering supervised visitation between mother and child). Nevertheless, what the Court does in response to troubling parental conduct must be distinguished from the regulation of a parent's conduct which has done her child no wrong. The Court must tread lightly, if at all, in imposing prior restraint on the associations and speech of a parent who has given no cause to the Court to conclude that she will act in any way harmful to the parties' child. In the context of this Court imposing an order restricting parental freedom of association and speech, it would thus be an abuse of discretion by allusion to the authorities herein cited at a minimum not to have a reasonable and equitable basis for so doing.

The first sentence of the PSA clause in question requires the parties to take "great care prior to introducing" romantic partners to their child, referenced in such sentence only by name. As written and in isolation, the provision in dispute does thus not limit itself to the period when the child remains a minor. It may be inferred that a purpose of such a clause was to shield the child from the potential instability of exposure to casual, temporary and fleeting romantic interests of her parents. Whether this was the concern or another, there is no reasonable basis to require the restriction to remain applicable once the child reaches adulthood.

The question follows whether the Court could deem the first sentence of the restrictive clause was meant to apply to the child only while she was a minor. The Supreme Court of Virginia has not generally given license to the so-called practice of "blue-penciling" a contractual term and courts of record have generally desisted from construing contracts beyond their plain language.

> The courts of this Commonwealth do not engage in the practice of "blue-penciling" contracts, and this Court will likewise not construe the contractual provisions contrary to their facial import as to save the agreement of the parties by artfully interpreting around the impermissible portions. *See, e.g., Landmark HHH, LLC v. Park*, 277 Va. 50, 57 (2009) (citing *TM Delmarva Power, L.L.C. v. NCP of Virginia, L.L.C.*, 263 Va. 116, 119 (2002)); *Bergman v. Bergman*, 25 Va. App. 204, 214 (1997) ("'Where there is no ambiguity in the terms of a contract, we must construe it as written, . . . and we are not at liberty to search for the meaning of the provisions beyond the pertinent instrument itself'" (quoting *Smith v. Smith*, 3 Va. App. 510, 514 (1986))).

*Integrity Auto Specialists, Inc. v. Meyer,* 83 Va. Cir. 119 (2011). Nevertheless, because the child remains a minor at present, the first sentence of the restrictive clause could be construed as being valid at this time and becoming invalid only once its overbroad scope outweighs its potentially reasonable purpose.

This provision, if again incorporated into this Court's order resolving the instant dispute, is equivalent to an injunction punishable upon transgression by the judicial contempt power. Previous agreement by the parties to a contractual term alone is not dispositive as to whether such provision is nevertheless void as against public policy. "Whatever tends to injustice or oppression, restraint of liberty, . . . and natural or legal right; . . . when made the object of a contract, is against public policy and therefore void and not susceptible of enforcement." *Wallihan v. Hughes,* 196 Va. 117, 124 (1954) (quoting 4 M. J., Contracts, § 115, p. 484). The Court may further not enter an order that restricts speech that is "'so broad, so unreasonable, and so open ended' that the manner in which he [or she] 'is supposed to comply with this order is difficult to know.'" See *D'Ambrosio v. D'Ambrosio,* 45 Va. App. 323, 343 (2005).

> A first principle of justice is that an injunction not be so vague as to put the whole conduct of a defendant at the peril of a summons for contempt. Instead, courts must navigate carefully between the extremes of issuing a decree that is so vague

> and overreaching that all actions by the defendant might potentially violate the decree and a decree that is so limited as to be ineffective in preventing the harm contemplated . . . .

*Tran v. Gwinn*, 262 Va. 572, 584-85 (2001).

A basic threshold in analysis of the provision in dispute is whether it is so vague as to be unenforceable. "When the terms of a disputed provision are clear and definite, it is axiomatic that they are to be applied according to their ordinary meaning." *Smith,* 3 Va. App. at 514.

> The law does not favor declaring contracts void for indefiniteness and uncertainty, and leans against a construction which has that tendency. While courts cannot make contracts for the parties, neither will they permit parties to be released from the obligations which they have assumed if this can be ascertained with reasonable certainty from language used, in the light of all the surrounding circumstances.

*High Knob, Inc. v. Allen,* 205 Va. 503, 507 (1964). However, "[a]n ambiguity exists when language admits of being understood in more than one way or refers to two or more things at the same time." *Renner Plumbing v. Renner*, 225 Va. 508, 515 (1983). Imposing upon the parties that they exercise "great care prior to introducing" their romantic "boyfriends or girlfriends" to their child, suggests there is to be an uncertain degree of selectivity with whom they may associate in the presence of the child. In the instant case, "great care" to one parent may mean "less care" to another. The restrictive sentence does not further direct what is meant by such terms, leaving them essentially to interpretation arbitrarily by each parent.

Provisions incorporated from an agreement into the Court's orders must be sufficiently definite in the final analysis to be enforceable through the Court's contempt power.

> Under well-established Virginia jurisprudence, contempt only lies "'for disobedience of what is decreed, not for what may be decreed.'" *Petrosinelli*, 273 Va. at 706-07, 643 S.E.2d at 154 (citation omitted). "'[B]efore a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied.'" *Id.* at 707, 643 S.E.2d at 154 (quoting *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (1977). "'[F]or a proceeding in contempt to lie,'" there "'must be an express command or prohibition' which has been violated." *Id.* (quoting *French v. Pobst*, 203 Va. 704, 710, 127 S.E.2d 137, 141 (1962)). These principles arise from the recognition that the "'judicial contempt power is a potent weapon.'" *Id.* at 706, 643 S.E.2d at 154 (quoting *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)). *See also Shebelskie v. Brown*, 287 Va. 18, 30, 752 S.E.2d 877, 884 (2014) (same).

*DRHI, Inc. v. Hanback,* 288 Va. 249, 255 (2014). For the Court to incorporate in its order that the parties must take "great care prior to introducing" their romantic partners to their child, the Court necessarily must be able to discern what such command means here. It cannot. The restriction respecting the introduction of their romantic partners to the parties' child is hopelessly vague, unenforceable, and shall not be included in the Court's revised custodial order.

## CONCLUSION

The Court has considered two issues for resolution in the context of a broader ruling respecting modification of a child custody and support order entered in the parties' divorce incorporating the terms of a PSA. The Court is called upon to decide whether the PSA term delineating a specific percentage split obligation to pay unreimbursed child medical expenses is subject to modification, and whether a clause regulating the introduction of the parties' romantic partners to their child may be deemed unenforceable.

The Court holds the statutory default presumption that division of reasonable and necessary unreimbursed medical expenses between the parents in a disputed child support proceeding is to be in proportion to their income, was not rebutted by the parties' PSA setting fixed percentages. Such agreement is not within the statutorily-addressed deviation in a subsequent child support modification action as it no longer amicably resolves the entirety of the current child support dispute. Further, in this case, there is no other equitable basis that dictates the propriety of such a deviation. Thus, the child support order entered in this cause shall reflect the parties are obligated to pay reasonable and necessary unreimbursed medical expenses in proportion to their income as determined at trial.

The Court further holds the PSA custodial term that the parties are to exercise "great care prior to introducing" their "boyfriends or girlfriends with whom they may have a romantic relationship" to their child, is void as against public policy and unenforceable. The clause is unduly vague and calls upon the Court to unreasonably limit the freedom of association and speech of the parties interacting with their child into and throughout her adulthood.

Wherefore, the Court shall incorporate the ruling herein in the order resolving the action for modification of child custody and support, and until such time, this matter continues and is not final.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

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