

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

SHERRI R. MILLER (formerly BERKMAN),

Plaintiff,

v.

Case No. CL2017-7308

ROBERT A. BERKMAN,

Defendant.

MEMORANDUM OPINION DISMISSING PETITION FOR RULE TO SHOW CAUSE FOR  
CIVIL CONTEMPT

On February 2, 2026, and February 3, 2026, the parties tried the issues raised by the Rule to Show Cause (“Rule”) issued to Plaintiff Jennifer Miller (“Mother”) as a result of the Petition and Affidavit for Civil Rule to Show Cause Against Plaintiff filed by Defendant Robert A. Berkman (“Father”) on May 6, 2025 (“Petition”). The Court has considered the testimony and documentary evidence presented by the parties and has assigned such weight to it as is appropriate. The Court has also considered the arguments by counsel and now makes the following rulings.

DISCUSSION

The case before the Court involves allegations by Father that Mother is in civil contempt of prior orders in this case relating to the parties’ minor child (“Minor”). While cases involving civil contempt are seemingly ubiquitous, they contain various formulations of the elements necessary to sustain such a claim.

Mother, citing *Koons v. Crane*, 72 Va. App. 720, 738 (2021), argued that she could not be held in contempt without a showing by Father that she acted in bad faith or in willful disobedience of the Court's orders. On the other hand, Father argued that willfulness is not an

element of civil contempt and the Court understands his argument to be that Mother can be found in civil contempt without a finding of either willfulness or bad faith.

The Court finds that neither side is wholly correct. As explained below, the weight of authority in Virginia demonstrates that a moving party in a civil contempt proceeding may establish a *prima facie* case by showing: (a) a clear and definite order; (b) the alleged contemnor knew about it; and (c) the alleged contemnor failed to comply with it. Upon such a showing, the burden shifts to the alleged contemnor to show “justification.” The Court may find a party in civil contempt if, upon the full record, the evidence shows willful or bad faith non-compliance with its order by clear and convincing evidence.

In *Leisge v. Leisge*, the Virginia Supreme Court stated that “the sanctity and enforceability of a civil judgment should not hinge upon the mental state of an unsuccessful litigant” and “it matters not with what intent the defendant did the prohibited act.” *Leisge v. Leisge*, 224 Va. 303, 309 (1982) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)). *Leisge* arose in the context of a father who refused to return his daughter to Virginia after his visitation period expired because he feared for her psychological health. In the resulting litigation, the father was found in contempt of the relevant custody order. On appeal, he argued “that since the requisite *mens rea* had not been established by proof, his disclaimer [that he had only acted out of an intention to protect his daughter] should release him from a contempt conviction.” *Leisge*, 224 Va. at 309. (emphasis added). The Virginia Supreme Court disagreed, stating that “the absence of a specific intent to violate the court order does not relieve [father] of the consequences” of non-compliance with the custody order. *Id.*

The question is whether *Leisge* eliminated concepts of willfulness and bad faith from the law of civil contempt in Virginia. The Court finds that it did not, because in the same term *Leisge*

was decided the Virginia Supreme Court stated that “an aggrieved party to a divorce suit has the right to petition for relief, and the court has the authority to hold the offending party in contempt for acting in bad faith or for willful disobedience of its order.” *Carswell v. Masterson*, 224 Va. 329, 332 (1982). Many Virginia cases since *Leisge* and *Carswell* are in accord. Thus, it cannot be that *Leisge* eliminated concepts of willfulness and bad faith from civil contempt proceedings. Instead, the Court believes *Leisge* should be read for the limited proposition that willfulness is not part of a moving party’s *prima facie* case.

As recently stated by the Court of Appeals in *Koons*, Virginia courts have authority to hold an offending party in contempt for “acting in bad faith or for willful disobedience of [the court’s] order.” *Koons*, 72 Va. App. at 737. At the same time, these cases hold that:

In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. Once the movant proves noncompliance, ‘the burden is on the obligor to provide justification for the failure to comply.’

*Koons*, 72 Va. App. at 737-38; *Street v. Street*, 24 Va. App. 14, 20-21 (1997); *Barnhill v. Brooks*, 15 Va. App. 696, 704 (1993); *Alexander v. Alexander*, 12 Va. App. 691, 696 (1991). In *Belk v. Ebersole*, 94 Va. Cir. 544, 546 (2016), Judge Bellows examined numerous authorities and came to a conclusion similar to the one reached by the undersigned:

Virginia case law establishes that a Plaintiff, in order to make out a *prima facie* case for civil contempt, need only prove that the Defendant violated the Court's order. However, that does not mean willfulness is irrelevant, for it certainly is not irrelevant to the law of civil contempt, as the foregoing cases clearly demonstrate. This is because the law affords the Defendant the opportunity to prove ‘justification’ for his failure to comply with the Court's order.

Having considered the foregoing cases and others cited below, the Court finds that to sustain his claims of civil contempt against Mother, Father had to establish the following elements by clear and convincing evidence:

1. A clear and definite order;<sup>1</sup>
2. Knowledge of the order by the alleged contemnor;<sup>2</sup> and
3. The alleged contemnor's non-compliance with the order.<sup>3</sup>

Upon such a showing, the burden shifts to the alleged contemnor to show justification.<sup>4</sup> Specifically, the alleged contemnor must show that he or she has acted "without fault," which in practical terms means neither willfully nor contumaciously (*i.e.*, bad faith). *See, e.g., Laing v. Commonwealth*, 205 Va. 511, 514-15 (1964) ("it is true the inability of an alleged contemnor, without fault on his part, to render obedience to an order of court, is a good defense to a charge of contempt. . . . But where an alleged contemnor has voluntarily and contumaciously brought on himself disability to obey an order, he cannot avail himself of a plea of inability to obey as a defense to the charge of contempt"); *Belk*, 94 Va. Cir. at 546 ("Defendant proved that his failure to meet all of his court-ordered financial obligations during the year in question was not intentional, willful or in bad faith").

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<sup>1</sup> *E.g., Petrosinelli v. PETA, Inc.*, 273 Va. 700, 707 (2007); *Winn v. Winn*, 218 Va. 8, 10 (1977). In practical terms, this means an order that is not vague, ambiguous, or reliant on implication.

<sup>2</sup> *E.g., Zedan v. Westheim*, 60 Va. App. 556, 574 (2012) ("in order to hold a litigant in contempt for violation of a court order, the litigant must have knowledge of the terms of the order") (citing numerous cases).

<sup>3</sup> *E.g., Leisge*, 224 Va. at 309; *Koons*, 72 Va. App. at 738; *Street*, 24 Va. App. at 20-21; *Alexander*, 12 Va. App. at 696.

<sup>4</sup> *Koons*, 72 Va. App. at 737-38; *Barnhill*, 15 Va. App. at 704 (1993); *Street*, 24 Va. App. at 20-21; *Alexander*, 12 Va. App. at 696. *See also Laing*, 205 Va. at 514-15.

Following this exercise, a court must weigh all the evidence and may not hold party in civil contempt absent willful disobedience or bad faith. *See, e.g., Carswell*, 224 Va. at 332 (a trial court “has the authority to hold [an] offending party in contempt for acting in bad faith or for willful disobedience of its order”); *Koons*, 72 Va. App. at 737 (same); *Zedan*, 60 Va. App. at 575 (same).

After Father presented his case-in-chief, counsel for Mother moved to strike Father’s evidence. After receiving the arguments of counsel and for the reasons stated on the record, the Court GRANTED Mother’s motion to strike all or part of the following Counts of the Petition: I (¶ 7), II (all), III (¶ A), and IV (all).

Following Mother’s case and Father’s rebuttal case, the Court heard closing arguments on Count I (¶¶ 8, 9, and 10) and Count III (¶¶ B and C). After taking the matter under brief advisement, the Court now rules as follows.

#### *Count I*

The remaining aspects of Count I allege that despite Father’s efforts to procure information about the Minor from an entity called The Children’s Heart Institute (“CHI”), Mother has “failed to authorize or otherwise has prevented” the release of any information. Father further alleges that Mother caused or instigated his removal from CHI’s information portal. Father claims that this conduct violated various provisions of a May 7, 2020 Custody Order (the “May Custody Order”).<sup>5</sup>

Assuming but not deciding that a clear and definite order exists that encompasses these allegations, the Court finds that Father has not established non-compliance with any such order by a preponderance of the evidence, much less clear and convincing evidence. Among other

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<sup>5</sup> In Count I, Father primarily focused on paragraphs 1 and 5 of the May Custody Order.

things, the parties' testimony on this topic was in conflict but the Court credits Mother's testimony that she did not engage in the conduct Father alleges against her. Further, no one from CHI was called as a witness in support of Father's assertions.

### *Count III*

In Count III, Father again claims that Mother violated certain provisions of the May Custody Order.<sup>6</sup>

With respect to Count III (B), Father alleges that Mother failed to appropriately notify him of a so-called "504" meeting at the Minor's school. Assuming, but not deciding, that a clear and definite order exists and encompasses these allegations, the Court finds that Mother did not notify Father of the 504 Meeting. The Court alternatively finds that Father had an obligation under the second sentence of ¶ 5 of the May Custody Order to keep himself apprised of such matters and that by his own admission he failed to do so. He testified that he only sporadically (twice a month) checked a school-sponsored service called ParentVue. That, and his relatively passive level of monitoring school-related communications, constitutes a form of unclean hands or estoppel under the facts of this case. It would be unreasonable to make Mother an information surety when Father's own default was a primary source of his alleged injury. This was Mother's belief as well.

With respect to Count III (C), and assuming, but not deciding, that a clear and definite order exists and encompasses the allegations, Father contends that Mother failed to inform him in advance of an awards ceremony at the Minor's school in November 2023 and as a consequence he was unable to attend. In this instance, the Court finds that under the last sentence of paragraph 5 of the May Custody Order, Mother and Father each had a duty to inform the

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<sup>6</sup> For Count III, Father primarily focused on paragraphs 6 and 7 of the May Custody Order.

other, in advance, of school events they knew about. Mother did not comply. However, neither did Father. While Father says he did not know about the event in the first place, the Court finds that he did or, in the alternative, that he failed to exercise the reasonable due diligence required under the second sentence of paragraph 5 of the May Custody Order to keep himself informed of such matters. The Court notes that when Mother provided an after-the-fact account of the event, Father did not make a contemporaneous allegation that he had not been informed of it in advance and did not claim he was unaware of it.<sup>7</sup> The tenor of Mother’s testimony was that she did not believe she had an obligation to notify Father under the circumstances.

Accordingly, the Court finds it would be unreasonable to expect only Mother to observe a joint duty that Father failed to fulfill himself. The Court also finds that this issue was within the conduct, transactions, or occurrences invoked by Father’s Motion to Modify Custody, Parenting Time and Child Support filed March 26, 2024, and that it was resolved through a “Final” Agreed Order dated September 16, 2024. *See* Va. Sup. Ct. R. 1:6(a). Accordingly, it cannot be relitigated under the doctrine of *res judicata* and separately because it was an issue resolved (*i.e.*, settlement).

#### ORDER

For the foregoing reasons, the Petition for Rule to Show Cause filed by Defendant Robert A. Berkman is DISMISSED WITH PREJUDICE. However, pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, the finality of this Order is hereby STAYED and the Court SHALL RETAIN JURISDICTION pending adjudication of dueling requests for an award of attorney’s fees and costs. The Court is not inclined to award fees and costs to either side based on

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<sup>7</sup> Counsel for Father suggested that some electronic communications from the Minor’s school may have ended up in Father’s spam filter or junk mailbox. That is not a risk the Court expects Mother to insure.

its view of the proceedings to date. However, both sides are free to seek to persuade the undersigned to the contrary. In such a case, and to the extent they have not already done so, each party shall submit updated affidavits and invoices regarding attorney's fees and costs for which they seek recovery. Any party desiring a hearing on the issue shall contact chambers for the undersigned to obtain an available date after the appropriate "meet and confer" conference between counsel.

THE FINALITY OF THIS ORDER IS STAYED PENDING FURTHER ORDER ON THE ISSUE OF ATTORNEY'S FEES AND THE COURT RETAINS JURISDICTION UNDER RULE 1:1. SIGNATURES ARE DISPENSED WITH UNDER RULE 1:13. EACH PARTY MAY FILE EXCEPTIONS WITHIN TEN DAYS OF THE DATE OF THIS ORDER.

February 13, 2026  
Fairfax, Virginia

  
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Timothy J. McEvoy, Circuit Court Judge