**STATE OF MICHIGAN**

**IN THE COURT OF APPEALS**

COREY GLENN WASHINGTON,

Plaintiff / Appellee,

vs.

COA Docket No.:
Ingham Circuit Court No.: 17-962-DP
Hon. Laura Baird

MAUREEN MARGARET OESTERLING,

Defendant / Appellant.

**DELAYED APPLICATION FOR LEAVE TO APPEAL (CORRECTED)**

**STATEMENT OF REASONS**

**BRIEF IN SUPPORT**

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STATEMENT EXPLAINING DELAYED APPLICATION

MCR 7.205(A) provides that an interlocutory appeal may be filed 21 days from the date of the order being appealed, or "within other time as allowed by law or rule." MCR 7.205(G) where an application for appeal was not filed within 21 days, a party may file a delayed application as prescribed in MCR 7.205(B) with a statement of facts explaining the delay.

This delayed application is filed with respect to the Court of Appeals' dismissal of a claim of appeal filed with respect to an order denying a motion for reconsideration dated September 18, 2018, but which was not served by the Circuit Court in accordance with MCR 8.105 and MCR 2.107 until February 4, 2019, from an August 9, 2018 order awarding Plaintiff-Appellee, Mr. Corey Washington (Mr. Washington), $25,000 in attorneys' fees against Defendant-Appellant, Ms. Maureen Oesterling (Ms. Oesterling).

In its dismissal order the Court of Appeals stated Ms. Oesterling could filed a delayed application for leave to appeal. (**TAB A**, Court of Appeals Dismissal Order, 02/20/19).

The delay in this application is a direct result of the rote confusion and failure on the part of the Circuit Court to enter orders, serve orders, and properly regulate the management of the docket in these proceedings.

The underlying case is a contentious paternity suit filed on March 27, 2017 by Mr. Washington against Ms. Oesterling. There have been multiple "orders" regarding custody and support entered in this case, including a recent January 24, 2019 order granting reconsideration of an August 31, 2018 decision of the Circuit Court **that was not actually entered by the Circuit Court until January 3, 2019**! (**TAB B**, Order Granting Reconsideration, 01/24/19). That order, which was entered by the second Circuit Court judge to preside over this case, Judge Baird, reinstated the initial custody order of February 2, 2018 in Ms. Oesterling's favor after the Circuit Court realized

it had made erroneous subsequent rulings regarding custody of the minor child at the heart of this dispute. *Id*.

The case remains pending in the Circuit Court. (**TAB C**, Current Register of Actions (ROA)). Since inception, it has been attended to by several Circuit Court judges and two separate judges have been officially assigned to the case. *Id*. Judge Baird was reassigned the case on August 28, 2018 pursuant to the "one family rule". *Id*., #124. The case was transferred to her from Judge Economy. *Id*. Judge Garcia also presided over several hearings, including, apparently, the motion for reconsideration that is at the basis of this appeal. (**TAB D**, Order Denying Reconsideration, 09/18/18). However, it was Judge Economy who appears to have signed the order denying that motion. *Id*. Even though, as noted, the case had already been transferred to Judge Baird! See **TAB C**, ROA #124.

Just before that reassignment to Judge Baird, on August 9, 2018, Judge Economy entered an order awarding Mr. Washington $25,000 in attorneys' fees ostensibly under MCR 3.206(D)(2)(b). (**TAB E**, Order Awarding Attorney Fees, 08/09/18). A subsequent order was entered on November 19, 2018 placing funds of Ms. Oesterling in escrow until May 21, 2019, which funds she received because she was forced to sell her family's home so that she could defend herself in this retaliatory litigation filed by Mr. Washington. (**TAB F**, Stipulation and Order Regarding Escrow of Funds, 11/19/18). This, despite the fact that this Court has stated that "[i]t is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010), citing *Gates v Gates*, 256 Mich App 420, 438-439; 664 NW2d 231 (2003).

On September 5, 2018, then acting trial counsel for Ms. Oesterling filed a motion for reconsideration of the August 9, 2018 order awarding attorney fees. (**TAB G**, Motion for

Reconsideration, 09/05/18). Opposing counsel did not object to the motion as untimely. In fact, the Circuit Court accepted the motion as timely filed.

Despite the fact that Judge Baird had replaced Judge Economy on August 28, 2018, it appears that Judge Garcia reviewed the motion, and either him, or Judge Economy signed an order denying the motion on September 18, 2018. (**TAB D**, Order Denying Reconsideration, 09/18/18).

To make matters even more confusing, the September 18, 2018 order denying the motion for reconsideration was not even properly "served" on counsel by the Circuit Court **until February 4, 2019**. (**TAB H**; **TAB I**, Affidavit of Liisa Speaker and Adam Denton, respectively). The Circuit Court clerk never served the order denying reconsideration on Ms. Oesterling's trial counsel as it was required to by MCR 8.105(C). *Id*. In fact, the clerk never mailed the order, nor did it enter a notation on the register of actions that the order was mailed to counsel of record with a proof of service.[1] The Circuit Court finally noted this in the docket on February 7, 2019. ROA, #166. In fact, the Circuit Court only notated this because co-counsel for Ms. Oesterling filed a proof of service with the Circuit Court. *Id*. As of February 4, 2019, the date the order was sent via email to co-counsel, the Circuit Court *still* had not officially notated the "service" of the September 18, 2018 order on the docket. See footnote 2, *supra*.

Despite this Court's February 20, 2019 order dismissing the Claim of Appeal from the September 18, 2018 order denying the motion for reconsideration of the August 9, 2018 order on

[1] MCR 8.105(C) provides: "Notice of a judgment, final order, written opinion or findings filed or entered in a civil action in a court of record must be given forthwith in writing by the court clerk to the attorneys of record in the case, in the manner provided in MCR 2.107." Subsection (A)(1) of the latter rule provides, in relevant part, that every paper filed in the court in the action must be served on the parties and/or their counsel of record. This did not happen with respect to the trial court's entry of the order denying Ms. Oesterling's motion for reconsideration, and in fact, Ms. Oesterling's counsel was not made aware of it until *after* the time for filing a timely interlocutory appeal had passed. (**TAB H**; **TAB I**).

the attorneys' fee award on the basis that the motion for reconsideration was not timely filed, this Court has held on several occasions that the "timing" requirement of the filing of a motion for reconsideration under MCR 2.119 is not jurisdictional and can be waived at the discretion of the trial court by the simple acceptance of the late motion, and that such treatment does *not* raise a jurisdictional bar to this Court's review of a properly filed claim of appeal of the underlying order upon which the motion for reconsideration was based. See *Bers v Bers*, 161 Mich App 457, 462-63; 411 NW2d 732 (1987) (addressing MCR 2.119 and stating "the time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously"). Next, citing *Smith v Sinai Hospital of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986), this Court stated:

> [A] trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing. ***There is no suggestion in the court rules that the filing requirements for rehearing motions should be considered jurisdictional.***
>
> [*Id*. (emphasis added).]

This peculiar confluence of events led to another onerous burden for Ms. Oesterling and her counsel. A "timely" delayed application for leave to appeal the August 9, 2018 order would have been due on **February 5, 2019**, the day ***after*** co-counsel for Ms. Oesterling finally had confirmation that the late-filed motion for reconsideration of that order had been denied! See **TAB H**; **TAB I**.

Undersigned counsel was finally engaged on January 28, 2019 to file an appeal with respect to the trial court's August 9, 2018 award of attorneys' fees. Unbeknownst to undersigned counsel, the trial court's September 18, 2019 order denying reconsideration (which, as previously noted,

was not served on counsel until February 4, 2019), was entered with respect to a motion for reconsideration that was filed on September 5, 2018.

There is nothing in the Circuit Court record to suggest that there was not good cause to file the September 5, 2018 motion for reconsideration of the August 9, 2018 order awarding attorney fees. The Circuit Court accepted the motion.

Thus, on February 12, 2019 undersigned counsel filed what he thought was a timely "Claim of Appeal" from the August 9, 2018 order based on September 18, 2018 order denying the motion for reconsideration.

As noted, on February 20, 2019, this Court dismissed the claim of appeal as beyond the jurisdiction of the court because trial counsel for Ms. Oesterling did not timely file the motion for reconsideration of the August 9, 2018 order granting attorneys' fees, even though the trial court entertained that motion for reconsideration and there was no objection as to its untimeliness, and even though the actual order entered by the trial court denying that motion was not served on counsel of record until February 4, 2019 as required by the court rules. See footnote 2, *supra*.

While the trial court did not entertain a motion to file a late motion for reconsideration, as noted by this Court's February 20, 2019 order, citing MCR 7.204(A)(1)(b), it did actually entertain that motion. Therefore, the trial court implicitly found "good cause" to accept that motion because it explicitly entered a ruling on the merits. See, again, *Bers v Bers*, 161 Mich App at 462-63 (addressing MCR 2.119 and stating "the time requirement for filing a motion for reconsideration or rehearing insures that the motion will be brought expeditiously"). Next, citing *Smith v Sinai Hospital of Detroit*, 152 Mich App 716, 723; 394 NW2d 82 (1986), this Court stated:

> [A] trial court wants to give a "second chance" to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion. All this rule does is provide the trial court with some guidance on when it may wish to deny motions for rehearing. There is ***no suggestion in the***

***court rules that the filing requirements for rehearing motions should be considered jurisdictional***.

[*Id*. (emphasis added).]

There was no reason to believe there was not "good cause" to accept Ms. Oesterling's motion for reconsideration because there was no objection by opposing counsel, and no mention of its untimeliness by the Circuit Court. The relevant language of MCR 7.204(A)(1)(b) passively states that an appeal will be timely if the motion for reconsideration was filed "within *further time the trial court has allowed for good cause* during that 21-day period". The Court Rule does not require that the trial court actually enter an order *finding* good cause . Indeed, the court rule does not even say that the proponent of the motion for reconsideration must formally seek further time. As far as the language of the rule goes, the trial court can *sua sponte allow* further time. That is what appeared to have happened in this case. See *Bers v Bers*, 161 Mich App at 462-63 and *Smith v Sinai Hospital of Detroit*, 152 Mich App at 723.

There was good reason for this. Consider that a timely motion for reconsideration of the August 9, 2018 order would have been technically due on Thursday, August 30, 2018. However, the transition of judges from Judge Economy to Judge Baird occurred just two days prior to that date, on Tuesday, August 28, 2018. See ROA #124. While the motion for reconsideration was filed on Wednesday, September 5, 2018, it is not surprising that the Circuit Court did not raise an issue with the timing of the filing of the motion for reconsideration during this transition. Indeed, further evidence that the Circuit Court had no problem allowing the time for filing this motion to be extended *sua sponte* is demonstrated by the fact that the transition was still obviously occurring throughout this period. Indeed, it was actually Judge Economy who signed the motion denying reconsideration on September 18, 2018, from the motion for reconsideration that was apparently presided over by Judge Garcia, not Judge Baird, even though Judge Baird had been technically

presiding over the case since August 28, 2018! See ROA, #124; **TAB D**, Order Denying Reconsideration on 09/18/18 presided over by Judge Garcia but signed by Judge Economy).

Even further causing delay in the entire series of events in this case is the fact that this order denying reconsideration was not actually sent to any counsel in this case until February 4, 2019! Therefore, even though he had previously consulted on this case, after the notice of the September 18, 2018 order on February 4, 2019, undersigned counsel had only one day to (1) to realize that this late-served order denying reconsideration was issued from an untimely filed motion for reconsideration that no one objected to and which the Circuit Court obviously allowed *sua sponte* for good cause because the Circuit Court was going through a transition of the entire case from one judge to another, which although stated to have occurred on August 28, 2018, had still not actually occurred at least as of the date of the signing the order denying the motion for reconsideration, and (2) to then file a delayed application for leave to appeal the August 9, 2018 order. Indeed, the Circuit Court *never* complied with MCR 8.105(C) by actually giving notice to the attorneys of record as required in the manner provided by MCR 2.107. See footnote 2, *supra*. See **TAB C**, ROA. In fact, it was not until **February 7, 2019**, after the time for filing a delayed application had passed with respect to the August 9, 2018 order awarding attorneys' fees, that counsel of record were served with this order because co-counsel for Ms. Oesterling filed a proof of service showing that they themselves had done it. See ROA #166.

As this Court is aware, and as is evidenced by the intricacies of the underlying orders and events in this very case, filing a delayed application for leave to appeal cannot easily be done within 24 hours. It is certainly more demanding than filing a claim of appeal.

In its February 20, 2019 order, this Court invited Ms. Oesterling to file a delayed application for leave to appeal the September 18, 2018 order for reconsideration without considering this

peculiar series of events and the fact that the Circuit Court obviously allowed an extension to file the motion for reconsideration to September 5, 2018 without objection.

What is perhaps an even greater testament to the reason for delay in this case, which has been caused by the multiple transitions in is the fact, already mentioned, that on January 24, 2019, the Circuit Court judge now presiding over the case granted reconsideration of an order that the judge had actually made on August 31, 2018, but had not actually entered on the record until January 3, 2019! (**TAB J**, Motion for Reconsideration). The basis for this motion was that between February 2, 2018 (the date of the original custody order) and multiple *sua sponte* changes and modifications to that order, the trial court *never* held the proper hearings to justify those changes and modifications to the original February 2, 2018 custody arrangement. *Id*., pp. 9-10 (detailing the Circuit Court's *sua sponte* orders changing the parenting time arrangement from the February 2, 2018 arrangement where Mr. Washington's custody time would be phased in to a straight 50/50 (week on / week off) arrangement). These *sua sponte* changes were modifications to the child's custodial environment without the requisite hearings, evidence, and findings of proper cause or sufficient change in circumstances. *Id.* The January 23, 2019 motion actually had to request that the trial court vacate all prior orders concerning custody since the February 2, 2018 custody order!

It should be noted that the trial court granted this motion for reconsideration realizing that in fact, the prior "changes" in custody; those that were ordered by Judge Economy subsequent to February 2, 2018, had been entered in error. (**TAB B**).

It should also be noted that the entire basis for Mr. Washington's "request" for attorney fees under MCR 3.206 was that Ms. Oesterling did not comply with these multiple errant orders of the court. In fact, while not even conceding that this Court Rule should apply in this suit under the Paternity Act, as explained below, Ms. Oesterling filed objections properly contesting the custody

arrangements, and the subsequent modifying orders that were, again, entered by the Circuit Court *sua sponte* and, ultimately, in error. (**TAB B**, Order Granting Reconsideration, 01/24/2019). Incidentally, this Court has held that MCR 3.206(D)(2)(b) cannot even be violated where the one against whom fees are sought has exercised properly legal procedures to file objections. See **TAB K**, *Kalaydjian v Kalaydjian*, unpublished per curiam opinion of the Court of Appeals, issued September 29, 2011 (Docket No. 298107), p 5 (stating that "[u]tilization of proper legal procedure to attempt to avoid the effect of a court order is not a 'refusal to comply with a court order'" as contemplated by MCR 3.206(D)(2)(b)), followed in *Richards v Richards*, 310 Mich App 683, 701; 874 NW2d 704 (2015).

This delayed application is being filed to challenge the Circuit Court's order denying reconsideration of the attorneys' fee award to Mr. Washington because that award effectively prevents Ms. Oesterling from continuing to fully defend herself and the interests of her minor child, custody and control of whom is at the center of this controversy which is still occurring in the Circuit Court.

As the Court, due to the many erroneous, unentered, unsigned, and/or unserved orders in this case and the fact-intensive and serious nature of the several legitimate objections filed by Ms. Oesterling (during which several different attorneys appeared and withdrew and several different judges were assigned to address this case), undersigned appellate counsel has been required to become entirely familiar with the proceedings and the lower court record (which continue to evolve) to properly present the important issues of law and argument underlying the application for leave to appeal what is ultimately another *errantly* entered order of the Circuit Court!

Finally, delay has occurred because Ms. Oesterling's ability to fight for her constitutional rights to ensure the proper care and custody of her child is (but should not be) dependent upon her being

able to have access to the monies that have been tied up in escrow as a result of the Circuit Court's award of sanctions against her and in Mr. Washington's favor. This Court has held on several occasions that a party to a domestic relations action should not be required to pay opposing counsel's attorney fees from his or her own property, which is needed for their own support. *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010), citing *Ozdaglar v Ozdaglar*, 126 Mich App 468, 473; 337 NW2d 361 (1982). "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Id*., citing *Gates v Gates*, 256 Mich App 420, 438-439; 664 NW2d 231 (2003). Yet, that is what is being forced on Ms. Oesterling in this case.

This state of affairs is especially stark given that the economic situation of both parties is so widely disparate. Mr. Washington makes over $180,000 per year. Ms. Oesterling is a college student and the single mother of four children who makes less than 15,000 per year (Mr. Washington's monthly income!). (**TAB L**, Conciliator's Recommendation, p. 5). This Court has held that a party sufficiently demonstrates an inability to pay attorney fees when their annual income is less than the amount being claimed. *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010). The attorney fee award in this case was $25,000. Likewise, where a party's income is actually more than double the opposing party's yearly income, that party automatically has the ability to pay the other party's attorney fees. *Stallworth v Stallworth*, 275 Mich App 282, 288-289; 738 NW2d 264 (2007). Thus, it would seem uncouth, at best, to require the party whose *annual* income is less than the *monthly* income of the opposing party to pay the latter's attorneys' fees. However, this is what has been allowed to occur in this case.

Ms. Oesterling has had to liquidate her assets (sell her family home) just to defend herself and her minor child in these legal proceedings, and she now faces the prospect of being litigated out

of her natural and constitutional rights as a parent because she cannot afford the exorbitant legal fees being charged by Mr. Washington's attorney, and at the same time pay for her own legal representation in defending her rights.

These circumstances are especially dire given that Mr. Washington, an executive at MSU, originally used his position of power and authority over Ms. Oesterling who was a subordinate employee of his at MSU, ultimately engaging with Ms. Oesterling in a relationship which resulted in the birth of the minor child that is at the heart of this dispute.

Indeed, Mr. Washington's patriarchal attitude did not stop after the relationship was over. He is now using his wealth and status to affirmatively sue Ms. Oesterling under the Paternity Act so that he can exercise additional control over her and her family by asserting a right to custody of the minor child. As Mr. Washington was intimately involved with Ms. Oesterling when she was a subordinate employee of his at MSU, Mr. Washington knows he has the financial means and advantage to litigate Ms. Oesterling out of her rights of custody over her minor child, and indeed, to force the impossible dilemma upon her of choosing between protecting all of her children from poverty and fighting his continuous onslaught of legal manipulation.

Ms. Oesterling has already suffered significant financial prejudice defending herself and her family in this case. Moreover, it has been difficult, due to her job schedule, the responsibilities and obligations of taking care of her children, and her financial dependency on work to find and to keep attorneys that are willing to help her.

There is no prejudice suffered by Mr. Washington as the monies that were awarded as attorneys' fees per the Circuit Court's order, which is the subject of this appeal, have been placed in escrow awaiting disposition. Moreover, aspects of this case are still being litigated in the Circuit Court.

This Court may exercise jurisdiction over Ms. Oesterling's delayed application for leave to appeal upon a demonstration of substantial harm suffered by her. A delayed application may be filed in the event a timely application was not filed upon a proper showing to this Court. Indeed, this Court has discretion to consider an appeal of an underlying order as timely. MCR 7.216(A)(7); *Detroit v Michigan*, 262 Mich App 542, 546; 686 NW2d 514 (2004); *Waatti & Sons Elec Co v Dehko*, 230 Mich App 582, 585 ; 584 NW2d 372 (1998) (granting leave to appeal where a claim of appeal was not technically timely filed).

Ms. Oesterling submits that such a demonstration is made in this Application for Leave to Appeal and Brief in Support. This Court has granted leave to appeal on many occasions even though a "claim of appeal" was technically late. *Waatti*, *supra*. Indeed, here, the February 12, 2019 "claim of appeal" as to the August 9, 2018 order would have been "timely" if this Court had considered that the Circuit Court accepted, without objection, the filing of the Motion for Reconsideration on September 5, 2018, and subsequently ruled on that motion without mentioning the timing, and that the actual order denying that motion for reconsideration was not even entered on the record – indeed never served by the Circuit Court as required by MCR 8.105 and MCR 2.107 – and was not sent to counsel of record until February 7, 2019! See ROA # 166.

The court rules specifically grant this Court discretion to grant leave with regard to untimely appeals. See MCR 7.205(G)(3)(b). Again, the Circuit Court accepted and ruled on the motion for reconsideration in this case even though it was filed after the 21-day period. That order was not even served on counsel of record until February 7, 2019. ROA #166.

## BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

## JURISDICTIONAL STATEMENT

MCR 7.205(A) provides that an interlocutory appeal may be filed 21 days from the date of the order being appealed, or "within other time as allowed by law or rule." MCR 7.205(G) where an application for appeal was not filed within 21 days, a party may file a delayed application as prescribed in MCR 7.205(B) with a statement of facts explaining the delay.

## QUESTIONS PRESENTED

Pursuant to MCR 7.212(C)(5), Appellant presents the questions in this appeal in relation to the facts of this case under the Paternity Act, MCL 722.711, *et seq*., as follows:

I.

> Although attorney fees may be awarded under the Paternity Act, there must be a determination that the party against whom the award is entered is financially able to pay it and that the party who is requesting the award has a financial need for it to be paid. As this Court has said, the Paternity Act "reflects the intent of the Legislature to ***apportion the financial burdens*** of parenthood as equally and fairly as possible, keeping in mind the interests of the child ***and the financial status of the parties***." *Thompson v Merritt*, 192 Mich App 412, 425; 481 NW2d 735 (1991) (emphasis added). Indeed, this Court has long held that attorneys' fees under the Paternity Act are ***only available*** "if they are necessary to enable an adverse party ***to carry on or defend*** the action." *Id*. at 423, citing *Bessmertnaja v Schwager*, 191 Mich App 151, 158; 477 NW2d 126 (1991) (emphasis added).
>
> Conversely, MCR 3.206(D)(2)(b), the court rule applied in this case, does not require consideration of the financial status of the parties to justify an award of attorney fees.[2]
>
> Here, the Circuit Court entered an exorbitant fee award of $25,000 in favor of Plaintiff, Mr. Washington, who makes over $180,000 annually (over $15,000 per month) as an executive director of analytics at Michigan State University (MSU) and against Defendant, Ms. Oesterling, a college student and the single mother of four children, who was, until recently, unemployed, and who averages

[2] The trial court and counsel for Mr. Washington referred to the prior iteration of this rule, which was MCR 3.206(C)(2)(b). It has been renumbered to MCR 3.206(D)(2)(b), and will be referred to as such throughout this application.

approximately $14,400 in annual income (less than Mr. Washington's monthly salary!). This fact alone demonstrates that the Circuit Court followed the rote language of the court rule rather than this Court's instruction to consider financial equity in actions brought under the Paternity Act. This is legal error that this Court must correct. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Where a statute governing a substantive matter of public policy conflicts with application of a court rule, the statute prevails. *Malone v Malone*, 279 Mich App 280, 288; 761 NW2d 102 (2008), citing, *inter alia*, *McDougall v Schanz,* 461 Mich 15, 30-31; 597 NW2d 148 (1999). See also Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making,* 55 Mich L R 623, 635 (1957). Indeed, actions under the Paternity Act take precedence over the court rules. *Klein v Franks*, 111 Mich App 316, 321; 314 NW2d 602 (1981).

Pursuant to this principle, Circuit Courts cannot enter attorneys fee awards in suits under the Paternity Act without first considering the financial status of the respective parties and the equities of imposing such an award. The Court Rule, MCR 3.206(D)(2)(b) conflicts with this stated legislative policy because it ostensibly allows an award of attorney fees to be imposed in an action brought under the Paternity Act irrespective of the financial standing of the party against whom the sanctions are sought. The question, one of first impression being presented to this Court, is as follows:

Did the Circuit Court commit palpable error in entering an award of attorney fees in favor of Mr. Washington under MCR 3.206(D)(2)(b) in this action brought under the Paternity Act without considering the financial equities and status of the parties where in the motion for reconsideration, the issue of financial equities was presented?

II.

Even if MCR 3.206(D)(2)(b) applies in this case, to justify an award of attorney fees the requesting party must demonstrate "facts sufficient to show that…the attorney fees and expenses ***were incurred because the other party refused to comply with a previous court order***, ***despite having the ability to comply***." (emphasis added). The burden of proof is on the party seeking attorney fees as a sanction. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). See also *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010).

If the plain language of this subsection *requires* a finding that the party being imposed with the burden of attorney fees must have (1) actually violated, i.e., refused to comply with, a court order; (2) been able to comply with such order; and (3) that the party requesting the award of attorney fees incurred the fees because of the other party's noncompliance, did the trial court err in awarding attorney fees without a showing by Plaintiff-Appellee that all of these elements were satisfied?

III.

Even if the requirements of MCR 3.206(D)(2)(b) were satisfied, was the trial court's award of attorney fees supported by the record?

## SUMMARY OF THE ARGUMENTS

Natural parents have a fundamental liberty interest in the care, custody, and management of their children. *Santosky v Kramer*, 455 US 745, 753-54; 102 S Ct 1388; 71 L Ed 2d 599, 606 (1982). The Court's recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment is well documented. *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978); *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 845; 97 S Ct 2094; 53 L Ed 2d 14, 35 (1977); *Moore v East Cleveland*, 431 US 494, 500; 97 S Ct 1932; 52 L Ed 2d 531, 538 (1977); *Cleveland Bd of Ed v LaFleur*, 414 US 632, 639-40; 94 S Ct 791; 39 L Ed 2d 52, 60 (1974); *Stanley v Illinois*, 405 US 645, 651-52; 92 S Ct 1208; 31 L Ed 2d 551, 559 (1972); *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645, 652 (1944); *Pierce v Society of Sisters*, 268 US 510, 534-35; 45 S Ct 571; 69 L Ed 1070, 1078 (1925); *Meyer v Nebraska*, 262 US 390, 399-400; 43 S Ct 625; 67 L Ed 1042, 1045 (1923). Even where blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. *Santosky v Kramer*, 455 US 745, 753-54; 102 S Ct 1388; 71 L Ed 2d 599, 606 (1982).

In keeping with these principles, this Court has acknowledged that ***a fundamental component*** of a person's ability to protect this constitutional right is the need for ***paid legal representation*** for ***all*** citizens in parental rights litigation. "The fundamental liberty interest of parents with regard to their children permeates Michigan laws." *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). Therefore, it is clear that financial pressures and concerns should not be a discriminating or prejudicial factor in the ability of natural parents to defend and assure the protection of their

constitutional liberty interests, and more importantly, as this case demonstrates, the protection of their minor children. *Id*. at 333-334. "[P]arents, whether rich or poor, have the natural right to the custody of their children." *Id*. at 333, quoting *Herbstman v Shiftan*, 363 Mich 64, 67; 108 NW2d 869 (1961).

To that end, this Court has stated that the Paternity Act, upon which the underlying action was commenced, "reflects the intent of the Legislature to ***apportion the financial burdens*** of parenthood as equally and fairly as possible, keeping in mind the interests of the child ***and the financial status of the parties***." *Thompson v Merritt*, 192 Mich App 412, 425; 481 NW2d 735 (1991) (emphasis added). Therefore, this Court has held that any award of attorney fees to either party ***under the act*** must be predicated upon a consideration of the financial equities of the parties and the ability of the party against whom such an award is sought to be able to pay such an award. *Id*.

However, MCR 3.206(D)(2)(b), the Court Rule that was used by Mr. Washington in this case against Ms. Oesterling, ostensibly allows for the imposition of an attorney fee award in a domestic relations action ***with no requirement*** or ***consideration*** of the financial equities and/or capabilities of the party against whom the attorney fee award is sought. In other words, unlike this Court's established jurisprudence in Paternity Act cases, protecting the constitutional rights of ***all parents*** to protect minor children, the Court Rule makes this impossible because the ***non-monied party*** can be forced to both pay an exorbitant attorney fee award to the opposite side, while at the same time be required to maintain his or her own legal counsel to defend or prosecute his or her legitimate constitutional interests. This is exactly what is being allowed to happen in this case.

Where the application of a statutory provision and a court rule come into conflict on a substantive matter of policy governed by the Michigan legislature, the statutory provision and its

interpretation must prevail. *McDougall v Schanz*, 461 Mich 15, 31; 597 NW2d 148 (1999) (citing Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich L R 623, 650-651 (1957) and stating that "if a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield."). Here, the substantive matter of policy is whether a party in an action under the Paternity Act may recover attorney fees from the opposing party notwithstanding the financial equities involved and financial circumstances of the party against whom the attorney fee award is sought. Michigan case law explicitly holds that such an award is not appropriate where the party against whom the award is sought is financially unable to pay the award and afford to defend himself or herself in the legal proceedings. Moreover, Michigan case law also provides that the Paternity Act always takes precedent over the Court rules. See *Klein v Franks*, 111 Mich App 316, 321; 314 NW2d 602 (1981) noting that any conflict between the court rules and the Paternity Act has already been resolved in favor of the Paternity Act and "the Paternity Act ***takes precedent over any other conflicting court rule***." (emphasis added)

Thus, an award of attorney fees cannot be entered in such cases without considering the financial situation of the parties. Yet, the court rule, as is evident from its application in this case, appears to allow just that. The conflict must be resolved by this Court.

The Circuit Court allowed Mr. Washington to use the Court Rule as a sword to manipulate and control the legal proceedings, rather than as a shield to protect against abusive and unwarranted manipulation of the legal process. Duped by this intentional distortion of the rules, which by the way was presented to it without the necessary support and justification, as explained below, the Circuit Court entered an attorney fee award of $25,000 against Ms. Oesterling, for Mr. Washington's attorney (who charges an exorbitant $395 per hour in a routine domestic relations

child custody case)[3] despite the fact that Ms. Oesterling earns less than that amount in a year and Mr. Washington's annual salary is over $180,000 annually.[4] Whether this court rule allows for such an award despite this Court's jurisprudence interpreting the Paternity Act to require consideration of the party's ability to financially support it and to be able to defend himself or herself is an issue that has not been addressed by this Court. On this point alone, Ms. Oesterling believes this Court's jurisprudence should prevail and therefore the trial court committed reversible error that warrants correction by this Court. Where a trial court incorrectly *chooses*, *interprets*, or *applies* the law, it commits legal error that this Court is bound to correct. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994).

Even if the court rule does apply, and Ms. Oesterling does not concede this point, by its plain language, it requires (1) proof that an order of the court was ***actually violated by an intentional refusal to comply***, (which did not happen here); and (2) that the legal work upon which the attorney fee award is based was actually caused by (resulted from) said violation and (3) the fees were reasonable. *Reed v Reed*, 265 Mich App 131, 165; 693 NW2d 825 (2005). The burden of proof as to all of these is on the party seeking the sanctions.

As to the first element, at no time during these proceedings leading up to the trial court's order awarding attorney fees was there a finding as required by the Court Rule, MCR 3.206(D)(2)(b)

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[3] Generally, "paternity cases are relatively simple and…the trial court should consider the complexity and difficulty of the issues involved in determining a reasonable fee award." *Oviedo v Ozierey*, 104 Mich App 428, 430; 304 NW2d 596 (1981), citing *Sturgis Savings & Loan Ass'n v Italian Village Inc*, 81 Mich App 577, 584; 265 NW2d 755 (1978). A fee award of nearly $10,000 "would be unjustified" in the usual paternity case. *Id*.

[4] This Court has held that a party sufficiently demonstrates an inability to pay attorney fees when their annual income is less than the amount being claimed. *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010). Likewise, where a party's income is actually more than double the opposing party's yearly income, that party automatically has the ability to pay the other party's attorney fees. *Stallworth v Stallworth*, 275 Mich App 282, 288-289; 738 NW2d 264 (2007).

that Ms. Oesterling actually violated a court order and was held in contempt. Even if this Court were to conclude that something less than violation of a written order of the court would suffice to allow imposition of attorneys' fees by the "monied" party against the party in financial distress, there was also no finding, as required by that same court rule that Ms. Oesterling was able to comply. In fact, in this latter regard, all of the "requirements" and "hurdles" Mr. Washington's lawyer explained were required of Ms. Oesterling to "comply" with were in fact not within her control and dependent upon the actions or reactions of others. Furthermore, this Court has stated that legitimate objections lodged as to the orders alleged to have been violated by the party seeking attorneys fees does not rise to the level of unilateral refusal to comply. (**TAB K**, *Kalaydjian v Kalaydjian*, Unpublished Opinion Per Curiam of the Court of Appeals, issued September 29, 2011 (Docket No. 298107), p 5. Secondly, as has been demonstrated by the Circuit Court's reversal and vacating of all orders affecting custody entered by the Circuit Court subsequent to February 2, 2018, and its granting of reconsideration on January 24, 2019 reinstating that original order, Ms. Oesterling's objections were far from frivolous or contemptuous. (**TAB B**, Order Granting Reconsideration, 01/24/2019). Misconduct sufficient to support the sanction of attorneys' fees cannot be predicated on good-faith efforts to engage in litigation of the primary issues. *Reed v Reed*, 265 Mich App 131, 164-165; 693 NW2d 825 (2005).

Regarding the second element, the moving party must not merely present a billing statement for approval under this exception (as Mr. Washington did), rather, he or she must demonstrate by documentation and testimony what charges can be attributed to the other party's actual misconduct as required by the plain language of the rule. *Augustine v Allstate Ins Co*, 292 Mich App 408, 414; 807 NW2d 77 (2011). The focus is on whether the wrongful conduct of one party caused the other party to incur the legal fees. *Stackhouse v Stackhouse*, 193 Mich App 437, 445-446; 484 NW2d

723 (1992). Moreover, the trial court abused its discretion by awarding attorney fees on the basis of Ms. Oesterling's unreasonable conduct without an actual hearing and finding that her misconduct caused plaintiff to incur the fees awarded. *Id*. See also *Reed*, 265 Mich App at 164-165. The fact that litigation has been lengthy or contentious is not by itself reason to conclude misconduct has occurred. *Reed*, *supra*; (**TAB M**, Hearing Transcript, 07/27/2018).

Mr. Washington's brief in support of attorney fees actually skipped this requirement, and went straight to an ordinary justification for the reasonableness of the fees. (**TAB N**, Brief in Support of Request for Payment of Attorney Fees (and attachments)). Even if the billings submitted demonstrate work performed by Mr. Washington's attorney in litigating this case, as already noted, this Court has stated that filing objections to orders of the circuit court does not constitute a "refusal" to comply with the court's orders under the rule. Since Mr. Washington did not and cannot prove that Ms. Oesterling actually refused to comply with an order of the court (as opposed to filing legitimate objections (which were later justified)), he cannot prove that the attorneys' fees incurred were caused by Ms. Oesterling's noncompliance. Indeed, as trial counsel for Ms. Oesterling stated, Mr. Washington hired his attorney to litigate his custody rights. The "legal services" he provided to Mr. Washington was in furtherance of that representation. (**TAB M**, Hearing Transcript, p. 7).

Finally, the trial court is required to "conduct a hearing to determine what services were actually rendered and the reasonableness of those services." *Reed*, *supra* at 166. Here, the trial court failed to this, merely accepting the mere assertions made by Mr. Washington's counsel that Ms. Oesterling violated the court's order, that the claim that the legal fees presented were incurred as a result of responding to those violations, and that the fees were reasonable without conducting

the required evidentiary hearing to even consider the question. Reversal is required on this basis as well. See *Lyons v Lyons*, 125 Mich App 626, 633; 336 NW2d 844 (1983).

Finally, before getting into the details of the legal argument, it should be noted that Mr. Washington is the ***monied party*** in this action. He is Executive Director of Analytics at Michigan State University (MSU) and earns over $180,000 annually. He initially pursued a relationship with Ms. Oesterling when she was a subordinate employee of his at MSU, and already a single mother of three other children.

In keeping with this already deeply skewed patriarchal relationship, Mr. Washington now continues to use his substantially greater position of power, status, and financial means to control, manipulate and dictate the tenor and tempo of these legal proceedings to such an extent that the Circuit Court has now ordered Ms. Oesterling, who until just recently became employed again, to pay Mr. Washington's attorney fees so that he can continue to prosecute his paternity action to assert greater custody and control over Ms. Oesterling and her children.

The fact that the Circuit Court awarded attorneys' fees in this situation, without more, should be sufficient for this Court to halt this process before Ms. Oesterling is faced with financial ruin just to protect her own and her child's constitutional liberty interests. Fortunately, there are significant legal issues of first impression in this case that should prevent the rote language of the court rule from affecting a distortion of the law resulting in a travesty of justice. Michigan courts have long held that where substantive interpretation of a statutory provision conflicts with the application of a court rule, the substantive statutory provision and the jurisprudence interpreting it should prevail. This Court has specifically stated that the Paternity Act's provisions take precedence over the court rules. Ms. Oesterling submits that here, this rule of law must prevail.

Domestic relations matters concerning determinations of parentage and custody are fraught with the possibility that an indigent or financially challenged party will be unable to protect his or her rights, or those of his or her minor child. The considerations of equity among the parties and the dangers of allowing inequities to creep into the contentious and often acrimonious disputes often attendant to such matters is nearly a foregone conclusion. Thus, as this Court has recognized, the substantive policy of the state as expressed in these statutes is carefully laid out. Indeed, this court has held that with respect to actions brought under the Paternity Act "sound policy considerations dictate that a losing defendant in a paternity action should not be able to take advantage of plaintiff's indigency as relates to attorney fees." *Oviedo v Ozierey*, 104 Mich App 428, 430; 304 NW2d 596 (1981). While the Court was addressing an award to a plaintiff mother who filed an action against a defendant father, which is inverted in this case (Mr. Washington (the father) filed the action against Ms. Oesterling (the mother) ostensibly seeking to determine his rights to custody of the child), the point the panel made was that it would be inequitable to fail to consider the financial equities in the case because a party to such a proceeding might use his or her greater financial position or advantage to the detriment and prejudice of the opposing party. *Id*. That is exactly what is happening in this case. The attorney fee award, if upheld, would essentially foreclose Ms. Oesterling's rights and ability to continue to defend this action and her asserted rights to custody and protection of her own child, which she has thus far raised on her own without any concern by Mr. Washington until he decided to use his position of wealth and power to file a retaliatory action under the Paternity Act.[5]

[5] It should be noted that Mr. Washington did not become interested in seeking shared custody of the minor child until after Ms. Oesterling had lodged a sexual harassment complaint against him with MSU, which allegations arose out of the extremely skewed relationship engaged in by Mr. Washington while he was Ms. Oesterling's supervisory employer at Michigan State University.

Indeed, this Court had long held that attorneys' fees under the Paternity Act are only available "if they are necessary to enable an adverse party *to carry on* or *defend* the action." *Thompson v Merritt*, 192 Mich App 412, 423; 481 NW2d 735 (1992) (emphasis added), citing *Bessmertnaja v Schwager*, 191 Mich App 151, 158; 477 NW2d 126 (1991). Even in divorce proceedings, which may or may not involve the more serious questions of the welfare and custody of minor children, this Court has held attorney fees may be awarded only when a party needs financial assistance to prosecute or defend the suit. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). See also *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). This statement of law has not been overruled, even in light of MCR 3.206(D)(2)(b). Moreover, the decision in *Schwager*, *supra*, which held that attorneys' fees are awardable under the Paternity Act, was based on the reasoning that attorneys' fees were awardable in actions for divorce, but only where the financial equities of the parties is considered in the final determination.

So, there is a conflict between this Court's interpretation and application of the Paternity Act concerning attorneys fee awards and the application of MCR 3.206(D)(2)(b). If the latter does not require consideration of the financial equities of the parties in such an action, then there is most definitely a conflict in application of these two provisions concerning a very substantive matter of public policy – the right of a party to be able to defend himself or herself in a lawsuit concerning care and custody of minor children – a constitutional interest of the highest order.

This Court has consistently held that a consideration of the financial equities of both parties must be considered. This is only fair given that one or another party with the financial means (the monied party) could dictate and control the tenor and tempo of the proceedings to the disadvantage of the financially disadvantaged party. There is no question here that Mr. Washington is the monied party (he makes as much in one month as Ms. Oesterling makes in a year). Thus, Mr. Washington

has the financial means to control and dictate the proceedings to cause Ms. Oesterling to submit to his will by sheer virtue of her inability to defend her liberty interests and those of her minor child. What can she do if the Circuit Court allows Mr. Washington, the aggressor, to require Ms. Oesterling to pay for his prosecution against her?

This Court should grant the application to address this apparent conflict in this Court's substantive jurisprudence interpreting the Paternity Act's allowance of an award of attorneys only after a consideration of the financial equities of allowing such an award, and the Michigan Court Rules, which appear to allow attorney fees to be awarded regardless of the financial circumstances of the parties. Since the statute is supposed to take precedence over the court rule, this Court's interpretation and application of the former should prevail. This is especially so given the gravity of the public policy concerns at issue here, not the least of which is the fundamental liberty interest one retains under the constitution protecting his or her parental rights and the rights and wellbeing of their children.

In fact, it is Ms. Oesterling that is entitled to attorneys' fees in this case. MCR 3.206(D) provides that "a party may, *at any time*, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action." (emphasis added). The rule further provides that "a party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay. *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003). As this Court has held, the financial equities must be considered when awarding attorneys' fees under the Paternity Act. *Thompson*, *supra*. As Ms. Oesterling's annual income during the time of this underlying litigation was approximately the same as Mr. Washington's monthly income, Ms. Oesterling has demonstrated *de facto* need for an award of attorney fees under this rule. (**TAB L**, Conciliator's

Recommendation, p. 5). This Court has held that a party sufficiently demonstrates an inability to pay attorney fees when their annual income is less than the amount being claimed. *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010). Likewise, where a party's income is actually more than double the opposing party's yearly income, that party automatically has the ability to pay the other party's attorney fees. *Stallworth v Stallworth*, 275 Mich App 282, 288-289; 738 NW2d 264 (2007).

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

### *A. Factual Background*

Plaintiff, Corey Glenn Washington (Mr. Washington) is a Director of Analytics at Michigan State University (MSU) with a salary of approximately $178,606.20 per year (or $14,883.85 per month) (**TAB L**, p. 7; **TAB O**, Final Order of Child Support, 09/20/2018, p. 6).

In 2014, Ms. Oesterling was a subordinate employee of Mr. Washington at MSU. (**TAB L**, p. 7) Mr. Washington, who has been married since 2011, engaged with Ms. Oesterling in an extra-marital relationship. *Id*. Ms. Oesterling, who is the single mother of 3 children from a prior marriage, became pregnant with Mr. Washington's child. *Id*., pp. 7-8.

On June 22, 2015, Ms. Oesterling gave birth to Aristarchus Washington. (**TAB P**, Stipulation and Order of Filiation, 07/10/2017). The relationship between Mr. Washington and Ms. Oesterling began to deteriorate in September of 2015 when Mr. Washington's wife moved back in with him. Ms. Oesterling was forced to leave her job at MSU to seek employment elsewhere. In the Spring of 2017, Ms. Oesterling filed a complaint with MSU against Mr. Washington for sexual harassment that she alleged occurred during the time she was his subordinate employee at MSU, alleging he used his position of power and influence over her. Through its now infamous "Office of Institutional Equity" (OIE), MSU conducted an "*internal review*" of these allegations of sexual

misconduct perpetrated by one of its own executive employees, Mr. Washington, against Ms. Oesterling.[6] Unsurprisingly, in July 2017, MSU's internal review of sexual misconduct allegations against one of its own led nowhere. A subsequent "appeal" was also denied.

By 2017, Ms. Oesterling was a full-time student at MSU and she was also working for a gross income of approximately $1200 per month. (**TAB L**, pp. 7-8. She also incurred health insurance costs for her minor children and child care costs which amounted to approximately $7420 per year (approximately $618.00 per month (approximately half of her gross income)). After giving birth to Aristarchus in 2015, Ms. Oesterling has raised him and cared for him continuously and the custodial environment has been established with Ms. Oesterling. *Id*., p. 6.

***B. Procedural Background***

On March 27, 2017, just after Ms. Oesterling had lodged complaints against Mr. Washington with MSU, Mr. Washington filed a Petition for Entry of an Order of Filiation and Order Regarding Custody, Parenting Time and Child Support. (**TAB Q**, Petition for Filiation, 03/27/17). In his petition, Mr. Washington declared he was the father of Aristarchus Washington. *Id*., p. 2, ¶ 6. Mr. Washington stated that he had "engaged in parenting time with the minor child since his birth." *Id*., ¶ 8. He further stated that through the petition he sought "a specific parenting time schedule" and requested the Court to "enter an Order determining that [he] is the father of the minor child,

[6] The OIE is the organization created by MSU in the wake of the Larry Nasser sex-abuse case. Between 2016 and 2017, the time Ms. Oesterling's harassment complaint was lodged, the OIE was overwhelmed with sexual harassment and misconduct complaints. See https://eu.lansingstatejournal.com/story/news/local/2018/09/27sexual-assault-harassment-reports-msu/1430189002. As many now know, the OIE, was roundly criticized for being totally inept at properly addressing and dealing with sexual harassment and sexual assault complaints by employees and students at MSU. Indeed, the OIE was seen as a program with no accountability and no oversight as to who was in charge.

that parties shall have joint legal and physical custody of the minor child, that a parenting time schedule be established, and that child support be determined." *Id*., ¶¶ 8-9.

Ms. Oesterling was not served with the petition until April 18, 2017. (**TAB C**, ROA #6). Ms. Oesterling (who was still a full-time student at MSU and whose income at this time was $1200 per month (half of which was being used for care of her four minor children)) had to find an attorney to file an answer and respond to Mr. Washington's petition seeking custody. Ms. Oesterling was finally able to hire an attorney and an answer to Mr. Washington's petition was filed on May 9, 2017. *Id*., ## 7-8.

In her answer, Ms. Oesterling admitted that while Mr. Washington had engaged in some parenting time since the minor child's birth, she was the one who in fact sought a schedule for his visitation with the minor child because Mr. Washington had insisted a regular schedule was not possible due to his daily schedule and his claims that his wife was "preventing him from visiting the minor child at times." (**TAB R**, Answer to Petition filed May 9, 2017, p. 2, ¶ 8). Ms. Oesterling also objected to Mr. Washington's request for joint physical and legal custody stating that she had been "the primary caregiver for the minor child since birth with [Mr. Washington] being no more than a male acquaintance to the child" and that she "has provided for the minor child's needs, including but not limited to daycare, medical appointments, purchasing of clothing, housing, food" and that "[Mr. Washington] has failed to attend medical check-ups despite being advised of them." *Id*., ¶ 9. Ms. Oesterling stated that she should therefore have "sole physical and legal custody" of the minor child. *Id*.

On July 10, 2017, Ms. Oesterling's attorney requested the parties go to conciliation. The Circuit Court (Judge Economy) entered a stipulation and order of filiation. (**TAB C**, ROA #13; **TAB P**). On July 14, 2017, Judge Economy entered a stipulated order adjourning the pretrial

conference to November 20, 2017 and the trial for December 12, 2017. (**TAB C**, ROA #14. On July 24, 2017, the court entered an order referring the matter to the friend of the court (FOC) for conciliation. *Id*., #15.

After the August 15, 2017 conciliation, the Conciliator recommended that the parties share joint legal custody of the minor child, with Ms. Oesterling retaining primary physical custody. (**TAB L**, Conciliator's Recommendation, 08/17/2017). The Conciliator noted that Ms. Oesterling's attorney did not attend the conciliation and had therefore instructed Ms. Oesterling not to sign a stipulation agreeing with the Conciliator's recommendation. *Id*., p. 1. As a result, the Conciliator offered the parties' agreement "as a recommendation for a final order" rather than as an agreed stipulation. *Id*.

The substantive content of the Conciliator's recommendation contained a fairly detailed schedule for the shared custody arrangement, giving Mr. Washington increasingly greater custody privileges (in three phases), conditioned on him being able to "complete" each preceding phase successfully; a failure on his part was to reset the phase that he was unable to successfully complete. *Id*., pp. 1-5. After successful completion by Mr. Washington of the three "phases", the minor child was to stay with him for one night during the week (every week), and from 6:00 p.m. Friday to 6:00 p.m. Sunday on alternating weekends. *Id*., p. 2.

The Conciliator's recommendation also contained alternated custody for the child's birthday and for the following holidays: Spring Break / Easter; Memorial Day weekend; Fourth of July; Labor Day weekend; Halloween; and Thanksgiving. *Id*., pp. 2-3. Mr. Washington was also to have custody on Father's Day from 9:00 a.m. to 6 p.m., and the child was to remain with his mother on Mother's Day. Christmas break was separately addressed and the Conciliator recommended an alternating shared custody arrangement for the holiday for even numbered years and odd numbered

years. *Id*., p. 3. Summer break was also addressed, but the Conciliator incorrectly put "Defendant" (Ms. Oesterling) as having the right to custody of the child (where Ms. Oesterling was the primary physical custodian). The recommendation thus read, as follows:

> **SUMMER BREAK:** Defendant[sic] shall have one week of uninterrupted parenting time each month in June, July, and August. If the parties do not agree in writing (signed by both parties) on the weeks summer parenting time shall be exercised by [the] first day of May ("May 1st") preceding the upcoming Summer Break, then, the schedule will be as follows:
>
> - In June, the parenting time shall commence on the third Friday in June at 6:00 p.m. and continue until the following Friday at 6:00 p.m.
> - In July, the parenting time shall commence on the second Friday in July at 6:00 p.m. and continue until the following Friday at 6:00 p.m.
> - In August, the parenting time shall commence on the second Friday in August at 6:00 p.m. and continue until the following Friday at 6:00 p.m. [*Id*., p. 3]

The Conciliator's recommendation also contained a provision allowing the parties to "mutually agree" in advance to other parenting time arrangements, but cautioned that "the Friend of the Court [would] only enforce the written parenting time schedule above or as otherwise ordered by the Court." *Id*., p. 4.

Concerning "transportation", the recommendation stated that each party "is responsible for picking up the child at the start of his/her parenting time" and that "[u]nless otherwise agreed between the parties or specified herein, the pick-up shall occur at the other party's residence." *Id*.

The order concluded with a statement on objections, as follows:

> This Order shall be[sic] remain effective until further Order of the Court. If either party desires to modify or rescind this Order, written Objections and a Request for a Hearing must be filed with the Circuit Court Clerk…within 14 days after service of the Order, setting forth the basis of the objections in detail…. If an Objection and Request for Hearing is timely filed and served, a hearing will be set before an Ingham County Friend of the Court Referee. ***If no objections are filed within 14 days from the date of the certificate of mailing, this Order becomes a final order of the Court and resolves all pending claims.***

The Circuit Court filed a proof of service noting it had mailed out the recommended order on August 28, 2017. (**TAB C**, ROA #24).

On September 11, 2017, Ms. Oesterling filed a timely objection to entry of the conciliator's recommendation, which was scheduled for a hearing on October 26, 2017. *Id.* ##25, 29. (**TAB S**, Objection to Recommendation for Final Order, 09/11/2017).

Ms. Oesterling objected to the conciliator's recommendation that the parties share joint "legal" custody. (**TAB S**, p. 2, ¶ 6). Ms. Oesterling stated that Mr. Washington never wanted to be a father to the minor child, and that he had never wanted to be involved with decisions about the minor child since birth, "including but not limited to selection of pediatrician, daycare, wellness check-ups, diet, discipline, education". *Id*.

Ms. Oesterling also objected to the parenting-time schedule on several grounds, including:

- Observing Mr. Washington "on numerous occasions making poor and unsafe decisions regarding children including talking [Ms. Oesterling's] 10-year old son into climbing an over 20-foot high staircase
- Mr. Washington lacked compassion for Aris, allowing him to cry in public "for 30 minutes without consoling him."
- Mr. Washington assisted kids in climbing into basketball chutes that were no less than 12-feet off the ground which were clearly made for basketballs and not strong enough to support the weight of a child.
- Mr. Washington scolded and reprimanded Aris for knocking down blocks he had stacked up, which Ms. Oesterling pointed out was a "normal developmental activity for an 18 month old", which had been conveyed to Mr. Washington prior to this event.
- At a family outing to paint pottery, Mr. Washington harshly reprimanded Aris when he painted on a piece of pottery being created by his step-sister, Charlotte (Mr. Washington's daughter), only following her example because she had purposefully painted pieces being created by Ms. Oesterling's other children (and was not scolded by Mr. Washington), and Aris did the same thing to his step-sister.
- Mr. Washington failed to prevent Aris from climbing up into a ball shooting machine that shoots balls at very high pressure and when Ms. Oesterling confronted him, he told her he needed help watching the kids.
- During scheduled visits with Aris, Mr. Washington would leave Charlotte (his daughter) with Ms. Oesterling and leave her with both kids to go "run errands" while he was supposed

to be visiting with Aris. At other times, Mr. Washington would spend this time on the phone or video chatting.

- In February of 2017, at another visit, Mr. Washington began yelling at Ms. Oesterling and grabbed her arm to physically prevent her from leaving and attempted to block her ability to leave while she was holding Aris in her arms. Mr. Washington insisted this was "normal behavior" and that he would continue to treat Ms. Oesterling in this way.
- Mr. Washington had advised Ms. Oesterling that his wife "is emotionally unstable and therefore should not be around the child until her emotional / mental stability can be ascertained."

[*Id*., pp. 2-4, ¶ 7.]

Ms. Oesterling also pointed out that the recommendation erroneously named her, rather than Mr. Washington as being entitled to summer parenting time, when it was Ms. Oesterling who had primary physical custody of Aris, and that the order should have read: "Plaintiff-father (Mr. Washington) shall have one week of uninterrupted parenting time." *Id*., p. 4.

Ms. Oesterling also objected to the exchange of custody at their respective residences, stating "the parties relationship is toxic and the exchange should take place in a public space at a half way point of the parties…." *Id*. Finally, Ms. Oesterling pointed out that Mr. Washington had requested that the daycare provider be either someone who is unknown to Ms. Oesterling "and / or a known drug addict." *Id*. Ms. Oesterling also objected to the inclusion in the recommended order of mention of school since Aris was not of age to be in school and would not be for several years. *Id*.

Therefore, Ms. Oesterling requested the court to deny the conciliator's recommendation, and requested that it modify it to reflect "sole legal custody" for Ms. Oesterling. In her request for relief, Ms. Oesterling asked that Mr. Washington:

- "enroll in, attend and successfully complete a parenting class";
- "enroll in, attend and successfully complete a domestic violence class";
- "[o]nce successfully completing the parenting and domestic violence classes, reassess [Mr. Washington's] parenting time"

[*Id*.]

On September 25, 2017, while Ms. Oesterling's objection to the Conciliator's Recommendation was pending, Ms. Oesterling filed a motion requesting that exchanges of custody of the minor child between her and Mr. Washington take place at the Meridian Township Police Department. (**TAB C**, ROA #27). Ms. Oesterling's motion was based on Mr. Washington's behavior during exchanges that had taken place at other locations while the parties were still trying to iron out the custody arrangement. A hearing on that motion was scheduled and took place on October 11, 2017. An order was entered for parenting time exchanges to take place at the East Lansing Fire Department. (**TAB T**, Order, 10/11/2017).

Mr. Washington filed his response to Ms. Oesterling's objection on October 24, 2018. (**TAB U**, Objection, 10/24/2017). He deflected blame on Ms. Oesterling for being unable to comply with temporary shared custody on Ms. Oesterling, even going so far as to imply that Ms. Oesterling had mental health issues. *Id*., p. 6,

Despite the fact that the Conciliator's Recommendation had not been agreed on and Ms. Oesterling's timely objection had been filed with respect to that recommendation (and remained pending), Mr. Washington argued in his response that pursuant to MCL 722.27(1)(c) of the Paternity Act Ms. Oesterling had not substantiated cause or a change in circumstances regarding a change in the custody arrangement. *Id*., pp. 7-8.[7] The response then goes on to essentially admit

[7] Mr. Washington's counsel was abjectly wrong on this point for at least two reasons. First, there was no "final" custody order for which a change of circumstances could be sought and Ms. Oesterling being the custodial parent at the time. A court may modify or amend a child custody ***order*** for proper cause shown because of a change of circumstances. *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009), citing MCL 722.27(1)(c). However, there must be a court-sanctioned, that is, signed, ***custody order in place*** for MCL 722.27(1)(c) to apply. "[T]o establish a 'change of circumstances,' a movant must prove that, since ***entry of the last custody order***, the conditions surrounding custody of the child, which have or could have a significant effect on the

that no final order had been entered, asking the court to "affirm" the Conciliator's Recommendation. *Id*., p. 9. At this time, there was no existing custody order. *Id*.[8]

On October 26, 2017, the FOC held a hearing as to Ms. Oesterling's objection. (**TAB V**, Friend of the Court Hearing Transcript (FOC TR), 10/26/2017). The parties reached an agreement concerning Ms. Oesterling's objections. The terms of that agreement were then placed on the record. For each of the phases in the original recommended order, the parties agreed to change the "weekly parenting time" days from Tuesday and Wednesday, to Wednesday and Thursday. *Id*., p. 5, ll. 5-10. The parties agreed that they would share "joint legal custody" of the minor child. The parties then went through each of the "phases" of the custody arrangement that had been provided in the original Conciliator's Recommendation.

A written order was to be drafted within 21 days by Mr. Washington's attorney detailing the modifications so that the order could be placed on the record as a final order. In the meantime, Ms. Oesterling was required to find new counsel and an appearance by such counsel was placed on the record on December 11, 2107. (**TAB C**, ROA #36). On January 11, 2018, 77 days after the FOC hearing on October 26, 2017, Mr. Washington's counsel finally submitted a Motion for Entry of an Order based on the FOC Referee Hearing held on October 26, 2017 Modifying the Recommendation for Final Order. *Id*., #40.

A hearing was set for February 2, 2018. At the hearing a stipulation for entry of an Order Modifying Recommendation for Final Order Regarding Parenting Time was entered. (TAB W, Custody Order, 02/02/2018). This order does not contain language required pursuant to MCR

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child's well-being, have materially changed." *Vodvarka v Grasmeyer*, 259 Mich App 499, 512-514; 675 NW2d 847 (2003).

[8] See footnote 7, *supra*.

2.602(A)(3) regarding final, appealable orders. *Id*., p. 3. The order was not served until February 7, 2018, via a February 8, 2018 recorded entry on the docket. (**TAB C**, ROA #46). On February 12, 2018, Ms. Oesterling's then attorney withdrew from representation. *Id*., # 47.

On February 13, 2018, Ms. Oesterling filed a detailed Motion for an Ex Parte Order for a temporary abeyance of the parenting time and a request to refer the matter to the FOC for investigation. (**TAB X**, Motion for Ex Parte Order, 02/13/2018). Ms. Oesterling explained that since visitations had begun per the tentative schedule recommended in August 2017, Ms. Oesterling had noticed a significant change in her child's emotions and behavior. *Id*., p. 3, ¶ 10. The child became upset easily, exhibited anxiety both before and after his visits with Mr. Washington, had difficulty sleeping, and began to physically strike out at persons and objects. *Id*. In particular, after the February 3-4, 2018 weekend, during which Aristarchus stayed with Mr. Washington at his home, the child became upset when a favorite toy of his was referred to by the name "Alistair", which the child had previously named it. Ms. Oesterling's boyfriend's name was also "Alistair" and the child told his mother that Mr. Washington had gotten mad at him for calling the toy "Alistair". After Ms. Oesterling spoke to their family counselor (Ms. Laura Aula), who recommended that Ms. Oesterling reinforce it was okay for the child to refer to his toy by the name he had given it, she broached the subject with Aristarchus later in the evening. Again, he became upset, began to cry, and said that Mr. Washington would get mad and would "hit" him if he called the toy by the name "Alistair". *Id*., pp. 4-5, ¶¶ 14-16.

Aristarchus also "told [Ms. Oesterling] that when he called the toy "Alistair Giraffe" at [Mr. Washington's home] this weekend, [Mr. Washington] told the minor child he could not call the toy that anymore. The minor child also stated that [Mr. Washington] becomes angry at him if he asks for "Mommy", and that [Mr. Oesterling] struck him with a hanger at the last parenting time

visit." *Id*., p. 4, ¶ 16. Aristarchus "further stated that his half-sibling in [Mr. Washington's] home was also hit by [Mr. Washington] with a hanger, and that [Mr. Washington's] wife hits [Mr. Washington] with a hanger." *Id*.

After relating this story to Ms. Aula, and at the latter's suggestion, Ms. Oesterling contacted child protective services (CPS) and the local police. *Id*, pp. 4-5, ¶ 19. Ms. Aula met with the child and on February 6, 2018, after speaking with him, she felt the minor child's statement were momentous enough that she also reported the matter to CPS. (**TAB Y**, CPS Report by Social Worker Aula). A follow-on letter from Ms. Aula dated February 6, 2018, stated:

> I am writing this letter is[sic] on behalf of Aristarchus Washington DOB 06/22/2015, due to him reporting his father was physical with him on visitations this past weekend. It would be suggested that the reports from the police and Child Protective Services be followed. It would also be suggested that the visits be supervised and psychological evaluations be completed on all adult parties. As well as the completion of formal parenting classes for his father and step mother.
>
> [*Id*.]

On that same day, Ms. Oesterling made an appointment with Aristarchus' primary care pediatrician, Dr. Israel, who, for several months had noted that Aristarchus had been exhibiting "symptoms suggestive of significant anxiety which correlate with the minor child's visits with [Mr. Washington]." *Id*., p. 5, ¶ 19 and (**TAB Z**, Dr. Israel Report, 02/07/2018). Dr. Israel's report confirmed based on reports of alleged physical abuse by Mr. Washington, that "there is some physical evidence on examination consistent with these reports, in the form of bruises on his legs." *Id*. Dr. Israel continued:

> Either of these problems; the abnormal anxiety, OR the history of reported abuse alone would be sufficient reason to cease visitation with [Mr. Washington] on medical grounds. Taken together, I would strongly support his mother's request that the visits stop for the foreseeable future until these concerns are addressed. If I can provide any further information please feel free to contact me.
>
> [Id.]

Like Ms. Aula, Dr. Israel also reported the matter to CPS. (**TAB X**, p. 5, ¶19). Based on this evidence, which she attached to her Motion for an Ex Parte Order, Ms. Oesterling asked the court to hold the parenting time arrangement in abeyance until the FOC could conduct a proper investigation and issue a recommendation. *Id*, pp. 6-7. This motion was presented to Judge Garcia, because Judge Economy was out sick on that day.

On February 14, 2018, the Circuit Court (Judge Garcia) entered an order denying the request to hold the parenting time arrangement in abeyance, but ordered that "proper cause and change of circumstance exists to warrant a Friend of the Court investigation" and referred the matter for investigation. (**TAB AA**, Order, 02/13/2018).

On February 20, 2018, a subpoena was entered on the record. (**TAB BB**, FOC Subpoena, 02/20/2018). This subpoena, filed by the Supervisor of Investigations for the Ingham County Friend of the Court, noted that the FOC had been "assigned to review the matter and make recommendations"; that the FOC had "reason to believe that the Michigan Department of Human Services/Children's Protective Services/Foster Care Services having had involvement with the parties and/or of their minor child in this matter" and so requested these agencies to release to the FOC any and all information and reports (including medical, mental health and substance abuse) regarding the parties or the minor child. *Id*. The subpoena requested that this information be submitted in writing to the FOC within 7 days. *Id*.

On February 27, 2018, Ms. Oesterling filed an objection to the February 14, 2018 order. (**TAB CC**, Objection, 02/27/2018). She pointed out that it had been signed by Judge Garcia (rather than the then presiding Judge Economy who had been assigned and presided over the case since its inception, but who was ill on the day her *ex parte* motion was presented to the court). *Id*., p. 2, ¶ 3. She argued that the abuse allegations warranted *ex parte relief* and *did demonstrate* irreparable

harm if the parenting time arrangement was not enjoined pending the investigation by the FOC and further pending the requests by the family counselor for psychological evaluations for the adult parties. *Id*., ¶ 4. She also stated she was filing the objection to preserve her right to an evidentiary hearing. *Id*. A hearing was scheduled on Ms. Oesterling's objection for March 28, 2018. (**TAB C**, ROA #53).

On March 6, 2018, the parties attended the FOC's "Investigation Conference". The parties "*were not able to reach full agreement*" and the FOC therefore made "recommendations for a modified order" in its March 8, 2018 report. (**TAB DD**, Investigator's Recommendation, 03/08/2018, p. 1.) The report *recommended* that the parties adhere to the February 2, 2018 Order with certain exceptions. *Id*. The FOC recommended the exchanges of the minor child continue to occur at the East Lansing Fire Department. Ms. Oesterling was to choose an individual "Independent Parenting Time Supervisor" to supervise each exchange. The parties would each be equally responsible for the costs of the supervised exchanges. *Id*.

The FOC specified that Mr. Washington was to be given make-up parenting time consisting of "four make-up weekdays visits between the hours of 4:00 p.m. until 8:00 p.m. and one make-up weekend visit between the hours of 4:00 p.m. until 4:00 p.m. the following day." *Id*., p. 2. The FOC further that Mr. Washington, as "[t]he parent exercising non-holiday make-up parenting time must provide the other party with fourteen days written notice of intent to exercise make-up parenting time that is less than six (6) overnights, with a copy to the Friend of the Court". *Id.* "The fourteen (14) days written notice shall be considered from the date the notification is sent." *Id*. The Friend of the Court further specified that "[m]ake-up parenting time is not subject to the approval of the denying party"; that "[t]he denying party is expected to fully comply with the written notice

of intent to exercise make-up parenting time"; and "[d]enial of make-up parenting time will result in further enforcement actions against the denying party." *Id*.

Mr. Washington was also required to provide Ms. Oesterling with a list of at least three therapists within 10 days of the date that the FOC's recommended order was entered. *Id*. Within ten days of the date Ms. Oesterling received this list, she was to choose one from the list and notify Mr. Washington. *Id* Mr. Washington was to immediately initiate contact with the therapist and schedule the first appointment. He was to provide Ms. Oesterling with timely notice of the appointment date and time. If Mr. Washington failed to provide Ms. Oesterling with a list, she was allowed to secure a therapist of her choice and to initiate contact, schedule the first appointment, and provide Mr. Washington with timely notice of the appointment date and time. *Id*. In conclusion, the Friend of the Court stated that both parties had demonstrated a consistent pattern of pursuing litigation since the action was initiated in March of 2017. *Id*., p. 7. A proposed order was attached to the Friend of the Court's recommendation. *Id*., p. 8.

On March 9, 2018, a "Notice of Submission" of the order was noted on the register of actions as entry #56. On March 13, 2018, the next entry in the Register of Actions stated that Mr. Washington had filed a "motion to change support with proof of service." (**TAB C**, ROA #59; **TAB EE**, Motion to Change Support, 03/13/2018). This form was filed on March 13, 2018, and is signed by Mr. Washington. (**TAB EE**). The form clearly states that the request "requires the Friend of the Court to reopen its case pursuant to MCL 552.505a." *Id*. On March 20, 2018 this was referred to the FOC for investigation. (**TAB C**, ROA #64).

On March 21, 2018, Mr. Washington filed a motion to find Ms. Oesterling in "violation of the courts orders." (**TAB FF**, Motion for Contempt, 03/21/2018). The motion stated that the Circuit Court entered an order on February 2, 2018 modifying the recommendation for final order

regarding parenting time and that this February 2, 2018 order "contain[ed] the parenting time schedule agreed to by the parties." *Id*., p. 1, ¶2. The motion further stated that Ms. Oesterling had sought an *ex parte* order to abey parenting time and a request for referral to the FOC. *Id*., p. 2, ¶ 3. Mr. Washington stated that Ms. Oesterling "unilaterally and without court approval" had discontinued the parenting time and had continued to do so since mid-February 2018. *Id*., ¶ 4. Mr. Washington noted that Judge Garcia (not the then presiding Judge Economy) had denied Ms. Oesterling's request for an abeyance, but had referred the matter to the FOC for investigation. *Id*., ¶ 5. Mr. Washington further admitted that the FOC investigator had performed and investigation and issued *another* recommended order regarding parenting time, make-up parenting time, therapy and psychological evaluations for both parties. *Id*., ¶ 6. Mr. Washington requested the Circuit Court to enter an order requiring Ms. Oesterling to pay the attorney fees and expenses incurred by Mr. Washington with regard to the motion pursuant to MCR 3.206(D).

On April 10, 2018, Ms. Oesterling filed a response to Mr. Washington's motion. (**TAB GG**, Response to Motion for Contempt and Objection, 04/10/2018). Ms. Oesterling admitted that she had discontinued parenting time because of the alleged incident of abuse that occurred at Mr. Washington's home during the February 3 and 4 visit. *Id*., p. 2, ¶ 4. Ms. Oesterling recounted the contents of her February 13, 2018 motion (see **TAB X**), and stated that she was unaware that child protective services (CPS) and/or the Lansing Police Department had closed their investigations into the alleged abuse as Mr. Washington did not attach either of these to his motion. *Id*.

While Mr. Washington's motion was pending, Ms. Oesterling's then acting attorneys withdrew. ROA # 79.

On May 16, 2018, the trial court entered an order in relation to Mr. Washington's March 21, 2018 motion. (**TAB HH**, Order of the Court, 05/16/2018). The court did not find Ms. Oesterling

in contempt, nor did it order that she pay any attorney fees. The order merely set forth several requirements. First, the order stated that Dr. Stephen R. Guertin, M.D. "shall see the minor child…for a pediatric evaluation as soon as possible with regard to [Ms. Oesterling's] allegations of physical abuse." *Id*., p. 1. Second, the order appointed Cathy Stull as "Temporary Guardian Ad Litem to represent the interests of the minor child…." *Id*., p. 2. The order further required Ms. Oesterling, who was unemployed at this time, "to pay all fees and expenses related to Ms. Stull's service…in this case." *Id*. The order further stated that "Cathy Stull shall make a determination as to when parenting time with the minor child by the [Mr. Washington] shall re-commence" and "Cathy Stull shall make a determination as to who will serve as a temporary parenting time supervisor during [Mr. Washington's] parenting time with the minor child and the duration of such supervision." *Id*. The order also required "Cathy Stull shall meet with [Mr. Washington's] proposed parenting time supervisor, Peyka Stefanova, on Monday, April 16, 2018, at 10:00 a.m."

The order did not find Ms. Oesterling in contempt, nor did it state Ms. Oesterling had violated any of the court's orders regarding parenting time. *Id*. Rather, the order simply held in abeyance Mr. Washington's request for attorney fees. *Id*.

On May 25, 2018, a status conference was held. (**TAB II**, Hearing Transcript, 05/25/2018). Ms. Oesterling appeared on her own behalf as she did not have an attorney at this time. The minor child's guardian ad litem, Cathy Stull, recommended (contrary to the February 2, 2018 Custody Order) that parenting time immediately commence on a week-on, week-off basis. *Id*., p. 4. Ms. Oesterling stated that the child had never had a visit alone with Mr. Washington, and his first overnight was not until December 1, 2017. *Id*., p. 8. At that time, the child had not had a visit alone with Mr. Washington since February 4, 2018. *Id*. She opposed giving 50/50 parenting time to Mr. Washington. *Id*., p. 10. Judge Economy ultimately stated:

> It's week to week right? I don't know, but we're going to have to try it for a while and see if it works.
>
> [*Id*., p. 11.]

A proposed order was objected to by Ms. Oesterling while she was between attorneys. She prepared the objection and filed it herself. (**TAB JJ**, Pro Per Objection, 06/04/2018). On June 15, yet another attorney filed an appearance for Ms. Oesterling. (**TAB C**, ROA #100). After a brief hearing, the court ordered the "week on, week off" parenting time to begin. (**TAB KK**, June 15, 2018 Order). At the hearing, the Circuit Court specifically stated it was not making any rulings on any attorneys' fee requests made by Mr. Washington. (**TAB LL**, Hearing Transcript, 06/15/2018).

A hearing was next scheduled for June 29 to address Ms. Oesterling's objections to the May 25 order, and to address Mr. Washington's previously filed motion for payment of attorney fees. A transcript of this hearing has not been received. Undersigned counsel will ensure that the transcript is ordered in due course.

On July 11, 2018, the Circuit Court ordered "week on / week off" parenting time to continue. (**TAB MM**, Order, 07/11/2018). The order did not make any ruling regarding attorneys' fees, but only mentioned that Ms. Oesterling's counsel would be able to file a response to Mr. Washington's motion for attorneys' fees, which had been filed on June 28, 2018 (**TAB N**, Brief in Support of Attorneys' Fees, 06/28/2018).

In that motion, Mr. Washington claimed that Ms. Oesterling had "unilaterally" discontinued the parenting time since mid-February. *Id*., p. 2. However, Mr. Washington said nothing of the fact that the FOC had reopened an investigation pursuant to Ms. Oesterling's request on February 13, 2018, in which she provided evidence of potential abuse of the minor child by Mr. Washington, which suspicions were corroborated by two separate professionals. See **TAB X**, **TAB Y**, **TAB Z**, and **TAB QQ**. Ms. Oesterling had also filed an objection to the February 2, 2018 order, as well as

an objection to the Circuit Court's February 13, 2018 order on her motion. See **TAB AA**; **TAB CC**. Mr. Washington also did not mention in this motion that the FOC had actually issued a subpoena and reopened an investigation at the request of the Circuit Court judge per its February 13, 2018 order.

Ms. Oesterling did not file a response to this motion. A hearing was held on the record on July 27, 2018 before Judge Economy.(**TAB M**). Mr. Washington's counsel merely stated that Ms. Oesterling had violated the courts prior orders, again, without mentioning the legitimate objections Ms. Oesterling had filed concerning the February 2, 2018 order, and the subsequent orders. See **TAB X**, February 13, 2018 Emergency Ex Parte Motion; **TAB CC**, February 28, 2018 Objection to Ex Parte Order; **TAB PP**, March 29, 2018 Objection to Investigator's Recommendation). Mr. Washington's counsel merely stated that he had incurred fees as a result of Ms. Oesterling's noncompliance with the court orders, without mentioning any of the objections and investigations that had been initiated after the February 2, 2018 custody order. Mr. Washington's counsel merely stated that his fees were caused by the litigation concerning the custody. The trial court did not question Mr. Washington's fees, nor the assertions that all the fees he submitted were related to Ms. Oesterling's noncompliance. The trial court also did not consider the financial circumstances of either of the parties.

Ms. Oesterling's counsel pointed out to the court that she had never been held in contempt. (**TAB M**, pp. 7-8). Further, Ms. Oesterling's counsel pointed out that she had withheld parenting time based on what was three professionals who had stated their concerns (the counselor Ms. Aula based on her letter of February 6, 2018 (**TAB QQ**, Counselor's Report, 02/06/2018); the pediatrician (**TAB Z**, Pediatrician's Report); and Child Protective Services (**TAB Y**, Child Protective Services Report)).

On August 9, 2018, the Circuit Court (Judge Economy) entered an order awarding Mr. Washington $25,000 in attorneys' fees. On September 5, 2018, after the case had been reassigned to Judge Baird (on August 28, 2018), Ms. Oesterling's counsel filed a motion for reconsideration of the Circuit Court's August 9 order. See **TAB G**, Motion for Reconsideration, 09/15/2018. For the first time, Ms. Oesterling's counsel raised the issue of the disparity between the parties' income – stating Mr. Washington makes about $15,000 per month and Ms. Oesterling was then employed at a wage of $12.00 per hour. *Id*. The motion for reconsideration also noted that Ms. Oesterling had complied with the May 16, 2018 order (**TAB HH**) (another order that Mr. Washington claimed Ms. Oesterling failed to comply with and for which he claimed he had incurred fees chargeable to her). Further, Ms. Oesterling's counsel stated she had fulfilled all her obligations under the May 16, 2018 order, and those other instructions in the order were not directed to Ms. Oesterling.

The Circuit Court (Judge Economy) or (Judge Garcia), it is not clear from the order, denied reconsideration on September 18, 2018. (**TAB D**, Order Denying Reconsideration). This order states that the motion was presided over by Judge Garcia and signed by Judge Economy (or at least Judge Economy is listed under the signature block) even though Judge Baird had been assigned the case on August 28, 2018 (both before the motion for reconsideration was filed and the order denying it was entered). The order denying reconsideration was not served upon any counsel of record and indeed, the Circuit Court never notated that it had been served in the record. It was not until February 4, 2019 that current co-counsel prompted the Circuit Court to show that it had not served the order on any party, and current co-counsel had the order served on all the parties on February 7, 2019. See **TAB H**; **TAB I** and **TAB C**, ROA #166.

It should be noted at this point that after the February 2, 2018 order of custody, no subsequent formal hearings had been held, nor evidence taken to support any change in circumstances

concerning the custody of the minor child. The Circuit Court *never* entered a proper order until January 3, 2019! On August 24, 2018 Ms. Oesterling's then trial counsel filed a motion to correct the June 15, 2018 order. (**TAB NN,** Motion to Correct Entry of Order, 08/24/2018). Four days later, the case was reassigned from Judge Economy to Judge Baird. On August 31, 2018 Judge Baird held a hearing regarding the August 24, 2018 motion. (**TAB OO**, Hearing Transcript, 08/31/2018).

As noted in the reasons for delay of this application for leave to appeal, the Circuit Court did not even enter this order on the record until January 3, 2019, after Ms. Oesterling had retained current trial counsel, Erica Terranova and Liisa Speaker. (**TAB C**, ROA #150, January 3, 2019 entry noting motion of June 15, 2018 denied). Once that order was entered, current co-counsel filed a motion for reconsideration (**TAB J**) in which they pointed out that the Circuit Court had been misled by palpable error because Judge Economy's June and July 2018 orders (the ones that Mr. Washington's counsel said had also been violated by Ms. Oesterling in his June 28, 2018 motion and brief (**TAB N**), and at the July 27 hearing (**TAB M**), changed custody from the February 2, 2018 phase-in arrangement, to a 50/50 "week on / week off" arrangement without ever holding another proper custody hearing and requisite analysis! The Circuit Court, Judge Baird *granted* the motion for reconsideration and entered an order on January 24, 2019 reinstating the February 2, 2018 order pending further hearings. (**TAB B**). The Circuit Court also ruled that there was sufficient and proper cause or change in circumstances such that the matter was referred to the Friend of the Court, and that CPS was to release to the FOC all records and reports regarding the parties and the minor child. *Id*.

For the reasons stated below, palpable error also exists with respect to the Circuit Court's order denying reconsideration of the August 9, 2018 order awarding Mr. Washington attorneys' fees.

## ARGUMENTS OF LAW

**I.** An award of attorney fees in an action filed pursuant to the Paternity Act ***requires*** the court to consider the financial means of the party against whom the award is sought. On the other hand, MCR 3.206(D)(2)(b) ostensibly allows an award of attorney fees in a domestic relations action without regard to financial considerations where the party against whom the award is sought has violated a court order, which violation causes the other party to incur the attorney fees and costs. Where a statute governing a substantive matter of public policy conflicts with a court rule, the statute and this Court's interpretation thereof, must prevail. The Circuit Court erred in awarding attorney fees under MCR 3.206(D)(2)(b) without first considering the financial means of Ms. Oesterling to pay those fees and the financial needs of Mr. Washington to have those fees paid for him, where Mr. Washington's "monthly" salary is more than Ms. Oesterling's annual salary.

### *A. Standards of Review*

This Court reviews a trial court's decision to award attorney fees and its determination of the reasonableness of the fees for an abuse of discretion. *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015), citing *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A trial court abuses its discretion when it selects an outcome that is "outside the range of reasonable and principled outcomes." *Id*. A trial court's decision on a motion for reconsideration is also reviewed for an abuse of discretion. *Tinman v Blue Cross & Blue Shield*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). See also *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011). This Court reviews a trial court's findings of fact underlying the attorney fee award under the "clear error" standard. *Id*. "A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made." *Cassidy v Cassidy*, 318 Mich App 463, 479; 899 NW2d 65 (2017). Questions of law concerning the attorney fees award are reviewed *de novo*. *Teran*, *supra* at 208.

### *B. Burden of Proof*

The party requesting attorney fees has the burden of showing facts sufficient to justify the award. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). See also *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010).

### *C. Applicable Law*

#### *1. Attorney Fees are Authorized Under the Paternity Act But Only Where the Financial Equities are Considered and Imposition of an Award Will Not Financially Prejudice or Disadvantage the Party Against Whom the Award is Sought*

Generally, a party may not recover attorney fees, as either costs or damages, i.e., sanctions, unless recovery is expressly authorized by statute, court rule, or a recognized common-law exception. *Featherston v Steinhoff,* 226 Mich App 584, 592-593; 575 NW2d 6 (1997). See also *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 N.W.2d 586 (1986). The "American rule" followed in Michigan, holds that "a litigant is responsible for his or her own attorney's fees in the absence of an express statute, court rule, or judicial exception." *Temple v Temple (In re Estate of Temple)*, 278 Mich App 122, 140; 748 NW2d 265 (2008), citing *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004).

The current action was commenced by Plaintiff-Appellee, Mr. Washington under the Paternity Act, MCL 722.711, *et seq*. This Court has held that attorney fees may be recoverable under the Paternity Act in a manner "analogous to an award of attorney fees in a divorce proceeding" and, as such, attorney fees are awardable where "necessary to enable an adverse party to carry on or defend the action." *Bessmertnaja v Schwager*, 191 Mich App 151, 158; 477 NW2d 126 (1991). Section 7 of the Paternity Act, MCL 722.717, which provides for "payment of expenses in connection with the proceedings" authorizes an award of attorney fees in the same manner. *Id*.

Thus, an exception to the "American rule" exists because statutory authority for an award of attorney fees is allowed under the Paternity Act in accordance with this Court's interpretation of the provisions of that act and its applicability in a given case.

This Court has subsequently clarified that a trial court is ***required*** to consider the financial ability of the parties to carry on or defend the action in determining the propriety of an attorney fee award under the Paternity Act. *Thompson v Merritt*, 192 Mich App 412, 423; 481 NW2d 735 (1992). "Attorney fees are available under the Paternity Act '***if they are necessary to enable an adverse party to carry on or defend*** the action.'" *Id*. (emphasis added). In *Thompson*, this Court remanded requiring the trial court to consider the financial needs of the party requesting attorney fees.

As attorney fees awards in divorce actions and actions under the Paternity Act are treated analogously, Michigan Courts have established some general principles when reviewing attorney fees awards.

For example, this Court has stated: "A party to a divorce action may be ordered to pay the other's party's reasonable attorney fees if the record supports a finding that such financial assistance is necessary to enable the other party to defend or prosecute the action." *Borowsky*, 273 Mich App at 687; quoting *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). Stated differently "[e]ither by statute or court rule, attorney fees in a divorce action may be awarded *only when* a party needs financial assistance to prosecute or defend the suit." *Reed*, 265 Mich App at 164 (emphasis added).

Further, in domestic relations actions, this Court has held that a party should not be required to invade his or her own assets (property) to satisfy the opposing party's attorney fees. *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010), citing *Ozdaglar v Ozdaglar*, 126 Mich

App 468, 473; 337 NW2d 361 (1982). This is especially true where the party is relying on the assets for their own support. "It is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Woodington*, *supra*, citing *Gates v Gates*, 256 Mich App 420, 438-439; 664 NW2d 231 (2003).

In sum, and as a general rule, this Court has adhered to the principle that whether a party has established entitlement to an award of attorney fees is ***always*** "dependent on the particular facts and circumstances of each case," giving "special consideration to the specific financial situations of the parties and the equities involved." *Loutts v Loutts (After Remand)*, 309 Mich App 203, 216-218; 871 NW2d 298 (2015).

Finally, general public policy considerations bear heavily on the question of the burdens of litigation costs and expenses in domestic relations matters. This is because domestic relations matters like divorce, and particularly those involving child support and custody and control over minor children, are fraught with the danger that the party with the greater resources and assets will be able to manipulate the courts by virtue of the sheer ability to financially support overwhelming litigation strategies to encroach upon the natural and constitutional rights of natural parents. See *Combating Vexatious Family Law Litigation by Imposing Attorney's Fees as Sanctions*, 12 SAN FERNANDO VALLEY L. REV. 59, 73-75 (1984). Indeed, as the latter academic work suggests, the party that commences a domestic action is often the party with the financial means and resources to litigate in a variety of ways against the opposing party with no end in sight until the opposing party's resources are drained and capitulation is a foregone conclusion. Courts must take care that the monied party is not using the legal system (and the judges) to force his or her will upon the other party knowing that the latter will eventually have to submit to their demands, no matter how unreasonable, simply because they have exhausted their resources in trying to defend themselves.

*Id.* See also *Awarding Counsel Fees to the Monied Spouse: Conflict in the Departments*, Divorce, New York, August 13, 2018.

Indeed, in keeping with these principles, Michigan Courts have consistently held that the financial equities in a domestic relations action must be considered when determining whether a party should be awarded attorneys' fees. Specifically, under the Paternity Act, this Court in *Thompson* has recognized the inherent unfairness that would result in allowing attorneys' fees to be borne by the party who has no financial means to defend litigation prosecuted by the party with greater financial resources.

***2. MCR 3.206(D)(2)(b) Conflicts with the Jurisprudence on Consideration of Attorneys Fee Awards Under the Paternity Act the Court Rule Ostensibly Allows Attorneys Fee Awards Irrespective of Financial Equity or Ability to Pay***

MCR 3.206(D) allows an award of attorney fees in a domestic relations action. *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993). The rule is phrased as an inclusive disjunction as follows:

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> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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> (a) the party is unable to bear the expense of the action, *and* that the other party is able to pay, *or*
>
> (b) the attorney fees and expenses were incurred *because* the other party refused to comply with a previous court order*, despite having the ability to comply*.
>
> [(emphasis added).]

Thus, while MCR 3.206(D) provides two independent possible bases for awarding attorney fees and expenses, each avenue itself requires multiple prerequisites to be satisfied. *Richards v Richards*, 310 Mich App 683, 701; 874 NW2d 704 (2015), citing and following *Kalaydjian v*

*Kalaydjian*, Unpublished Opinion Per Curiam of the Court of Appeals, issued September 29, 2011 (Docket No. 298107) (**TAB K**).

### *3. Where Application of a Statute on a Matter of Substantive Law Conflicts with a Court Rule the Rule of Law Under the Statute Prevails*

"[I]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration the court rule should yield. *Tuscola Co Treasurer for Foreclosure v Dupuis (In re Tuscola Co Treasurer for Foreclosure)*, 317 Mich App 688, 701-02; 895 NW2d 569 (2016). This is because the Supreme Court's rule-making power is constitutionally supreme in matters of practice and procedure *only* when the conflicting statute embodying putative procedural rules reflects no legislative policy consideration other than judicial dispatch of litigation." *Id*. (emphasis in original). "In other words, if the statutes in question are grounded on policy considerations other than regulating the procedural operations of the judiciary, they do not impermissibly infringe the Supreme Court's rulemaking authority." *Id*.

To decide if a statute and a court rule conflict, each must be read according to its plain meaning. If a conflict exists, a reviewing court must assess whether there are substantive policy reasons for the legislative enactment. A statute is considered substantive if it concerns a matter that has as its basis something other than court administration. *Muci v State Farm Mut Auto Ins Co,* 478 Mich 178, 191; 732 NW2d 88 (2007). """If a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield."" *People v Williams,* 475 Mich 245, 260; 716 NW2d 208 (2006), quoting ***McDougall v Schanz,* 461 Mich 15, 30-31; 597 NW2d 148 (1999)** quoting Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making,* 55 Mich L R 623, 635 (1957). See also *Malone v Malone*, 279 Mich App 280, 288; 761 NW2d 102 (2008).

As noted in the prior discussion, while a court is required to consider the financial equities of the parties to award attorneys' fees in actions under the Paternity Act, subsection (D)(2)(b) of the court rule does not require such a consideration. This poses a true conflict between application of the rote language of the court rule and application of this Court's enunciation of the rule in cases like *Thompson*, 192 Mich App at 425 and *Schwager*, 191 Mich App at 158, where the Court of Appeals required an examination of the financial equities to be considered before awarding attorneys' fees in a paternity action. Indeed, long ago, this Court stated that any conflict between the court rules and the Paternity Act has already been resolved in favor of the Paternity Act and "the Paternity Act ***takes precedent over any other conflicting court rule***." *Klein v Franks*, 111 Mich App 316, 321; 314 NW2d 602 (1981) (emphasis added).

Where a statute governing a substantive matter of public policy conflicts with application of a court rule, the statute prevails. *Malone v Malone*, 279 Mich App 280, 288; 761 NW2d 102 (2008), citing, *inter alia*, *McDougall v Schanz,* 461 Mich 15, 30-31; 597 NW2d 148 (1999). See also Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making,* 55 Mich L R 623, 635 (1957). Indeed, actions under the Paternity Act take precedence over the court rules. *Klein v Franks*, 111 Mich App 316, 321; 314 NW2d 602 (1981).

***D. Analysis***

Straight application of the language of subsection (2)(b) does not require consideration of the financial ability of the parties against whom the award is entered. This conflicts directly with this Court's interpretation of the statute. A simple application of this Court's jurisprudence interpreting the allowance of attorneys' fee awards under the Paternity Act in contrast with the allowance of such an award under MCR 3.206(D)(2)(b) reveals a conflict in Michigan law. The conflict should be resolved in Ms. Oesterling's favor because of the obvious disparities in the parties' income and

financial standing, which bears directly on Ms. Oesterling's ability to defend herself in this litigation that was initiated by Mr. Washington.

Mr. Washington should not be able to use the Paternity Act as a sword to cut off Ms. Oesterling's rights as a parent and force her into submission through litigation using the financial inequities to his advantage where Ms. Oesterling has no bargaining power and no other way to defend hers and her child's liberty interests. Sanctioning Ms. Oesterling would be an affirmation by this Court that a party may use the Paternity Act to affirmatively force the other party into submission through costly litigation and leveraging the financial inequities to assert control. This is exactly what has been allowed to occur in this case. Forcing Ms. Oesterling, who is the defendant in this action, to pay her own and Mr. Washington's attorneys' fees while she is defending her rights to custody of her child, and during a time when for certain periods she was unemployed and now remains in precarious financial circumstances making less money in a year than Mr. Washington makes in a month is an egregious abuse of process. This situation should be of grave concern to this Court, if it is interested in preserving a system of justice that guarantees due process and the ability of people to defend themselves in litigation of this magnitude. The Circuit Court was presented in the motion for reconsideration on September 5, 2018 with the financial standing of both parties. (**TAB G**).

As explained in greater detail in the subsequent argument section, compounding an already dire situation, the Circuit Court's order approved the $25,000 in attorneys' fees was done so without proof of the reasonableness of the fee, which fee is an exorbitant and unconscionable rate of $395 per hour for an ordinary parental determination and child custody matter that Mr. Washington himself initiated by filing suit against Ms. Oesterling. And, to say that the fee is justified because the matter is complex due to the fact that Mr. Washington has had to address the

legitimate objections by Ms. Oesterling and the authorities concerning the critical and precious issue of the safety, wellbeing and custody of her minor child is to skew the true social problem underlying this case in a direction that is both discriminatory and dangerous, not mention patently unfair. In other words, allowing sanctions under these circumstance would only encourage abuse of the system and potentially threaten the sanctity and integrity of the social and judicial safety measures in place to ensure protection of minor children during custody disputes. Allowing this argument to win the day would be sanctioning the very conduct that lies at the heart of Ms. Oesterling's legitimate objections. Her objections, as justified by the professionals and independent state agencies that became involved in the consideration of the custody determination (see, inter alia, **TAB X**, Ex Parte Motion to Abey Parenting Time, 02/13/2018; **TAB Y**, Child Protective Services Report of Actual or Suspected Child Abuse; **TAB Z**, Pediatrician's Report Concerning Suspected Abuse, 02/07/2018; **TAB QQ**, Counselor's Report, 02/06/2018 (same)) were commendable and necessary. To disincentivize such legitimate inquiry during the litigation of a custody dispute would have the effect of silencing the parties and professionals whose concerns should be heard and carefully considered by the apparatus that is in place to thoroughly, carefully, and methodically address the propriety of changes in physical and legal custody of minor children. Indeed, the most important aspect, protection of the minor child, is paramount, and the system worked in this case. Ms. Oesterling should not be punished for employing the proper procedures and lodging procedurally correct and legally appropriate objections.

It would be inequitable, at best, unconstitutional at worst, if attorney fees awards were allowed in cases in which the financial equities are not considered at all. Think of the abuse and manipulation that can occur, and indeed, is occurring in this case, where the monied party not only seeks to deprive the non-monied party of the custody of his or her child, but also to force the latter

party to bear the expense of the litigation, knowing full well that these funds are needed for their own defense, not to mention for the support of the minor children involved (and, as here, those other minor children that are not involved directly in the paternity suit). Indeed, by virtue of the Circuit Court's attorneys' fee award Ms. Oesterling was required to sell the family home. This, despite the fact that this Court has stated that "[i]t is well settled that a party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support." *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010), citing *Gates v Gates*, 256 Mich App 420, 438-439; 664 NW2d 231 (2003).

We can say that the objectives of the Paternity Act, following *Thompson's* admonition, is to allow distribution of the costs of caring for a minor child born out of wedlock. As this Court stated, the burdens should be divided as equitably as possible. The court rule, while designed to punish contemptuous behavior in litigation, and particularly in domestic relations matters (and presumably, although not conceded, that includes actions under the Paternity Act), if applied with zero consideration of financial status of the competing sides *is wholly unrelated* in any rational way to the policy objectives of the statute. In other words, the Supreme Court's legitimate role as rule making authority must submit to the underlying policy concerns expressed in the act as copiously noted in this Court's jurisprudence. *Tuscola Co Treasurer for Foreclosure v Dupuis (In re Tuscola Co Treasurer for Foreclosure)*, 317 Mich App 688, 701-02; 895 NW2d 569 (2016). The court rule allows disparate treatment of parties in an action under the Paternity Act because it ostensibly (and in this case definitely) allows attorneys' fees and costs to be imposed on a party without the financial means to both bear those fees and costs and continue to defend (or prosecute as the case may be) their rights to custody and support. Application of the court rule conflicts with this Court's stated policy under the Paternity Act. *Thompson*, *supra*.

II. Even if MCR 3.206(D)(2)(b) applies in this case, to justify an award of attorney fees the requesting party must demonstrate facts sufficient to show that…the attorney fees and expenses ***were incurred because the other party refused to comply with a previous court order***, ***despite having the ability to comply***.

### *A. Applicable Law*

The plain language of the Michigan Court Rules controls their interpretation and application. Therefore, courts will interpret court rules using the same principles that govern the interpretation of statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011). MCR 3.206(D) allows an award of attorney fees in a domestic relations action. *Heike v Heike*, 198 Mich App 289, 294; 497 NW2d 220 (1993). The rule is phrased as an inclusive disjunction as follows:

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> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
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>
> (b) the attorney fees and expenses were incurred *because* the other party refused to comply with a previous court order*, despite having the ability to comply*.
>
> [(emphasis added).]

Therefore, by its plain language, MCR 3.206(D)(2)(b) requires a showing (1) that the party from whom the sanctions are sought has actually *refused to comply* with a previous court order; (2) that the party actually had the ability to comply; and (3) that the fees incurred as a result of, i.e., were caused by, the noncompliance. More importantly, as with all attorney fee awards, the Circuit Court is actually required to make factual findings and rulings on the record demonstrating that not only has the party seeking the award met his or her burden of proof, but that the legal prerequisites for the sanctions have been satisfied as well.

This Court has stated that utilization of proper legal procedures such as objections or filing of appeals is not the kind of unilateral refusal to comply with an order contemplated by MCR 3.206(D)(2)(b). (**TAB K**, *Kalaydjian v Kalaydjian*, unpublished per curiam opinion of the Court of Appeals, issued September 29, 2011, (Docket No. 298107), p 5). Procedures such as interlocutory appeals, objections, and motions, etc., are "completely legal mechanisms for preventing a court order from going into effect" and while the party *might* be subject to sanctions if the pleadings are devoid of arguable legal merit, the burden remains on the party asserting the right to attorneys' fees to prove it. *Id*. In short, "[u]tilization of proper legal procedures to attempt to avoid the effect of a court order is not a 'refusal to comply with a court order'" and sanctions are not available under MCR 3.206(D)(2)(b) in such circumstances. *Id*.

***B. Analysis***

Ms. Oesterling filed an objection to the February 2 Order of the Trial Court. While that objection was pending, she then filed a motion to abey the parenting time due to the then credible allegations of abuse. (**TAB X**). While the Circuit Court (Judge Garcia (who was not the proper judge presiding over the entire case from its inception at that time - Judge Economy)) refused to abey the February 2 order (for which an objection was then pending), he did order a further investigation. (**TAB AA**). Further, Ms. Oesterling's objection and the trial court's subsequent orders automatically triggered several additional safeguards under Michigan law to ensure the allegations of abuse were investigated *and* that the minor child's interests and welfare were protected during this investigation. Because the February 2 order had been objected to, and the additional investigation had been triggered, there was no court order in effect for Ms. Oesterling to comply with at that time. Further, the March 21, 2018 Motion for Contempt was filed on the basis that Ms. Oesterling had violated the February 2, 2018 order. However, Michigan courts have

held that there can be no sanctionable contempt of an order where there is a pending objection. (**TAB K**, *Kalaydjian*, *supra*).

In fact, Ms. Oesterling properly objected to the subsequent orders in which the Circuit Court modified the original custody arrangements without the proper hearing on the record as required. (**TAB B**, Order Granting Reconsideration and Vacating All Orders Prior to February 2, 2018 Order).

Moreover, as noted in the motion for reconsideration, Ms. Oesterling did not fail to comply with the Circuit Court's orders at all. (**TAB G**, Motion for Reconsideration, 09/05/2018). Moreover, at least during the time Ms. Oesterling's objections were pending after the February 2 order through August 31, 2018, it was clear legal error for the Circuit Court to change or enforce a new custody arrangement, even temporarily, where the court has not first held the requisite evidentiary hearings to consider the nature and extent of the objections. MCL 722.27(1)(c). See also *Mann v Mann*, 190 Mich App 526, 529; 476 NW2d 439 (1991) and *Pluta v Pluta*, 165 Mich App 55, 57; 418 NW2d 400 (1987). And indeed, the Circuit Court ultimately reversed and *vacated* all orders subsequent to February 2, 2018 custody order, which purported to change the custody arrangement by granting reconsideration of its January 3, 2019 order! (**TAB B**).

III. Even if the requirements of MCR 3.206(D)(2)(b) were satisfied, the Circuit Court's award of attorney fees was not supported by the record and the Circuit Court failed to conduct the proper findings and hearings on the record required by the court rule.

***A. Applicable Law***

The Circuit Court is at least required to explain its findings and the reasoning behind its decision to award attorney fees under the court rules. *Woodington v Shokoohi*, 288 Mich App 352, 371-372; 792 NW2d 63 (2010). (Trial court must make adequate findings of fact and reasoning in awarding or denying attorney fees). Record evidence must support the claim that the fees were

necessary because of a refusal to comply with a previous court order. A party may not leave it to the trial court to search for the factual basis to support his or her position. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

"A party requesting attorney fees bears the burden of proving they were incurred…and that they are reasonable." *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005), citing MCR 3.206(D)(2). It is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services. *Id*.

Moreover, application of this provision is restricted to situations in which the fees sought have actually been incurred because of the offending party's noncompliance. The legal services rendered must be connected and related to the noncompliance. The court is required to conduct a hearing on the record to determine exactly what services were actually rendered, the reasonableness of those services in relation to the alleged noncompliance, and the reasonableness of the fee.

***B. Analysis***

Even if this Court were to conclude that MCR 3.206(D)(2)(b) applies in an action filed under the Paternity Act notwithstanding the financial status of the parties, neither at the hearing on Mr. Washington's motion in July (**TAB M**), nor in its August 9, 2018 order (**TAB E**) did the Circuit Court articulate its basis for concluding attorneys fees were justified under MCR 3.206(D)(2)(b). The Circuit Court also did not inquire into Ms. Oesterling's financial status; it did not opine as to whether Ms. Oesterling actually violated any orders; it did not examine whether, if she did violate any orders, she had the ability at the time to comply with such orders; it did not examine whether any or all of the fees were related to this alleged noncompliance; and it did not question the reasonableness of the exorbitant $395 per hour charged by Mr. Washington's counsel. In this latter

regard it should be noted that this Court has stated that "paternity cases are relatively simple and…the trial court should consider the complexity and difficulty of the issues involved in determining a reasonable fee award." *Oviedo v Ozierey*, 104 Mich App 428, 430; 304 NW2d 596 (1981), citing *Sturgis Savings & Loan Ass'n v Italian Village Inc*, 81 Mich App 577, 584; 265 NW2d 755 (1978). A fee award of nearly $10,000 "would be unjustified" in the usual paternity case. *Id*. Here the award is $25,000.

The trial court did not engage in the proper analysis to determine whether Mr. Washington had met his burden to prove an entitlement to fees as required. Therefore, the trial court committed palpable error in refusing to consider the points made in Ms. Oesterling's motion for reconsideration, which raised the questions of the disparity in incomes (and therefore, implicitly, the reasonableness of the fee), and the question concerning whether Ms. Oesterling actually refused to comply, and whether any such noncompliance was beyond her control. The trial court did none of these things. Therefore, it abused its discretion in awarding the fees in the first instance.

## CONCLUSION

The trial court's award of attorneys' fees in this case was contrary to the policies underlying the Paternity Act, which, as this Court has previously noted, requires a consideration of the financial status of the parties *before* any award of attorney fees is made. The fact that the act has been interpreted to contain this substantive policy directive means that it controls if there is any conflict with the court rules. Indeed, it takes precedence over the court rules.

This is an issue of first impression. It must necessarily be addressed in an interlocutory posture. The trial court's order enforcing a $25,0000 attorney fee award against Ms. Oesterling, who is, as demonstrated, of modest financial means, is sanctioning the leveraging of the inequitable financial status of the parties to achieve the intimidation and force a resolution of the case that Mr.

Washington wants without considerations of justice that due process and the neutral proceedings of a full judicial vetting of the parties claims demands. Allowing the award to stand allowing the court rule to be used to cut off Ms. Oesterling's constitutional right to litigate for her liberty interests in protecting and caring for her children.

Even if the court rule applies here, Mr. Washington did not satisfy his burden to prove that the requirements of the rule were met. Finally, the Circuit Court utterly failed to conduct any proper hearings, evidentiary findings, and conclusions on the record.

## RELIEF REQUESTED

For the foregoing reasons, this Court should peremptorily reverse the trial court's order denying reconsideration of the attorneys' fee award. Alternatively, this Court should grant Ms. Oesterling's application for leave to appeal to address the very significant issues of law and policy raised in this case.

Respectfully submitted,

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