

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RACHEL J. EVENS – Petitioner

Vs.

TIMOTHY J. EVENS – Respondent

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

FEB 27 2020

Shirley A. Jameson-Fergel
Clerk

* * * *

TIMOTHY JOHN EVENS,
Plaintiff and Appellee,

vs.

RACHEL JOANNA EVENS,
Defendant and Appellant.

ORDER DISMISSING APPEAL
#29245

It appearing to the Court that the issues raised in the above-entitled matter are either intermediate in nature and not taken from a final judgment or order, or the issues are already the subject of this Court's review in appeal #28879; now, therefore, it is

ORDERED that the appeal be and it is hereby dismissed.

DATED at Pierre, South Dakota this 27th day of February, 2020.

BY THE COURT:

David Gilbertson

David Gilbertson, Chief Justice

ATTEST:

Shirley A. Jameson-Fergel
Clerk of the Supreme Court

By:

Patricia J. DeVaney
Chief Deputy Clerk
(SEAL)

PARTICIPATING: Chief Justice David Gilbertson, Justices Janine M. Kern, Steven R. Jensen, Mark E. Salter and Patricia J. DeVaney.

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
51Div18-000041

TIMOTHY JOHN EVENS,)
)
Plaintiff,)
)
vs.)
)
RACHEL JOANNA EVENS,)
)
Defendant.)

MEMORANDUM ORDER

PROCEDURAL BACKGROUND

The procedural background of this matter was extensively laid-out in the Court's September 20, 2019, Memorandum. Since then, there have been numerous emails, submissions, and filings in the Circuit Court. The Court understands that Mother, on October 16, 2019, appealed the Court's September 20 Memorandum, Order of Contempt and the associated Findings of Fact and Conclusions of Law. The underlying appeal, though, appears unresolved. An appeal related to a child-support issue was dismissed on September 24, 2019. The following activities have taken place between September 20, 2019, and today.

OCTOBER 23RD EMAIL FROM MOTHER

On October 23, Mother sent an email to the Court requesting the Court disqualify itself pursuant to S.D.C.L. 15-12-21.1. Mother indicated that she intended to file an affidavit for change of judge, in the event the Court denied her informal request. The Court responded with an email indicating that it was unaware of a reason to disqualify itself and that Mother likely waived her right to file an affidavit for change of judge.

OCTOBER 25TH EMAIL FROM MOTHER

On October 25, Mother sent the Court a lengthy email, in which she again asked the Court to recuse or disqualify itself.¹ A review of the email indicates that Mother's basis for recusal is essentially that she believes that some of the Court's prior decisions have been incorrect. She also insinuates that the Court failed to comply with certain provisions of the Federal Rules of Civil Procedure.

OCTOBER 28TH MOTION FROM MOTHER

On October 28, Mother purported to file a motion for enforcement of Divorce Decree. The motion includes a certificate of service which asserts that it was served by email "and/or" First Class Mail. In a November 2 email, Mother concedes that this motion was submitted to Judge Craig "Pfeifl." The Court understands Judge Pfeifle directed that this document be filed in the instant case.

The purported motion largely seeks remedy related to child custody, visitation and issues related to the Court-appointed Parenting Coordinator, Lindsay Bruckner, MBA, MSW, LCSW-PIP, QMHP. As the record reflects, the Court signed a Judgment and Decree of Divorce on December 21, 2018. In the Judgment and Decree, the Court awarded husband primary physical custody of the parties' minor children, subject to mother's visitation. In pertinent part, visitation was set out by way of an acknowledgement of Parenting Guideline 4 of the South Dakota parenting guidelines, which pertain to situations like this: where parents live more than 200 miles apart and the children are five or older. The children and Father live in Rapid City. At the time of the divorce, Mother lived in Montana. It appears, but is not clear, that Mother still resides in Montana. According to the guidelines and the Decree, Mother was afforded

¹ Mother specifically asks the Court to "resign."

visitation during the summer of 2019. She also is entitled to visitation during the children's winter break from school. She is also entitled to visitation over the Thanksgiving holiday in even-numbered years, but not this year. The Decree and the guidelines also recognize that Additional Time with the Noncustodial Parent might be appropriate, "where distance and finances permit" when the non-custodial parent is "in the area where the children reside." Importantly, the Decree also ordered that Ms. Bruckner be appointed as a Parenting Coordinator. Her appointment was confirmed by a subsequent order. The Judgment and Decree also ordered Mother to "continue counseling with a licensed mental health professional." Mother's purported motion demands that a hearing be "scheduled immediately."

In summation, the motion submitted to Judge Pfeifle asks the Court to:

- Impose sanctions against Father for parental alienation behavior granting additional visitation as retribution;
- Appoint Melanie Torno, LCSW, as the children's counselor while children are in Rapid City and Coral Beck, LCSW, while they are in Montana.
- Retain the children's dentists in Missoula for their January 2020 teeth cleaning, pending the Supreme Court's final decision of regarding the appeal of custody and residency.
- Establish an interim primary care provider in Rapid City and Dr. Hart, MD, as primary care provider in Missoula, Montana.
- Order Father to reimburse Mother for expenses of travel, medical care, clothing, activities, and expenses and other payments owed to Mother per the Divorce Decree.
- Order Father to execute titles to the property awarded to Mother.

NOVEMBER 1ST EMAIL FROM PARENTING COORDINATOR

On November 1, Ms. Bruckner submitted two documents to the Court. One of the documents was the parties' eight-page Fall 2019 initial agreement, dated October 24, 2019. It should be noted that the parties' agreement significantly expands the scope of Mother's visitation with the children by defining terms of the "Additional

Time with the Noncustodial Parent" beyond the Summer, Thanksgiving, Winter, and Spring school breaks.

The second document was a six-page update as to Ms. Bruckner's work on the case. The update reveals several very concerning observations about Mother's behavior. Among other things, Ms. Bruckner raises a concern that Mother's statements have been "threatening or hostile" to the children's counselor, Judith Kennedy, a Licensed Professional Counselor and Psychologist. Ms. Bruckner would like to have the Court recognize Ms. Kennedy as the children's counselor. Ms. Bruckner relayed that she had spoken the children's prior counselor, Coral Beck, LCSW, who told Ms. Bruckner that Mother described Ms. Kennedy as a "second-grade teacher," not a licensed counselor or psychologist. Ms. Bruckner also relayed that she warned Mother concerning Mother's "belittling and demeaning comments" towards Ms. Bruckner including allegations that she is illiterate, "inexperienced," and will be sued for malpractice. Ms. Bruckner also revealed that Mother had not been seeing a licensed mental health professional as ordered by the Court.

In summation, Ms. Bruckner asks the Court to:

- Recognize Judith Kennedy, LPC, as the counselor who will be seeing all the children until the time Ms. Kennedy's professional recommendations are to discharge the children, or until she feels she is not making progress with the children and it would be appropriate to seek therapy with another counselor.
- Allow that should Ms. Kennedy be not available as a counselor, Melanie Tomo, LCSW, shall be the back-up option.
- Specify that should the children move back to Montana, the children may see Coral Beck, LCSW.
- Confirm that the children are not to see more than one counselor at a time.
- Remind Mother that she was ordered to establish counseling in the Decree and that she was given the deadline of November 1, 2019, to inform the Parenting Coordinator of her therapy provider and the date of her first session. Mother's counselor may not be one providing therapy to Father or the children.

- Remind both parties that it is not appropriate to make statements that can be construed as threatening or hostile to the professional counselor who is seeing the children in this case.
- Clarify insurance coverage for the children given that they may not be eligible for Montana Medicaid if their primary residence is in Rapid City, South Dakota.
- Allow children to establish medical, vision, and dental care in Rapid City. However, the children may see their Montana providers when in Montana if necessary to address a medical issue.
- Clarify "liberal visitation" when mother is Rapid City. Parenting Coordinator recommends every other weekend and one day a week during the period of 11/4/2019 until 12/31/2019, or until Mother returns to Montana.²
- Inform Mother that the "belittling and demeaning comments" toward the Parenting Coordinator are inappropriate and will not be tolerated.

NOVEMBER 2ND EMAIL FROM MOTHER

Mother responded to Ms. Bruckner's update with an email. The email begins with a thinly disguised threat of "grave consequences" for Ms. Bruckner. Then Mother alleges that Ms. Bruckner's statements in her update were defamatory. The email also asserts a baseless request for Ms. Bruckner to provide evidence under "Federal Rule 301" and sets forth Mother's intention to seek additional visitation as "retribution." Finally, the email indicates that the October 28 motion, which was submitted to Judge Pfeifle, was based on S.D.C.L. 25-4A-2, even though the motion itself claims to be brought pursuant to S.D.C.L. 15-6-8. Although Mother asserts that such a motion needs to be resolved within 30 days (and even though the motion demanded that a hearing be "scheduled immediately"), she indicates that she is unavailable for a hearing until December 5, 2019. Later in the email, Mother again threatens Ms. Bruckner. She concludes by indicating that intends to forward her email to Judge Pfeifle, to keep him "in the loop."

² However, Mother, in her November 6 affidavit, attests that she is not able to be in Rapid City until December 5, 2019.)

NOVEMBER 8TH EMAIL FROM MOTHER

Mother forwarded an email to the Court on the morning of November 8, which she had apparently sent to Father and Ms. Bruckner. It does not appear she sent it to Father's counsel. The email is very condescending to the Parenting Coordinator. It is vague. It is nonsensical.

NOVEMBER 8TH EMAIL FROM PARENTING COORDINATOR

Within the hour, the Court received a response from Ms. Bruckner.³ The email indicated that on the afternoon of November 1, law enforcement called Ms. Bruckner related to a visitation dispute between the parties. Mother had apparently followed Father, who drove to the Public Safety Building. Mother asserted that she had a right to visitation with the children. Ms. Bruckner relayed to law enforcement that it was Father's time with the children.

The email also outlined the discussions that had occurred between November 1 and November 8 regarding upcoming "Additional Time with the Noncustodial Parent" visitation. Those discussions appear to have been difficult

The final topic discussed in the email is an incident which occurred on November 7. Mother was apparently granted permission to take the children from counseling to the YMCA for evening activities. The children's nanny was to pick them up from the YMCA. Mother, instead, picked them up. She refused to take them to Father's house and waited outside the Public Safety Building and messaged that she would be keeping the children for the evening. Ultimately law enforcement had to

³ The Court was in Court all day November 8 and was not able to read the emails as they were "received." They were read later.

intervene to return the children to Father. To be clear, none of this was mentioned in Mother's earlier email.

It appears, from the Parenting Coordinator's email, that she is "deeply concerned over the number of times law enforcement has had to be involved in the last week" and is concerned "what this does to the children . . . to be exposed to having police have to monitor the exchanges." She relays that Mother ignores her and disregards recommendations. Ms. Bruckner is concerned that Mother will continue to "take the children during the other parent's time" and that law enforcement will need to be called in the future to have the children returned. She described the situation as "escalating."

SECOND NOVEMBER 8TH EMAIL FROM MOTHER

Mother responded and accused the Parenting Coordinator of lying. The email goes on for many paragraphs, but ultimately concludes with a demand for Court intervention to allow her to have visitation "next week." She concludes stating that she has been waiting for a hearing since October 28, despite the fact that she earlier claimed not to be available for a hearing until December 5.

DISCUSSION

RECUSAL

Mother's requests for the Court's disqualification are baseless. Initially, Mother's basis for disqualification was the Court's "most recent rulings in the May and July hearings." Ostensibly, Mother believes that she is entitled to a new judge because the Court has previously made rulings adverse to her position. This is not a basis for disqualification.

Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal.⁴

Plainly, Mother's remedy for these perceived incorrect rulings is to appeal them and seek a reversal or remand from the Supreme Court. Her numerous appeals, though, remain unresolved.

But Mother's additional grounds for disqualification, as contained in her October 25 email, are just more of the same. They are assertions that the Court committed reversible error. There is no meaningful assertion of partiality or bias. The Court, having made the prior rulings, understands them to be correct, but even if some or many of those decisions were incorrect, disqualification is not appropriate on this record.

VISITATION ISSUES

It is appropriate to address and resolve some of the concerns presented by Ms. Bruckner and by Mother. In doing so, the Court notes, without comment, that Father has not offered a position on any of these recent developments. Also, the Court notes that "[t]he circuit court may limit visitation if it is in the best interest of the child[ren]."⁵ Moreover, "[c]ircuit courts 'have broad discretion when considering matters of child custody and visitation.' That broad discretion includes discretion as to what evidence

⁴ *Liteky v. United States*, 510 U.S. 540, 555–56, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994).

⁵ *Pisper v. Pisper*, 2013 S.D. 98, ¶ 19, 841 N.W.2d 781, 787.

the trier of fact will rely on.”⁶ The Court turns initially to the requests in Ms. Bruckner’s November 1 update.

First, the Court recognizes Judith Kennedy, LPC, as the counselor who should be seeing the children until Ms. Kennedy’s professional recommendation is to discharge the children, or until she feels she is not making progress with the children and it would be appropriate to seek therapy with another counselor. If Ms. Kennedy becomes unavailable as a counselor, Melanie Torno, LCSW, should be a back-up option, unless otherwise ordered. And, in the event children move back to Montana, the children may see Coral Beck, LCSW. In any case, the children are not to see more than one counselor at a time.

Second, it is not appropriate to make demeaning or threatening statements to the professional counselor who is seeing the children in this case. Likewise, belittling and demeaning comments aimed at the parenting coordinator are also inappropriate. Any further instances of such conduct by either party will not be tolerated.

Third, the Court cannot clarify the children’s insurance coverage at this time. The Judgment and Decree of Divorce dictates that Mother provide health insurance for the children. The Court will schedule a hearing to consider the parties’ arguments.

Fourth, there will be no further “Additional Time with the Noncustodial parent” visitation until further order of the Court. Unless otherwise ordered by the Court, Mother’s next visitation period will be during the Winter (Christmas) school break. The Court understands that the Rapid Area Schools are observing winter break from December 23, 2019, to January 3, 2019. This limitation is appropriate for many reasons. The Court recognizes the work of Ms. Bruckner, who has worked to provide

⁶ *Id.* ¶ 29.

Mother with visitation far in excess of what is contemplated by either the visitation guidelines or this Court's order. And credit should be given to Father, too, for accommodating this visitation schedule. However, the recent issues involving visitation make it clear that this additional undefined visitation is not in the children's best interest. In fact, Mother has not claimed that any of her requested visitation is in the best interests of her children. Her claims, rather, are focused on herself, not the children. And her demand for increased visitation is not based on the best interests of the children; it is, by her own admission, based on a desire to seek "retribution." Particularly, Mother has subjected the children to numerous interactions with law enforcement. And these are not the first instances. The Court received evidence at trial of law enforcement involvement during Labor Day weekend 2018. And on August 12, 2018, Mother also refused to cooperate with a visitation exchange. The Court agrees with Ms. Bruckner that this behavior is escalating. This additional visitation should be suspended for the benefit of the children. The court will consider restarting additional visitation, though. The Court will schedule a hearing to address the visitation issue.

The Court finds Mother's argument that Ms. Bruckner is liar to be unavailing. Ms. Bruckner is a Court-approved professional with no motivation to lie. On the other hand, the Court made numerous findings in its trial Findings of Fact and Conclusions of Law regarding Mother's lack of credibility.

Fifth, Mother should immediately file with the Clerk of Courts, verification from a licensed therapist that she is in compliance with the Court's order for her to begin and continue therapy with a licensed mental health provider.

MOTION FILED OCTOBER 28

The Court will schedule a hearing to consider any appropriate issue raised in Mother's October 28 motion. The Court understands that Mother is not available until December 5. The Court's docket does not allow for a hearing before then either.

The Court notes that Mother's Certificate of Service indicates that she served Father's counsel by email "and/or" First Class U.S. Mail. Father's counsel has not agreed in writing to accept service by email and, in the past, has properly served Mother by email and by also sending First Class mail. When Mother has been represented by counsel, Father has also properly served Mother by filing in Odyssey.

It is unclear whether Mother's service by email meets the requirements of S.D.C.L. 15-6-5(j)(2). Notwithstanding the potential failure to properly serve, the Court will set a hearing at its next availability.

Conclusion

The Court reminds the parties that all pleadings regarding trial court matters must be properly filed with the Clerk of Courts and proper notice provided to the opposing parties. All appeal matters must be filed with the South Dakota Supreme Court. This Court will not respond to improper email communication.

The Court's calendar allows little opportunity for a hearing. The next available time the Court has available is the morning of Tuesday, December 10, 2019. The Court will set a hearing at 8:30 a.m. M.S.T. that day. At the hearing, the Court will consider the medical insurance issues, the visitation issues, and other issues as the Court has jurisdiction given the pending appeals and as it sees fit. The Court's next available dates for a hearing, at this time are December 30 and January 29.

Order

For the reasons set for above, it is hereby ORDERED that the "Additional Time with the Noncustodial Parent" set forth in the Divorce Decree shall be discontinued until further order of the Court. All other visitation set forth in the Divorce Decree shall be strictly followed by the parties.

Further it is hereby ORDERED that Mother Rachel Evens shall provide proof of compliance with the mental health counseling ordered in this Court's Conclusion of Law No. 12, filed December 26, 2018. Proof shall be filed by December 6, 2019.

Further, it is hereby ORDERED that Judith Kennedy, LPC, is the children's counselor until Ms. Kennedy recommends that the children be discharged or seek therapy with another counselor. Should Ms. Kennedy discharge the children from her care, Melanie Torno, LCSW, shall be a back-up option. Should the children move back to Montana, Coral Beck, LCSW, may be assigned as a counselor. In any case, the children are not to see more than one counselor at a time.

Notice of Hearing

Further, it is hereby ORDERED that a hearing on the issues discussed above will be held at 8:30 a.m. M.S.T. in Courtroom C5 of the Pennington County Courthouse in Rapid City, South Dakota.

Dated November 13, 2019.

BY THE COURT:

THE HONORABLE JEFFREY ROBERT CONNOLLY
CIRCUIT COURT JUDGE

ATTEST:

RANAE TRUMAN, CLERK OF COURTS



Pennington County, SD
FILED
IN CIRCUIT COURT

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Ranae Truman, Clerk of Courts
By Deputy

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