To commence the statutory time
for appeals as of right (CPLR 5513 [a],
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
--X
J. P.,

Plaintiff,

-against-

J. P.,

Defendant.
--X

AMENDED
DECISION AND ORDER

CHRISTOPHER, J.

The following papers numbered 1- 26 were considered in connection with defendant's motion brought by Order to Show Cause:

PAPERS	NUMBERED
Order to Show Cause/Affidavit of Defendant/Affirmation of Nussair P. Habboush, Esq./Exhibits	1 - 8
Plaintiff's Affidavit in Opposition/Exhibits/Memorandum of Law	9 - 22
Defendant's Affidavit in Reply/Reply Affirmation of Nussair P. Habboush, Esq.	23 - 24
Affirmation in Opposition of Kathleen M. Hannon, Esq., Attorney for the Child, I. M.	25
Affirmation of Robin D. Carton, Esq., Attorney for the Children, J. P. and A. P.	26

In this matrimonial action the defendant moves for an order: 1) removing I. M., DOB

--/--/2006, from the Court's Temporary Visitation Access Order and declaring that plaintiff is a biological stranger and third party stranger to I. with no rights under the laws of the State of New York; 2) finding plaintiff in contempt of court for his willful violation of the Court's child support order; and 3) awarding defendant counsel fees in the amount of $7000 in connection with bringing this application.

The parties and counsel appeared before the Court on February 24, 2015 at which time the Court denied all branches of the defendant's motion and rendered a Decision and Order from the bench. With regard to defendant's motion for an order removing I. M., DOB –/--/2006, from the Court's Temporary Visitation Access Order and declaring that plaintiff is a biological stranger and third party stranger to I. with no rights under the laws of the State of New York, the Court denied said motion on the basis of judicial estoppel with written decision and order to follow.

Background

Plaintiff and defendant were married on – --, 2010[1] and have two children together, A. P. (DOB –/--/2010) and J. P., (DOB –/--/2012). Defendant also has three children from prior relationships, one of whom is I. M., (DOB 2/16/2006). It is undisputed that I. is neither the biological nor adopted child of plaintiff.

Plaintiff and defendant met in -- 2007, when I. was 20 months old, and moved in together shortly thereafter; plaintiff claims they moved in together one month later, defendant claims it was six months after they met. Defendant does not dispute the attorney for the child's assertion that I. last saw her biological father in December 2006, when she was less than one year old and that she has never known him. It is undisputed that plaintiff is the only father I. has known.

In or about May 2013, the parties separated. On May 21, 2013 defendant filed a Support

1The issue of whether the parties were legally married is one the Court must determine.

Petition in the Family Court of Westchester County seeking child support for the two P. children, I. and her two other children from prior relationships, G. C. and J. V. (See Plaintiff's Exhibit C).

On August 14, 2013 a Temporary Order of Support was issued by Support Magistrate Esther R. Furman in connection with defendant's Support Petition directing plaintiff to pay child support to defendant for the two P. children and I. (See Plaintiff's Exhibit D). The Temporary Order of Support states

> J. V.-P. filed a petition in ths Court on May 21, 2013 alleging that
> J. P. is chargeable with the support of :

Name	Date of Birth	Social Security Number
A. P.	– – , 2010	
I. M.	– – , 2006	
J. P.	– – , 2012	

Id. Pursuant to said Temporary Order of Support, plaintiff was directed to "pay the sum of $400.00 weekly to J. V.-P. payable through the Support Collection Unit, such payments to commence on August 16, 2013, for and toward the support of J. P.'s children;" as well as "80% of reasonable child care expenses for the children for whom support is ordered direct upon presentation of bills & receipts." *Id.* The Family Court issued the Temporary Order of Support and sent a copy to the parties, as well as to defendant's counsel, Jayne L. Brayer, Esq.

On January 8, 2014, the parties appeared, *pro se*, before this Court, and the Court consolidated the Family Court support proceeding with the matrimonial matter. On the same date, the defendant consented to a Temporary Access Order awarding plaintiff access with both P. children and I. (See Plaintiff's Exhibit F).

Arguments

Defendant now seeks to have the Court remove I. from the Temporary Access Order and

have plaintiff declared a biological stranger to I. In essence, defendant asserts that because plaintiff is not I. 's biological parent, pursuant to the holding in *Alison D. v. Virginia M.*, 77 NY2d 651 (1991), he lacks standing pursuant to DRL §70, to seek access rights to I. who is properly in the custody of defendant, her biological mother. *Allison D.*, 77 NY2d 651. Moreover, defendant argues that as I.'s biological parent she has the right to custody and control of the child, including the right to determine who may or may not associate with I. *Id.*; *Ronald FF. v. Cindy GG.*, 70 NY2d 141 (1987). In support of her argument, defendant also asserts, *inter alia*, that she does not agree with the way plaintiff parents I. and that I. has expressed to her that she does not want to be forced to visit with plaintiff. Plaintiff and Ms. Hannon, the attorney for I., dispute defendant's allegations regarding plaintiff's parenting skills, and assert that I. wants to visit with plaintiff and enjoys her time with him. These arguments, while relevant to a best interest analysis, are not germane to this motion which is limited to the issue of whether plaintiff, who is not I.'s biological father, has standing to seek access with I.

Plaintiff and Ms. Hannon, the attorney for I., argue that under the doctrine of judicial estoppel, defendant's motion to remove I. from the Temporary Access Order and have plaintiff declared a biological stranger to I. must be denied, as defendant is estopped from arguing that plaintiff lacks standing as a parent of I., as she assumed a contrary position in a prior proceeding and obtained a favorable result on the basis of that position. *See, Arriaga v. Dukoff*, 123 AD3d 1023 (2nd Dept. 2014). As set forth hereinabove, on May 21, 2013 defendant filed a Support Petition in the Family Court of Westchester County seeking child support for the two P. children, I. and her two other children from prior relationships, G. C. and J. V., that resulted in an order dated August 14, 2013, directing plaintiff to pay child support to defendant for the two P. children and I.

Plaintiff states that when he appeared before the Support Magistrate in August 2013 to answer the petition, he was not represented by counsel, but defendant was represented by Jayne L. Brayer, Esq. who is not defendant's attorney in the Supreme Court. Defendant does not dispute that she was represented by counsel at the August 2013 court appearance. According to plaintiff, during the appearance, defendant again requested that the Support Magistrate direct him to pay child support for all five children. He asserts that he told the Support Magistrate that he was the biological father of A. and J., and that he has raised I. and been her father since she was one year old. Plaintiff contends that the Support Magistrate agreed with defendant's allegation in the petition that he is the father of A., J. and I., but she did not agree that he was the father of defendant's two other children, J. and G., who are 24 and 17 years old, respectively.

Plaintiff further submits that in this same motion wherein defendant is seeking to sever the relationship between I. and him, she is claiming he owes child support on behalf of I. He asserts that she is requesting the Temporary Order of Support continue to be enforced, including the portion of it for I. Additionally, plaintiff points out, and defendant does not dispute, that most of the add-on expenses for which she is seeking payment from him, are for I.'s activities.

In Reply defendant argues that judicial estoppel does not apply in the instant matter. According to defendant's counsel, defendant did not "lead" the Family Court to find that I. M. was plaintiff's child. Defendant alleges that when she filed her petition for child support she did not know what to do. She claims when she saw the clerk to explain what she was seeking, he asked how many children she had, and advised her to list them all on the petition. It is her contention that she never would have listed I. on the petition, had she known plaintiff would attempt to use that to estop her from "protecting [her] own rights and[her] own daughter." Defendant asserts that plaintiff did not wish to pay child support for I., and not until the Support

Magistrate ordered him to do so, did he begin seeking visitation rights to I.

Also, defendant's Supreme Court counsel's rendition of the course of events that occurred during the support proceeding, differ somewhat from plaintiff's.[2] Counsel asserts that upon information and belief, during the support proceeding, plaintiff denied I. was his child. Defendant's counsel also claims that it was not defendant who requested the Support Magistrate to compel plaintiff to pay support for I. Counsel asserts that upon information and belief, the Support Magistrate asked plaintiff how many children he had, and when plaintiff only acknowledged the two P. children, the Support Magistrate became angry and inquired about the other children, and *sua sponte* ordered plaintiff to pay support for I. as well as the two P. children.

Analysis

Pursuant to DRL §70 "either *parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either *parent* for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require." (emphasis added). In *Alison D.*, 77 NY2d 651, the Court of Appeals determined that DRL§70 also applies to the issue of visitation rights. Declining to extend the meaning of the term "parent" in DRL §70 to include *de facto* parents, or parents by estoppel, the Court held that only a biological parent or a parent by virtue of adoption, is a "parent" under DRL§70. *Alison D.*, 77 NY2d 651. Accordingly, the *Alison D.* Court held that only a biological parent or adoptive parent has standing pursuant to DRL §70 to seek visitation

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2The Court notes that it is defendant's counsel, not defendant, who disputes plaintiff's rendition as to what transpired when the parties appeared before the Support Magistrate. Defendant did not comment in her affidavit with regard to plaintiff's assertions regarding said court appearance.

with a child in the custody of a fit parent, who has the right to decide what is in the child's best interests. *Id*.

In *Debra H. v. Janice R*., 14 NY3d 576 (2010), the Court of Appeals reaffirmed its holding in *Alison D*., and noted the importance of protecting a "parent's 'fundamental constitutional right to make decisions concerning the rearing of' [his or her] child (citation omitted)". *Debra H.,* 14 NY3d at 595. The Court also noted the benefits conferred by "the certainty that *Alison D*. promises biological and adoptive parents and their children." *Id*. at 600. However, in *Debra H*., the Court of Appeals was faced with a special set of circumstances, pursuant to which, notwithstanding the prevailing law, the Court found that a nonbiological parent had standing to seek visitation with her partner's biological child. In *Debra H*., same sex partners had entered into a civil union in the State of Vermont prior to the child's birth. The *Debra H*. Court found that as result of the Vermont civil union, the partner who was not the biological parent of the child, was considered the child's "parent" under Vermont law. As a matter of comity, the Court recognized the parentage created by the civil union in Vermont for purposes of conferring standing upon the partner, who was not the biological parent, to seek visitation and custody of the child under New York law. *Debra H*., 14 NY3d 576.

Most recently, in 2014, in *Arriaga v. Dukoff*, 123 AD3d 1023 (2nd Dept. 2014), based on the unique facts presented, the Second Department affirmed an order of the Suffolk County Family Court that granted visitation to the non -birth mother partner in a same sex domestic partnership on the basis of judicial estoppel. Under the doctrine of judicial estoppel, " 'a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed' (citations omitted)." *Id*.

In *Arriaga*, the parties separated when the child was almost 4 years old, and the child's biological parent filed a petition in Family Court seeking support from her partner who was a biological stranger to the child. A hearing was held on the issue of equitable estoppel, pursuant to which the Family Court issued an order determining that the non-birth mother was a parent to the child and chargeable with the support of the child. The non-birth mother commenced a custody/visitation proceeding as the child's "adjudicated parent", which the biological parent moved to dismiss on the ground that the non-birth mother did not have standing under DRL §70 since she was not a biological or adoptive parent of the child. The Family Court, affirmed by the Second Department, denied the motion to dismiss, finding that the biological parent was judicially estopped from arguing in the custody/visitation proceeding that the non-birth mother was not a parent of the child, as she had already asserted in the support proceeding that her partner, the non-birth mother, was a parent of the child, and it was on that basis, that the biological parent had obtained an order in her favor awarding her child support; she could not now assume a contrary position because her interests had changed. *Id.*

The Second Department's holding in *Arriaga,* 123 AD3d 1023*,* is instructive in the instant matter where the facts are decidedly similar to those in *Arriaga* . In the matter before this Court, defendant, the biological parent of I., filed a petition in Family Court alleging that plaintiff, a non-biological, non-adoptive parent, was chargeable with child support for I., and she was successful in a Family Court appearance, while represented by counsel, in securing an award of child support for I. It is of no moment that defendant claims that she did not know what to do when she filed her petition for support and relied on the advice of a clerk when she listed that plaintiff was chargeable with the support of all 5 of her children. Even assuming, *arguendo*, that defendant is credited with these facts, there is no denying that she accepted the order of

support, did not dispute it and accepted the support from plaintiff for I. While there are differences in the parties' versions as to what transpired when the parties appeared before the Support Magistrate in August 2013 when the Temporary Order of Support was issued, the Court finds it curious that defendant did not submit her rendition via a sworn statement in her affidavit, but rather she relies on assertions set forth by her current counsel, who was not present at that court appearance. Notwithstanding, under either party's version, the salient facts remain the same. Defendant filed a petition alleging plaintiff is chargeable for the support of I., and she received a support order directing plaintiff to pay support for I. While defendant contends that she never would have listed I. on the petition, had she known plaintiff would attempt to use that to estop her from "protecting [her] own rights and[her] own daughter," it is significant that when the parties appeared before the Support Magistrate in August 2013 in connection with the support petition, and defendant received the Temporary Order of Support for the two P. children and I., she was represented by counsel. Also, the Court notes that defendant did not request I. be removed from the Temporary Order of Support when it was issued in August 2013, nor has she made such a request since then. In fact, in this same motion wherein defendant is seeking to remove I. from the Temporary Order of Access, and sever the relationship between plaintiff and I., defendant is seeking a contempt finding against plaintiff for alleged basic child support arrears and arrears for add-on expenses, the majority of which, it is undisputed, are for I.'s activities.[3]

3While defendant asserts that pursuant to the records of the Support Collection Unit plaintiff's basic child support arrears were in the sum of $6310 as of January 2, 2015, plaintiff claims that as of January 23, 2015 his total child support obligation was in the amount of $30,000, $26,339 of which had been paid; of the $26,339, plaintiff alleges that $1850 was paid directly to defendant in February and March 2014. He claims only $3660 was owed as of January 23, 2015. With regard to his share of the add-on expenses that defendant claims plaintiff has not paid, plaintiff claims, and defendant does not dispute that she had not requested payment or presented bills or receipts for these expenses.

Based on defendant's affirmative act in filing a petition alleging plaintiff is chargeable with the support of I., which resulted in the Court's award of child support for I., defendant is judicially estopped from arguing that plaintiff is not a parent to I. for purposes of visitation. Defendant cannot now assume a contrary position because her interests have changed. "[I]n colloquial terms, the relief sought by [defendant is] known as ' having your cake and eating it too' (citation omitted)." *Arriaga*, 123 AD3d 1023.

Accordingly, as was set forth on the record on February 25, 2014, and as more fully set forth herein, defendant's motion for an order removing I. M., DOB --/--/2006, from the Court's Temporary Visitation Access Order and declaring that plaintiff is a biological stranger and third party stranger to I. with no rights under the laws of the State of New York, is denied.

This decision shall constitute the order of the Court.[4]

E N T E R

Dated: White Plains, NY
March 27 , 2015

____
HON. LINDA CHRISTOPHER, J.S.C.

To: Nussair P. Habboush, Esq.
Attorney for Defendant
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Alex R. Greenberg, Esq.
Attorney for Plaintiff

4 On March 23, 2015, subsequent to the Court having issued its Decision and Order in connection with Motion Sequence Number -- on March 19, 2015, the parties and counsel appeared before the Court. At this time, the Court learned that plaintiff had amended his complaint which originally set forth a cause of action for divorce, to one setting forth a cause of action to declare the nullity of a void marriage. Plaintiff now believes that defendant was never divorced from her prior husband of many years ago. She has yet to answer the amended complaint.

The Court has reviewed its Decision and Order and finds that this new information does not change the determination of the motion. The Court's purpose for issuing this Amended Decision and Order is to clarify that these new facts do not change the underlying basis of the decision. The Decision and Order was predicated upon judicial estoppel.

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