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MULTNOMAH COUNTY

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

In the Matter of:

KAINE ANDREW HORMAN,

Petitioner,

and

TERRI LYNN MOULTON HORMAN,

Respondent

Case Number: 1006-66086

PETITIONER'S RESPONSE
REGARDING RESPONDENT'S
MOTION FOR DISMISSAL

ENTERED

NOV 10 2010

IN REGISTER BY NCW

Petitioner/Father provides this material in response to Respondent/Mother's Motion for Dismissal.

Before addressing the specific representations in the November 2 Declaration of Peter Bunch in Support of Motion to Dismiss Motion to Modify Restraining Order, one important point needs to be brought to the Court's attention. Mother has dismissed her request for parenting time pursuant to ORCP 54. That rule requires no supporting documentation to achieve the dismissal of an action. It states:

A Voluntary dismissal; effect thereof.

A(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 32 D and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such notice on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or

1 stipulation, the dismissal is without prejudice, except that a notice
2 of dismissal operates as an adjudication upon the merits when filed
3 by a plaintiff who has once dismissed in any court of the United
4 States or of any state an action against the same parties on or
including the same claim unless the court directs that the dismissal
shall be without prejudice. Upon notice of dismissal or stipulation
under this subsection, the court shall enter a judgment of dismissal.

5 A(2) **By order of court.** Except as provided in subsection
6 (1) of this section, an action shall not be dismissed at the plaintiff's
7 instance save upon judgment of dismissal ordered by the court and
8 upon such terms and conditions as the court deems proper. If a
9 counterclaim has been pleaded by a defendant prior to the service
upon the defendant of the plaintiff's motion to dismiss, the
defendant may proceed with the counterclaim. Unless otherwise
specified in the judgment of dismissal, a dismissal under this
subsection is without prejudice.

10 Typically, a party simply files a notice of dismissal if no counterclaim has been
11 pleaded. If a counterclaim has been pleaded, an order of dismissal is required along with the
12 notice of dismissal. A party is not required to justify the reason he or she wishes to dismiss an
13 action. That is notable because Mother's attorney has attached a five-page "Declaration" to
14 what should have been a simple Notice of Dismissal. One can only speculate why Mother has
15 attached such a detailed Declaration to an otherwise short and simple document.

16 Father takes great exception to the statements contained in the Declaration of Mother's
17 lawyer. That Declaration, frankly, is nothing more than (a) Mother's effort to re-characterize
18 things already in the record; (b) Mother's attempt to justify her own litigation decisions; and
19 (c) Mother's effort to blame Father and his lawyer for Mother's current situation. The Court
20 file is no place for such statements. Father has contemplated a motion to strike the
21 Declaration from the record. Instead, Father's believes the Declaration of Mother's lawyer is
22 best handled by rebutting the allegations of Mother's lawyer, and by correcting some obvious
23 misstatements regarding the law.

24 The parties have been married since 2007. They have one daughter together, Kiara,

1 age 23 months. Father filed a Dissolution of Marriage Petition, and obtained a Petition to
2 Prevent Abuse (FAPA Order) on June 28, 2010. The FAPA Order gives custody of Kiara to
3 Father and provides for no parenting time between Kiara and her mother.

4 Father has one child from a previous marriage, Kyron. Father is currently
5 experiencing any parent's worst nightmare. Kyron has been missing since June 4, 2010.
6 Father has received information that leads him to believe Mother is responsible for Kyron's
7 disappearance.

8 On Mother's motion, the Court has abated the dissolution case until January 6, 2011.
9 The FAPA case remains active. Mother filed a motion to modify the FAPA Order and sought
10 parenting time with Kiara. Mother never signed an affidavit in support of her request for
11 parenting time. Instead, she placed that issue before the Court with a Declaration from her
12 attorney. That Declaration made general assertions about Kiara's need to have regular and
13 frequent contact with her mother, and Kiara's best interests. Mother's motion contained none
14 of the information, beyond legal and factual conclusions, that the Court typically receives
15 when considering what type of parenting time may or may not be in a child's best interests.
16 Instead, Mother asked this court to take the word of her attorney that parenting time between
17 Mother and Kiara is in Kiara's best interest. Mother wrongly assumed that this Court can
18 make a parenting time determination without complete information concerning Mother's past
19 conduct, character, family relations, and physical, psychological, psychiatric, and mental
20 health.

21 Mother has not yet taken the stand and she has not yet invoked her Fifth Amendment
22 right against self-incrimination. Instead, Mother's civil attorney advised the Court that
23 Mother *intends* to invoke her privilege against self-incrimination and that Mother will not
24 testify *at all* in support of her motion. Mother's attorney informed the Court that Mother

1 would seek to quash certain discovery subpoenas on the grounds that the information is
2 protected by Mother's right against self-incrimination.

3 Generally speaking, the privilege against self-incrimination prohibits compelling any
4 person to disclose information of a testimonial nature that might directly or indirectly subject
5 the person to a criminal liability. Doe v. United States, 487 US 201, 212, 108 S Ct 2341, 101
6 L Ed 2d 184 (1988). The privilege applies to "incriminating statements", which are
7 communications that might furnish a link in the chain of evidence in a criminal prosecution.
8 Blau v. United States, 340 US 159, 161, 71 S Ct 223, 95 L Ed 170 (1950). There is no
9 blanket Fifth Amendment right to refuse to testify in non-criminal proceedings. Tennessee,
10 Inc. v. Berger, 144 Ga. App. 45, 240 S.E. 2d 586 (1977). The privilege does not apply
11 "across the board" to prevent any and all testimony without regard for the content or subject.
12 The basic right of a person under the privilege is not simply one to avoid taking the stand, but
13 rather one to be free from compelled testimonial self-incrimination regarding the offense for
14 which he is on trial, as well as others. It provides no protection against the disgrace and
15 practical excommunication from society which might result from disclosure of matter which,
16 under the circumstances, could not give rise to criminal liability. The privilege does not
17 protect against remote and speculative possibilities. Zicarelli v. New Jersey Investigation
18 Comm'n., 406 US 472, 478, 92 S Ct 1670, 32 L Ed 2d 234, (1972). A witness can be
19 compelled to testify despite a claim of privilege only if a judge is convinced that it is perfectly
20 clear from a careful consideration of all the circumstances in the case, that the witness is
21 mistaken, and that the answers cannot possibly have a tendency to incriminate. Hoffman v.
22 United States, 341 US 479, 486, 71 S Ct 814, 95 L Ed 1118 (1951).

23 The privilege against self-incrimination does not establish an absolute right against
24 being compelled to speak and does not automatically preclude self-incrimination, whether

1 spontaneous or in response to questions put by government officials. U.S. v. Washington,
2 431 U.S. 181, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977). It does not prohibit every element
3 which may influence a criminal suspect to make incriminating admissions; the constitutional
4 guaranty is only that the witness not be compelled to give self-incriminating testimony, and
5 the test whether, considering the totality of the circumstances, the free will of the witness was
6 overborne. *Id.*

7 Paragraph 15 of Mother's attorney's November 2 Declaration states:

8 [M]other will not give up her right to seek legal custody and
9 unfettered contact with Kiara. [Father's] efforts to withhold all
10 parenting time is completely contrary to Kiara's best interest.
However, under all the circumstances, issues regarding parenting
time will need to wait until another day.

11 Obviously Mother intends to seek parenting time and/or custody after the 90-day
12 abatement ends. Father, however, is focused on protecting the safety of his daughter, Kiara,
13 and finding his son, Kyron. Father believes Mother has information concerning Kyron's
14 whereabouts. While Mother may choose not to participate in any meaningful way in these
15 proceedings, her silence will not come without consequences.

16 This is a civil case. The Fifth Amendment does not forbid adverse inferences against
17 parties to civil actions when they refuse to testify in response to probative evidence offered
18 against them. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). In Oregon, a presumption
19 exists that evidence willfully suppressed would be adverse to the party suppressing it.
20 ORS 40.135. If this proceeds to a trial, and Mother still refuses to participate, Father will ask
21 the Court to construe Mother's silence as an admission regarding Father's factual allegations.
22 Other jurisdictions have sanctioned civil litigants who have attempted to rely upon the Fifth
23 Amendment to prevent discovery requests and/or refuse to answer questions in civil
24 proceedings. In Sparks v. Sparks, 768 S.W. 2d 563 (Mo. App. 1989) the petitioner in an

1 action for dissolution of marriage filed for temporary maintenance and attorney fees. She
2 then refused on self-incrimination grounds to answer respondent's interrogatories concerning
3 her relationship to a contract killer who attempted to kill the respondent. The trial court
4 nonetheless granted her relief. The appellate court reversed, holding that the trial court
5 abused its discretion by granting relief to concealing party while the concealment continues.
6 768 S.W. 2d at 567. Also, in Hagenbuch v Hagenbuch, 730 SW2d 269 (Mo. App. 1987), a
7 dissolution case, the petitioner refused to respond to questions on self-incrimination grounds.
8 The trial court struck his pleadings and awarded maintenance support to the respondent on her
9 cross petition.

10 The fact that Mother's own attorney has advised the Court that Mother intends to
11 plead the Fifth speaks volumes about what Mother has to hide. An attorney in a civil action is
12 bound by the provisions of ORCP 17C, which provides that before Mother's attorney can
13 submit an argument in support of a pleading, that attorney certifies that the position is based
14 on reasonable "knowledge, information and belief, formed after the making of such inquiry as
15 is reasonable under the circumstances". One can only infer that Mother will not speak
16 because her testimony will lead to criminal liability for Kyron's disappearance. Until Mother
17 denies the allegations, there can be no other inferences drawn.

18 On October 25, 2010, Father filed a Response to Mother's motion seeking parenting
19 time with Kiara. Father provided detailed factual support for his concerns regarding Mother's
20 involvement in Kyron's disappearance, and his concerns regarding Mother's mental state.
21 Father's motion contained documentation that placed Mother's credibility at issue, and
22 provided the Court with insight into Mother's mental state in the days and weeks following
23 Kyron's disappearance. While Mother may have felt embarrassed by the evidence that she
24 had other things on her mind rather than the search for Kyron, that evidence is relevant

1 because it is directly related to the issue of whether Mother is fit to have any contact with
2 Kiara. Nothing in Father's Response was a surprise to Mother, since Mother already had the
3 text messages in her possession. By seeking visitation with this young child under the present
4 circumstances, Mother swung the door wide open to receive Father's concerns regarding
5 Mother's fitness as a parent, her mental state, and credibility.

6 Mother replied to Father's Response on October 29, 2010. Ironically, while Mother
7 characterized Father's October 25 filing as an effort to "vilify Mother" and "inflame and
8 poison public opinion against Mother", an "exclusive" story appeared in The Oregonian
9 newspaper regarding Mother's October 29 Response. The thrust of Mother's filing was that
10 Father is trying to "sabotage the mother/child relationship". Mother's Reply was remarkable,
11 not only for what it stated, but for what it omitted. Mother failed to address, in any
12 substantive manner (a) Father's concerns about Mother's mental state; (b) Father's belief that
13 Mother is involved in the disappearance of his son Kyron; (c) the horrific situation that now
14 exists regarding Kyron's location; and (d) Father's belief that Mother poses a direct threat to
15 the safety and welfare of the parties' daughter. Rather, Mother simply stated, "nothing in [the
16 text messages] supports Father's allegations that there are no conditions upon which Mother
17 should see her daughter". With due respect to the experienced attorney representing Mother,
18 the evidence provided by Father in his Response has *everything* to do with whether Mother
19 should see Kiara.

20 Mother also claims that Father has improperly referred to evidence that Mother has
21 failed two polygraph tests. Mother states "evidence about these alleged failures is not
22 admissible in any legal proceeding in this state". Mother is mistaken about the law. In
23 Fromdahl v. Fromdahl, 314 Or 496, 508, 840 P2d 683 (1992), a divorce case, the court held
24 that evidence that the husband may have failed a polygraph test, and the mother's knowledge

1 of those results, was erroneously excluded where the mother sought to introduce those results
2 to show the reasonableness of her belief that the father had sexually abused their children.

3 The November 2 Declaration of Mother's attorney also contains a full paragraph
4 referring to an "ORCP 54 Offer of Compromise, in which she sets forth a very reasonable
5 proposal to resolve every issue in the divorce proceeding". Mother claims that Father has
6 until November 5 to respond, and states that she does not believe Father will respond because
7 she believes Father has refused "to even entertain any kind of compromise or settlement of
8 any issue".

9 ORCP 54E is a civil rule that allows civil litigants to recover attorney fees and costs
10 after a trial if one party to the litigation fails to recover relief in excess of that offered in
11 settlement. The rule provides:

12 If the offer is not accepted and filed within the time prescribed, it shall be
13 deemed withdrawn, and shall not be given in evidence at trial and may be
14 filed with the court only after the case has been adjudicated on the merits
15 and only if the party asserting the claim fails to obtain a judgment more
16 favorable than the offer to allow judgment. In such a case, the party
17 asserting the claim shall not recover costs, prevailing party fees,
18 disbursements, or attorney fees incurred after the date of the offer, but the
19 party against whom the claim was asserted shall recover of the party
20 asserting the claim costs and disbursements, not including prevailing party
21 fees, from the time of the service of the offer.

22 However, this is a dissolution case and ORCP 54E does not apply to dissolution cases.
23 Saunders v. Saunders, 158 Or App 601, 975 P2d 927 (1999). The *Saunders* Court explained:


24 Dissolution cases commonly involve a host of different forms of relief, from
the partitioning or award of real and personal property, to the determination of
custody, the ascertainment of an appropriate parenting schedule, the
establishment of trusts, and the imposition of obligations to pay child and
spousal support. As the Supreme Court noted in *Haguewood*, the varieties of
relief involved often render it difficult to determine which party "prevails" in a
dissolution action. 292 Ore. at 212. In that regard, it is not surprising that
the statutes do not condition an award of attorney fees by a trial court in a
dissolution proceeding on one party "prevailing" over another. ORS
107.105(1)(h). ORCP 54 E, once again in contrast, requires a determination

1 whether a party that rejected an offer of compromise "obtained a more
2 favorable judgment." To embark on such a determination in a dissolution case
3 would require evaluating the extent to which various combinations of child
4 custody, visitation, property distribution, and support awards result in a more
or less "favorable" judgment. It is, in brief, an intrinsically impossible
determination....We conclude that ORCP 54 E does not apply to proposed
stipulated dissolution judgments."

5 Mother's use of ORCP 54E in a dissolution case is confusing. More concerning is
6 Mother's introduction of settlement negotiations into a court document. Evidence of
7 settlement offers is generally inadmissible to prove the validity or invalidity of a claim. OEC
8 404. Mother claims her settlement demand is "reasonable" and further claims that Father has
9 refused to "entertain any kind of compromise or settlement of any issues". By introducing
10 evidence of her settlement demand, and implying publicly that Father is not "reasonable",
11 Mother has just waived any right to keep the actual terms of her settlement demand
12 confidential. However, Father will provide Mother with the benefit of the doubt at this time
13 and will not reveal the actual terms that Mother has demanded in settlement. Father will
14 simply state that he does not believe it is just and equitable to provide spousal support to the
15 person he believes is responsible for the disappearance of his son.

16 Dated this 9 day of November, 2010.

17
18 GEARING RACKNER AND ENGEL LLP

19
20 
21 _____
22 Laura E. Rackner, OSB 843280
23 Brett E. Engel, OSB 952578
24 Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Brett Engel, do hereby certify that I served a true copy of the foregoing *Response* on STEPHEN HOUZE and PETER BUNCH, attorneys of record for Respondent, as follows:

Peter Bunch
Attorney at Law
808 SW Third Avenue
Suite 570
Portland, Oregon 97204-2428

Stephen Houze
Attorney at Law
1211 SW Fifth Avenue
Suite 1240
Portland, Oregon 97204

Fax: (503) 961-1559

Fax: (503) 299-6428

____ by **mailing** a full, true, and correct copy thereof in a sealed, first class postage-prepaid envelope, to the address(es) shown above which is/are the last known office address(es) of the person(s), and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.


X by causing a full, true, and correct copy thereof to be **hand delivered** to the person(s) at the person's(s') last known address listed above on the date set forth below.

____ by sending a full, true, and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the person(s) as shown above, which is the last known address, on the date set forth below.

____ by **faxing** a full, true, and correct copy thereof to the person(s) at the fax number(s) shown above, which is/are the last known fax number for the person's(s') office, on the date set forth below. The receiving fax machine was operating at the time of service and the transmission was properly completed.

Dated this 9 day of November, 2010.

GEARING RACKNER AND ENGEL LLP



Laura E. Rackner, OSB 843280
Brett E. Engel, OSB 952578
Of Attorneys for Petitioner