

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 20, 2012

513360

In the Matter of LORI M.
KACZOR,

Appellant,

v

MEMORANDUM AND ORDER

JEFFREY R. KACZOR,

Respondent.

Calendar Date: November 13, 2012

Before: Mercure, J.P., Lahtinen, Malone Jr., Stein and
Garry, JJ.

Alexander G. Verrigni, Rexford, for appellant.

Garry, J.

Appeal from an order of the Family Court of Fulton County (Skoda, J.), entered July 29, 2011, which, in a proceeding pursuant to Family Ct Act article 6, granted respondent's motion for an award of counsel fees.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of one child (born in 1996). Sole custody of the child was awarded to the father in 2002, with visitation to the mother.¹ In 2006, the mother filed a petition for modification of the prior custody order. Upon consent of the parties at the conclusion of the proceeding, Family Court made multiple specific directives and continued the

¹ The order granting sole custody to the father was affirmed by this Court (Kaczor v Kaczor, 12 AD3d 956 [2004]).

essential terms of custody and visitation. As relevant here, the order provided that, if the mother filed a petition in Family Court against the father and was "unsuccessful in prosecuting the petition for any reason whatsoever, including a withdrawal of said petition, the mother shall be responsible to reimburse to the father any and all attorney fees he incurs as a result of the petition."

In November 2010, the mother commenced the instant proceeding by filing a modification petition seeking sole custody of the child. Following preliminary appearances, the mother withdrew this petition on the day that trial was scheduled to begin. The father thereafter sought an order directing the mother to reimburse his counsel fees incurred in defending the petition. Family Court directed a hearing relative to the reasonableness of the claim. The mother conceded that the amount claimed was appropriate based upon time expended and the rate charged, but otherwise contested the application. Family Court rendered a fee award. The mother appeals, and we affirm.

Stipulations made in open court by parties represented by counsel will not be disturbed "absent a showing of good cause such as fraud, collusion, mistake or duress; or unless the agreement is unconscionable or contrary to public policy; or unless it suggests an ambiguity indicating that the words [do] not fully and accurately represent the parties' agreement" (McCoy v Feinman, 99 NY2d 295, 302 [2002] [citations omitted]; see Matter of Monaco v Armer, 93 AD3d 1089, 1089-1090 [2012], lv denied 19 NY3d 807 [2012]). Counsel fees are generally regarded as incidents of litigation, with each party remaining responsible for his or her own fees, but an award of legal fees may be rendered where such is authorized by statute, court rule or, as relevant here, an agreement made by the parties (see Matter of A.G. Ship Maintenance Corp. v Lezak, 69 NY2d 1, 5 [1986]; Matter of Ernestine R., 61 AD3d 874, 876 [2009]).

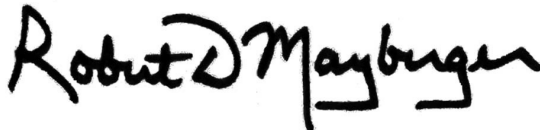
The subject stipulation was formally made in open court, with the assistance of counsel, and incorporated into a court order. No grounds are shown to vacate the parties' clearly expressed agreement. We note that "parties to a civil dispute are free to chart their own litigation course and, in so doing,

they may stipulate away statutory, and even constitutional rights" (Matter of Mallinckrodt Med. v Assessor of Town of Argyle, 292 AD2d 721, 722 [2002] [internal quotation marks and citations omitted]; accord Durst v Grant, 92 AD3d 1195, 1196 [2012], lv denied 19 NY3d 810 [2012]). Accordingly, as the parties "may fashion the basis upon which a particular controversy will be resolved" (Cullen v Naples, 31 NY2d 818, 820 [1972]; accord Mitchell v New York Hosp., 61 NY2d 208, 214 [1984]), we find that by her stipulation the mother effectively waived the requirement that her conduct be found frivolous prior to holding her responsible for the father's counsel fees, as well as any pertinent constitutional protection under both the NY and US Constitutions (see 22 NYCRR 130-1.1; Matter of Mallinckrodt Med. v Assessor of Town of Argyle, 292 AD2d at 722).

Mercure, J.P., Lahtinen, Malone Jr. and Stein, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court