

1 FAMILY COURT OF THE STATE OF NEW YORK

2 COUNTY OF CAYUGA

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4 ROBERT DAVIS, : Index No. V1564-99

5 Petitioner, :

6 -against- :

7 LEROY LEUBNER, : Violation of

8 Respondent. : Visitation

9 -----x

10 Cayuga County Courthouse
11 Auburn, New York

12 November 3, 1999

13 B e f o r e :

14 HON. PETER E. CORNING,

15 Justice

16 A p p e a r a n c e s :

17 STEVEN H. BUSCHMAN, ESQ.
18 and SIMON K. MOODY, ESQ.
19 Attorneys for Respondent
20 161 Genesee Street
21 Auburn, New York 13021

22 Also Present from Sheriff's Department:
23 Frederick Cornelius
24 Alex Cuipylo
25 Stephen McLoud

23 Lisa M. Giacona
24 RPR, RMR, CSR

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THE COURT: Okay. This is the matter of Robert Davis and Leroy Leubner.

You are Leroy Leubner?

MR. LEUBNER: Yes, I am, Your Honor.

THE COURT: Mr. Davis?

MR. DAVIS: Yes, I am, sir.

THE COURT: Good morning.

MR. DAVIS: Good morning.

THE COURT: Okay. There was an order of this Court dated October 20th and I have a petition filed by Mr. Davis indicating that Mr. Leubner may be in violation of the order wherein I gave custody of Melissa to Robert, custody of Kimberly to Leroy, visitation of Melissa as can be arranged with Melissa, visitation with Kimberly not less than one time per week for an eight-hour period of Saturday. Melissa and Kimberly three-hour visit at the mall, and I also directed that the children should be able to visit their mother at the jail.

It is alleged that Mr. Leroy (sic) did not allow Kim to visit Michelle at the jail. He told the jail that he was Kimberly's father and

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2 that they were not to allow her to visit with
3 the mother. The Director said that even with
4 the Judge's order visitation was not allowed.

5 MR. BUSCHMAN: (shaking negatively)

6 MR. DAVIS: That's true, sir. True, Your
7 Honor. I called the Director myself.

8 THE COURT: Director of what?

9 MR. DAVIS: Of the jail, out at Cayuga
10 County Jail. That's where they told me he was.

11 THE COURT: Who was it?

12 MR. DAVIS: I don't know. He didn't
13 mention his name. He said he was the Director,
14 or he said he was in charge of the jail is what
15 he said; and he told me that even with a court
16 order from this Court, that Kimberly would not
17 be allowed to see her mother because he is the
18 biological father.

19 MR. BUSCHMAN: It's, it's our
20 understanding through the child that she went to
21 visit at the jail on Saturday with Mr. Davis,
22 and at this point in time Mr. Leubner doesn't,
23 doesn't have -- if it be the court order,
24 although some confusion.

25 THE COURT: Did he direct the jail not to

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allow the visit?

MR. BUSCHMAN: Excuse me?

THE COURT: Did he direct the jail not to allow the visit?

MR. BUSCHMAN: Originally he had called --

THE COURT: That isn't my question. Did he or didn't he?

MR. BUSCHMAN: Not to allow what, a visit with Mr. Davis?

THE COURT: The visit with Michelle or Kimberly.

MR. BUSCHMAN: If it was with himself. He wanted to bring the child out there himself, Your Honor. He wanted to bring the child to the jail to visit.

THE COURT: He understands that he's looking at six months in the County Jail for a violation of my order?

MR. BUSCHMAN: I believe it's a misunderstanding of the order.

THE COURT: I don't think it's a misunderstanding of the order.

MR. DAVIS: Your Honor, he called the jail, talked to --

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2 THE COURT: All right. I will direct the
3 clerk to call the Sheriff. I want the Sheriff
4 here no later than 11:30 or his legal
5 representative. Call the Director, whoever that
6 is, to answer these questions. I want
7 Mr. Leubner back here at 11:30. We will conduct
8 a hearing on this matter.

9 This is the order of the Court and neither
10 the Sheriff, and particularly Mr. Leubner, has
11 no right to violate it.

12 MR. BUSCHMAN: Your Honor, was -- I think
13 one of the pertinent questions before, before
14 this Court was, did the child visit with her
15 mother on Saturday, and it is our information
16 that she visited with her mother on Saturday.

17 MR. DAVIS: She did.

18 THE COURT: I just thought you told me she
19 didn't?

20 MR. DAVIS: No. I said that he's tried to
21 stop it by calling Margaret at the jail who
22 answers the phone. Mr. Leubner supposedly was
23 screaming obscenities by what Margaret had told
24 me.

25 THE COURT: Who is Margaret?

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MR. DAVIS: She's the jailer there. I know her personally because I worked with her.

She said that Mr. Leubner was insulting Michelle saying that her child was not or his child was not going to visit with Michelle there, and I don't know the rest of the conversation because she didn't make me privy to the conversation.

Margaret said she read the court order, stipulated that Kimberly was going to see her mother, bring her in. I brought her in Monday. I get told by this Director that Kimmy can't come there any more because of the reasons what I wrote there.

THE COURT: Oh, she saw her Saturday?

MR. DAVIS: She saw her Saturday but she cannot go again.

THE COURT: But you've been told --

MR. BUSCHMAN: And Mr. Leubner, at this point he has no, he has no --

THE COURT: Did he contact the Sheriff and tell him that --

MR. BUSCHMAN: He talked to them. Yesterday -- yes. After, after having been served

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with this, Your Honor, he came into our office.
There was a misunderstanding.

He's had the child in counseling since the
last court order with Dr. Coleman about the
situation with the mother.

Obviously this is a very emotional
situation. He's trying to do what's right for
the daughter.

THE COURT: He's going to do -- what I
tell him to do he's going to do.

MR. BUSCHMAN: Certainly, Your Honor.

THE COURT: We're going to start with
that.

MR. BUSCHMAN: Certainly, Your Honor;
certainly, Your Honor, and he's going to -- what
I would, what I would recommend to the Court or
what I would put to the Court is that
Mr. Leubner bring the child to the jail and
Mr. Davis bring the child to the jail during his
visitation so they can both have time with the,
with Miss Davis at the jail, not one person or
the other bringing the child to the jail, but --

MR. DAVIS: Your Honor?

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MR. BUSCHMAN: -- both if they so choose to bring the child to the jail whenever --

THE COURT: Is he --

MR. BUSCHMAN: -- physical custody.

THE COURT: Is he visiting this woman? Why would he bring the child to the jail?

MR. BUSCHMAN: Because he's emotional support and physical custodian of the child.

THE COURT: Well, but he doesn't -- first of all, he has no reason to be at the jail unless he's going to visit Miss Davis, which I doubt.

MR. BUSCHMAN: Well, to bring the child there. It would be, Your Honor --

THE COURT: It's obviously intimidating. Now just stop and think about it, Mr. Buschman. He -- the child knows that he, that he's mad at the mother, and I, I am not saying that he's not, hasn't got reason to be. That's not the issue here. The issue is there's a court order and any attempt to impede that court order is a, is a contempt of court.

MR. BUSCHMAN: Yes, Your Honor.

THE COURT: So in any event, Mr. Davis, do

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2 I understand, and I didn't understand it from
3 reading the petition, that Kimberly visited her
4 mother on Saturday?

5 MR. DAVIS: Yes, he did, Your Honor -- she
6 did. I'm sorry.

7 THE COURT: All right, and then you had a
8 conversation on Monday?

9 MR. DAVIS: I called the jail to ask to
10 talk to the person in charge of the jail because
11 of the conversation of Mr. Leubner's with, I
12 don't know her last name, I only know her by
13 Margaret on Saturday, to ask if there was any
14 logs of what that was, conversation was because
15 I myself took it as being a violation of the
16 court order.

17 So they told me no. They connected me
18 with this guy who said he was in charge of, of
19 the jail. He said that Mr. Leubner had
20 contacted Fred Cornelius who had asked for
21 Michelle's court order, took it from her, out of
22 her, where she had it in her cell, whatever.
23 The Director supposedly read it. I talked to
24 him.

25 He said to me personally that Mr. Leubner

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2 is the biological father and I had no right to
3 bring her out there no matter what this Court
4 says, is exact quote.

5 MR. BUSCHMAN: And that's not Mr. Leubner,
6 Your Honor, that's --

7 THE COURT: Well, it is if that's what
8 the, if the, if -- whoever this Director is.

9 Well, in any event, is that your -- that's
10 your testimony?

11 MR. DAVIS: Yes.

12 THE COURT: I want the Director here, I
13 want Fred Cornelius here at 11:30. I'm not
14 going to put up with this business. Okay.

15 MR. DAVIS: Thank you, Your Honor.

16 THE COURT: And I want Mr. Leubner here.

17 (Whereupon there was a break in the proceedings.)

18 THE COURT: Good morning, everybody.

19 MR. MOODY: Morning, Your Honor.

20 MR. DAVIS: Morning.

21 THE COURT: I have before me an order to
22 show cause, the petition for a violation of
23 visitation.

24 Originally I thought that, that the child
25 of this marriage Kimberly who I'd ordered to be

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2 allowed to visit mother had not been allowed to.
3 She was apparently on Saturday.

4 Then apparently Mr. Davis has alluded to
5 certain conversations he's had with either
6 Mr. Leubner and/or jail and Sheriff's personnel
7 involving --

8 MR. DAVIS: Not the Sheriff. I didn't
9 talk to the Sheriff personnel. Oh, are you
10 talking about the jailer personnel?

11 THE COURT: Jailer, that's Sheriff's
12 personnel -- concerning an order entered by this
13 Court.

14 Mr. Davis, why don't you tell me what you
15 find occurred and then we'll go from there.

16 MR. DAVIS: This Saturday I brought
17 Kimberly up to see her mother.

18 MR. MOODY: Your Honor, should he be
19 placed under oath?

20 THE COURT: No. I don't need that.

21 Go ahead.

22 MR. DAVIS: Approximately ten o'clock --
23 no, 10:30, excuse me, we were going into the
24 jail. We were going to sign the kids in. I was
25 going to sign the kids in to see their mother

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2 and I guess, this is hearsay now, I can't say
3 that for sure that this happened, but came from
4 one of the jailers inside of the room area there
5 that Mr. Leubner had called.

6 MR. MOODY: Your Honor --

7 THE COURT: Please, Mr. Moody, sit there.
8 This is not under oath. I'm trying to get some
9 background to find out what's going on here.

10 MR. MOODY: My only question was with
11 respect to hearsay allegations.

12 THE COURT: I know that. I understand
13 that. This is Family Court.

14 Go ahead.

15 MR. DAVIS: That she said that Mr. Leubner
16 had called up there screaming and hollering,
17 that it was his daughter, that she was not to be
18 allowed to go into that room to see her mother.

19 The person, the jailer said that she has
20 read the court order and she's authorizing it
21 and we went in.

22 THE COURT: Okay.

23 MR. DAVIS: The next Monday I was informed
24 by Michelle that one of the jailers had come in
25 and told them that the Director, whoever he is

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there, wanted a copy of her court order.

She gave the court order to whoever. Come to find out she found out later that Fred Cornelius, is what she was told, was requesting the copy of the court order, to talk to the Director or somebody I guess.

The Director tells me on the phone that being that Mr. Leubner is the biological father, no matter what the court order says, that she would not be allowed in the jail.

THE COURT: Okay, which is what Mr. Davis indicated this morning.

Now from the -- I've asked the gentlemen from the jail to come. I would I guess I advise you you have the right to have the County Attorney with you, but what, what's going on?

INVESTIGATOR CORNELIUS: Do you want me to go first?

THE COURT: Yeah.

INVESTIGATOR CORNELIUS: I received a phone call on Friday from Mr. Leubner. He told me that he had an ordered visitation. He had to allow Kimberly to visit with Mr. Davis and --

THE COURT: This is Investigator

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Cornelius. You got that?

Okay. Go ahead.

INVESTIGATOR CORNELIUS: -- with Mr. Davis
and with Melissa.

He told me that his concern was that
Mr. Davis was going to bring Kimberly into the
jail to visit his (sic) mother. He told me that
he did not want that to occur, that he had sole
custody and that he did not want that to occur.

At this point I had no, no knowledge of
any, any order to the contrary. I told him that
I would take care of that, that I would, that I
would instruct the jail personnel not to allow
the, the girl to enter.

THE COURT: Now were you aware of my order
at that time?

INVESTIGATOR CORNELIUS: What's that?

THE COURT: Were you aware that I had
entered an order at that time?

INVESTIGATOR CORNELIUS: No, I wasn't.

THE COURT: Okay.

INVESTIGATOR CORNELIUS: I dropped the
ball on that because I got busy and I never, I
never talked to jail personnel.

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2 The next thing I heard about it was Monday
3 when I came in. I got a message from
4 Mr. Leubner and I called him back and he was, he
5 was upset because he told me that Kimberly had,
6 in fact, gone in and visited in the jail. I
7 told him that I would look into it.

8 I went over to the jail. I checked the
9 visitors' log and I saw that Mr. Davis, Melissa
10 and Kimberly had had a visit with Michelle 10:30
11 Saturday morning.

12 I discussed with the person who was in the
13 control room that morning, which was Marge
14 O'Connell, who received the call from
15 Mr. Leubner that, that Mr. Davis alluded to.

16 She said that she did get a phone call
17 from somebody who, who claimed to be Mr. Leubner
18 and, and had asked that, that we not allow
19 Kimberly into the jail and that he had the
20 authority to say that being that he had sole
21 custody of her.

22 She told me that she had read the, the
23 court papers and that between her and another
24 guard they had determined that, that they were
25 going to allow the visit to occur.

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2 I ran this all by the acting jail
3 administrator, which is Alex Cuipylo. I asked
4 if we had a copy of the court order or whatever
5 paperwork they had read.

6 They then brought, brought me the order
7 that I, I have the copy of here. I read the
8 order and I, I saw where it said it was ordered
9 that the daughter Kimberly was allowed to visit
10 with the mother; and I had some conversations
11 with some other personnel, Alex and, and Steve
12 McLoud, and it was my understanding that if he
13 had sole custody and we weren't directed by you
14 to, to facilitate this, this visitation with
15 Bob, that he had the authority to, to say, no, I
16 will bring her or, no, you know, I will do
17 whatever to comply with the order and if that
18 was a violation of the order, that he'd have to
19 answer to you. We would do what he said based
20 on him having custody of the child. That's
21 where, that's where this, this conversation that
22 Mr. Davis had with Alex came from, is that
23 interpretation of the order.

24 I then called your office immediately
25 thereafter to attempt to get a clarification on

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2 what exactly you wanted us to do with the
3 visitation, whether, you know, whether it
4 mattered which person brought the child or
5 whether it, it -- I wasn't sure what you wanted
6 to do so I wanted to get a clarification on
7 that.

8 THE COURT: Okay. Mr. Moody, anything you
9 want to say?

10 MR. MOODY: Well, Your Honor, firstly, I
11 never received a copy of the order. The --
12 although I was attorney of record, I never --

13 THE COURT: Well, it sat on your desk for
14 a while waiting for you to approve it for about
15 three or four days until I ordered it brought to
16 my office.

17 MR. MOODY: I don't know about that, Your
18 Honor.

19 THE COURT: Your secretary said it was on
20 your desk and that she was going to write a
21 letter approving it at some point in time.

22 MR. MOODY: The revised order was sent to
23 me October 25th. My letter to the Court
24 approving the content of a proposed order was
25 October 26th so it didn't sit on my desk for any

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length of time.

THE COURT: When was the court hearing?

MR. MOODY: On the 20th.

THE COURT: That's six days later.

MR. MOODY: Mr. Leone prepared the order,
not me.

THE COURT: I don't know when it got to
you, Mr. Moody.

MR. MOODY: Well, I have the fax which
shows the date on the top of the fax, October
25th at 11:26 a.m.

THE COURT: It was received by you?

MR. MOODY: Received by us.

THE COURT: All right.

MR. MOODY: So at no time -- then the
following day I sent a letter approving the form
and content of the order.

THE COURT: Okay.

MR. MOODY: Less than 24 hours after it
hit my desk.

I did not receive at any time, point in
time --

THE COURT: I don't think it's necessary.
I think when I ordered it in court, that's the

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order. You were there. Everybody knew what my order was. The order is effective that moment, not when you get it in your little hand signed.

MR. MOODY: Well, the order is effective when it's entered.

THE COURT: It's effective when I say it.

MR. MOODY: The subject minor children may visit with Michelle Davis at the place of incarceration is what the order states.

THE COURT: That's right.

MR. MOODY: And that has happened.

The order doesn't state who was to bring the child to the jail, the order doesn't state when the child was to be --

THE COURT: Well, maybe I was erroneous because I thought we were dealing -- but does your client deny he called the jail and told them not to do it?

MR. MOODY: What my client says is that he wants to bring the child to the jail --

THE COURT: Well, he's not going to.

MR. MOODY: -- and that's not part of the order.

THE COURT: Well, I'm going to, I'll

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change the order. May I see the order?

MR. MOODY: I only have a copy, an unsigned copy.

THE CLERK: Should be a copy right there, Judge.

MR. MOODY: The order is also --

THE COURT: What day, what day or days of the week does -- do the children wish to visit, Mr. Davis?

MR. DAVIS: Saturday morning.

THE COURT: What time?

MR. DAVIS: 10:30.

THE COURT: Any problem with the jail?

ALEX CUIPYLO: No, sir.

THE COURT: All right. I will direct that Mr. Davis -- the order of the Court dated October 20th, effective immediately, not when the parties get around to drawing the order or approving it, will be amended; that the paragraph, decretal paragraph four will read, ordered based upon the incarceration of the natural mother of the subject minor children, Michelle Davis, at the time of the making of this order, the subject minor children may visit

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2 with Michelle Davis at the place of
3 incarceration, said visitation to take place at
4 10:30 Saturday mornings at the jail and that
5 Mr. Davis will pick up Kimberly at the Leubner
6 residence at ten o'clock on that morning for
7 purposes of taking her to the jail and returning
8 her there after the visitation.

9 How long is the visitation normally,
10 Mr. Cuipylo?

11 ALEX CUIPYLO: One hour, sir.

12 THE COURT: Pardon?

13 ALEX CUIPYLO: One hour.

14 THE COURT: One hour.

15 So presumably if it's 10:30, 11:30, she
16 would be home by noon.

17 MR. DAVIS: Your Honor, one thing.

18 THE COURT: Yes?

19 MR. DAVIS: That's the same -- we were
20 going to, to adjoin the visit with Michelle and
21 the visitation for myself, Melissa and Kimberly
22 in the same day. Is that all right?

23 THE COURT: Yeah.

24 MR. DAVIS: And also could I have one
25 other thing clarified for the record, that the

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2 visitation for Melissa and Kimberly to be alone
3 together at the Finger Lakes Mall or whatever it
4 was in the order, does that have to be on the
5 same day that we have visitations with myself,
6 Melissa and Kimberly or can it be a separate
7 day?

8 MR. MOODY: If I may be heard, Your Honor?

9 THE COURT: All right.

10 MR. MOODY: The law guardian's report
11 recommended and it was agreed by and between the
12 parties that the two children, Kimberly and
13 Melissa, would exercise visitation together
14 alone on Saturdays, each and every Saturday,
15 from one p.m. to four p.m. at the Finger Lakes
16 Mall or at some other location.

17 THE COURT: Yep.

18 MR. MOODY: That was a specific schedule
19 that was set forth in the law guardian's report
20 and was approved by the parties.

21 Now the order doesn't reflect that. What
22 the order does state was with respect to
23 visitation by Mr. Davis with the child Kim was
24 that his visitation was to be together with
25 Melissa. That would be the three of them

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2 together, and the schedule was to be agreed upon
3 by and between the parties.

4 There was nothing on the record on October
5 20th with respect to that schedule. The
6 proposed order which I understand was signed by
7 Your Honor and after approval by me, was that
8 the, the Saturday visitation would take place,
9 visitation would take place on Saturday and that
10 would encompass the one to four, the three-hour
11 visitation from one o'clock to four o'clock with
12 Kimberly and Melissa alone; that is, therefore,
13 Mr. Davis would have visitation together with
14 Melissa, with Kim on Saturday.

15 Now if he utilizes that time to take Kim
16 with Melissa to visit with their mother at the
17 jail, then that's, that's up to him. I mean,
18 that's his visitation, but the law guardian's
19 recommendation was very clear with respect to
20 the times and these times were agreed upon by
21 the parties as far as Kim and Melissa were
22 concerned.

23 I would propose, therefore, that Mr. Davis
24 collect Kim at ten a.m. from the residence of
25 Mr. Leubner. The first part of the visitation

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2 is a visit with mother at the jail. Then they
3 would then spend the time from say eleven until
4 one together, have lunch or whatever. Then from
5 one to four the two girls visit together at the
6 mall or some other similar location, and that
7 would then leave them from say four until a
8 reasonable time, six or eight o'clock that
9 evening to have dinner and then return home.
10 Visitation would all be accomplished in the one
11 day, and that was the, the reasoning behind the
12 law guardian's recommendation in that regard.

13 THE COURT: How old is Kim?

14 MR. LEUBNER: She's nine years old, sir.

15 THE COURT: All right. Well, it
16 obviously, we are talking about extreme
17 circumstances here and so everybody is going to
18 have to make some concessions, but the order as
19 it reads, and I will clarify it, that
20 Mr. Leubner will pick up Kim at ten o'clock on
21 Saturday morning --

22 MR. MOODY: Mr. Davis.

23 MR. DAVIS: Mr. Davis.

24 THE COURT: Or Mr. Davis. He will then
25 allow the visitation for Kim presume -- maybe

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2 Melissa and himself, whatever, with Michelle for
3 one hour from 10:30 to 11:30. Then maybe you'll
4 have to have -- the three of you will have lunch
5 and then the girls should be together from one
6 to four, which is what the law guardian
7 entitled, and then at the four you would keep
8 Kim until say eight o'clock and have her home by
9 eight o'clock Saturday evening.

10 MR. DAVIS: Okay. I have one more
11 question, Your Honor.

12 THE COURT: All right.

13 MR. DAVIS: Melissa made a phone call to
14 her law guardian on Monday wanting to discuss
15 Kimmy's demeanor on Saturday of a certain couple
16 items that I won't bring up in the court here
17 now and Melissa is against talking to Michele
18 Driscoll again, that Michele Driscoll has
19 one-sided this whole situation. Melissa said
20 that she tried to talk to her and Michele
21 Driscoll yelled at her about things that she was
22 not calling her about; and Melissa is --
23 honestly, I would rather have her talk to you to
24 be honest with you, Your Honor, because she's
25 having a hard time. She calls her up to tell

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2 her that she's really worried about her sister
3 about a certain item and she gets a completely
4 different conversation on the other end of the
5 phone.

6 So I told Melissa that I would discuss it
7 with you, that the possibility of having
8 separate law guardians. I don't know how that
9 works but she's really upset.

10 THE COURT: How old is Melissa?

11 MR. DAVIS: She's 15.

12 THE COURT: Okay. Have her write me a
13 letter. I will take it under consideration.

14 MR. DAVIS: All right.

15 THE COURT: Anything else?

16 MR. MOODY: One other matter, Your Honor.
17 The child Melissa was required, in fact both
18 children were required to continue in
19 counseling. That was part of the order and one
20 of the recommendations made by the law guardian,
21 and my client has made arrangements for the
22 child Kim to engage in counseling pursuant to
23 the order with Dr. Stephen Coleman.

24 My client has instructed me that at least
25 based upon his medical insurance coverage

2 records Melissa is not in counseling, and we
3 would ask that Your Honor instruct Mr. Davis to
4 ensure that Melissa is involved in counseling.

5 MR. DAVIS: I can stop you now and make it
6 easier. She's got an appointment Wednesday.
7 She's had it set up for three weeks.

8 THE COURT: All right.

9 MR. MOODY: And further, Your Honor, again
10 in accordance with the law guardian's report and
11 placed on the record with the stipulation, the
12 counselor for Melissa was to address her
13 relationship problems with her father as a
14 specific component of the, of the counseling.

15 THE COURT: Okay. Now let me say this to
16 you. The order of this Court supersedes
17 anything, and we are a nation of laws, not of
18 opinions and not of whims.

19 Now, Mr. Leubner, if you've got any
20 thoughts that you may or may not agree with my
21 orders, that's your business; but when you take
22 any action which interferes with my orders, you
23 are treading on very thin ice. You are
24 subjecting yourself to a contempt of court
25 proceeding and you are subjecting yourself to

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six months in the County Jail should I find that. Do you understand that?

MR. LEUBNER: Yes, sir.

THE COURT: All right. Okay.

MR. MOODY: Would you like me to prepare a new order, Your Honor --

THE COURT: Yes, but --

MR. MOODY: -- that will accomodate these changes and then will supersede the prior order?

THE COURT: Right, but the order I'm making is in effect immediately.

MR. MOODY: Yes, yes, the order will reflect that also, and both parties acknowledge that in court.

THE COURT: Okay. Thank you.

MR. DAVIS: Thank you, Your Honor.

MR. MOODY: Thank you, Your Honor.

* * * *

REPORTER'S CERTIFICATION

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5 I, Lisa M. Giacona, do hereby certify that I am an
6 Official Court Reporter of the County Court at Auburn, New
7 York, duly appointed.

8 That I reported in stenotype shorthand the Violation
9 of Visitation had before the HON. PETER E. CORNING, Family
10 Court Judge, on the 3rd day of November, 1999, in the
11 matter of ROBERT DAVIS, PETITIONER, vs. LEROY LEUBNER,
12 RESPONDENT; and

13 That the transcript herewith numbered pages 1 through 28
14 is a true, accurate and correct transcript of those
15 stenotype shorthand notes.

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17
18 DATED AT: Auburn, New York

19 this 12th day of April, 2000

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22 Lisa M. Giacona
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At a Term of the Family Court of the State of New York, held in and for the County of Cayuga on the 20th day of October, 1999.

PRESENT: HON. PETER E. CORNING
JUSTICE PRESIDING

.....
ROBERT DAVIS,
Petitioner,

ORDER

-vs-

Docket No: V1563-99
V1564-99

LERoy LEUBNER,
Respondent.

.....
ROBERT DAVIS,
Petitioner,

-vs-

Docket No: V1562-99

MICHELE DAVIS,
Respondent.

.....
LERoy LEUBNER, JR.,
Petitioner,

-vs-

Docket No: V1456
/1457-99

MICHELE DAVIS,
Respondent.

.....
The Petitions in the above-captioned matters having all been filed with this Court on or about September 14, 1999, and September 27, 1999, the subject of each Petition being the two (2) minor children of Respondent Michele Davis and Petitioner/Respondent Leroy Leubner, to wit: MELISSA LEUBNER, born the 20th day of December, 1983, and KIMBERLY LEUBNER, born the 31st day of December, 1989; and these matters having come before this Court on the 1st day of October, 1999, with Michele Davis present, Robert Davis present and with counsel, to wit: Thomas G. Leone, Esq., and Leroy Leubner present and appearing Pro Se; and the Court having

entered a Temporary Order and directing the parties to appear again before the Court on the 20th day of October, 1999, for the recommendation of the Law Guardian; and the parties having appeared on that date, Robert Davis and Michele Davis present and represented by counsel, to wit: THOMAS G. LEONE, ESQ., and Leroy Leubner present and represented by counsel, to wit: SIMON MOODY, ESQ., and Law Guardian MICHELE DRISCOLL, ESQ., present, whereby the Law Guardian presented her report to the Court; and the parties, having heard the recommendation of the Law Guardian, have stipulated to the entry of a permanent order of this Court;

N O W , Therefore, it is hereby

ORDERED that Robert Davis is hereby granted sole custody of the minor child MELISSA LEUBNER, and that Leroy Leubner shall be entitled to visitation with Melissa as can be arranged directly with Melissa; and it is further

ORDERED that Leroy Leubner is hereby granted sole custody of the minor child KIMBERLY LEUBNER, and Robert Davis and Melissa Leubner together shall be entitled to visitation with Kimberly Leubner not less than one (1) time per week for an eight (8) hour period of time with said visitation to be each and every Saturday; and Melissa Leubner shall be entitled to separate visitation with Kimberly Leubner alone for a three (3) hour period at The Fingerlakes Mall or a place mutually acceptable to the parties, said visitation may be exercised prior to or subsequent to the aforementioned Saturday visitation; and it is further

ORDERED that there may be any further visitation as can be mutually agreed upon between the parties; and it is further

ORDERED based upon the incarceration of the natural mother of the subject minor children, MICHELE DAVIS, at the time of the making of this order, the subject minor children may visit with Michele Davis at the place of incarceration; and it is further

ORDERED that each custodial parent herein is directed to continue counseling for the child in his custody and care; and it is further

ORDERED that there shall be no discussion between the minor children, the natural parents, and/or the custodial parents with regard to the pending criminal case involving Michele Davis; and it is further

ORDERED that no party to this proceeding shall make any comments to any media source, i.e., television, newspaper, radio, etc., which may have any effect, adversely or otherwise, on the minor children of this proceeding; and it is further

ORDERED that each party to this action shall not make any disparaging or derogatory remarks about the other party; and it is further

ORDERED that the terms of this order shall remain in full force and effect until further order of this Court.

Dated: October __, 1999.

E N T E R,

HON. PETER E. CORNING
JUSTICE PRESIDING

APPROVED AS TO CONTENT:

MICHELE DRISCOLL, ESQ.
LAW GUARDIAN

Date: _____

SIMON MOODY, ESQ.
ATTORNEY FOR LEROY LEUBNER

Date: _____

At a term of the Family Court of the State of New
York held in and for the County of Cayuga on the
3rd day of November, 1999.

PRESENT: HON. PETER E. CORNING
JUSTICE PRESIDING

STATE OF NEW YORK FAMILY COURT
COUNTY OF CAYUGA

ROBERT DAVIS.

Petitioner.

vs.

ORDER

LEROY LEUBNER.

Respondent.

Docket No. V1563-99 and V1564-99

ROBERT DAVIS.

Petitioner.

vs.

Docket No. V1562-99

MICHELLE DAVIS.

Respondent.

LEROY LEUBNER, JR.,

Petitioner.

vs.

Docket No. V1456/1457-99

MICHELLE DAVIS.

Respondent.

The parties having filed petitions with respect to the custody of the children of
MICHELLE DAVIS and LEROY LEUBNER, JR., namely: MELISSA LEUBNER, born
December 20, 1983, and KIMBERLY LEUBNER, born December 31, 1989, and the said
petitions having duly come on to be heard before this Court on October 20, 1999, THOMAS G.
LEONE, Esq., having appeared with and on behalf of ROBERT DAVIS, and SIMON K.

MOODY, Esq., having appeared with and on behalf of LEROY LEUBNER, JR., and MICHELLE DAVIS, having also appeared *pro se*, and MICHELLE DRISCOLL, having also appeared as the law guardian for the said children and having submitted a report, and the parties having entered into a stipulation of settlement with respect to the issues raised in the said petitions, and this Court having subsequently entered an Order, and ROBERT DAVIS having thereafter filed a petition alleging that LEROY LEUBNER, JR., had violated the terms of the said Order, and that petition having duly come on to be heard before this Court on November 4, 1999, ROBERT DAVIS having appeared *pro se*, and SIMON K. MOODY, Esq., having appeared with and on behalf of LEROY LEUBNER, JR., and due deliberation having been had and this Court having clarified and revised the terms of the prior Order.

NOW, it is hereby

ORDERED, that ROBERT DAVIS, is hereby granted sole custody of the child,

MELISSA LEUBNER, and it is further

ORDERED, that LEROY LEUBNER, JR., is hereby entitled to visitation with the child,

MELISSA LEUBNER, at such times and for such periods of time as can be agreed and arranged by and between LEROY LEUBNER, JR. and the child, MELISSA LEUBNER; and it is further

ORDERED, that LEROY LEUBNER, JR., is hereby granted sole custody of the child,

KIMBERLY LEUBNER; and it is further

ORDERED, that ROBERT DAVIS is hereby entitled to visitation with the child,

KIMBERLY LEUBNER, with such visitation to occur in the presence of the child, MELISSA LEUBNER, on Saturday of each week from 10:00 A.M. until 8:00 P.M., save and except that the said children shall visit together, without the presence of any other party from 1:00 P.M. until 4:00 P.M. each and every Saturday, with such visits by and between the said children to take

place at the mall or a similar location; and it is further

ORDERED, that ROBERT DAVIS shall provide transportation for purposes of collecting and returning the child, MELISSA LEUBNER, from and to the residence of LEROY LEUBNER, JR., at the commencement and termination of each visitation period; and it is further

ORDERED, that the said children shall be entitled to visit together at such times and for such reasonable periods of time as the parties and the said children may mutually agree, and the parties shall encourage the said children to exercise such additional visitation; and it is further

ORDERED, that as a result of the present incarceration of MICHELLE DAVIS, the said children may visit with her at her place of incarceration, with such visitation to occur on Saturday of each week from 10:30 A.M. until 11:30 A.M.; and it is further

ORDERED, that ROBERT DAVIS shall provide transportation for the said children in order that they may exercise visitation with MICHELLE DAVIS, during her present incarceration at the place of her incarceration; and it is further

ORDERED, that ROBERT DAVIS and LEROY LEUBNER, JR., shall insure that the child in their respective care and custody shall continue in counseling, and ROBERT DAVIS shall also insure that the relationship problems experienced by the child, MELISSA, and LEROY LEUBNER, JR., are addressed by her counselor; and it is further

ORDERED, that there shall be no discussion by and between the said children and/or the parties, and the parties shall not permit any discussion by and between third parties in the presence of the said children, with respect to the criminal case that is pending against MICHELLE DAVIS; and it is further

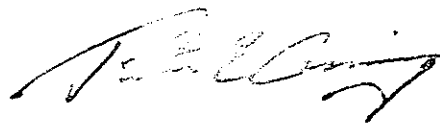
ORDERED, that the parties shall refrain from making any comments to any media source, including but not limited to, television, newspaper, radio, or any other media source.

which may have any effect, adversely or otherwise on the said children; and it is further

ORDERED, that the parties shall refrain from making any disparaging or derogatory remarks about each other in the presence of the said children.

Dated: November 21, 1999
Auburn, New York

E N T E R



HON. PETER E. CORNING
Justice Presiding

Williams Heint Moody, P.C.
Attorneys & Counselors at Law

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Auburn, NY 13021

Phone (315) 253-4050

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Roberta G. Williams

James Heint

Simon K. Moody

March 5, 2001

Admitted in Australia

Cayuga County Family Court
Courthouse
Auburn, New York 13021

Attn: Hon. Peter E. Corning

RE: Davis v. Leubner

Dear Judge Corning:

I refer to the above-referenced matter in which you have invited me to submit a Memorandum of Law in connection with the issue of standing for petitioner to seek visitation with Kimberly Leubner.

The seminal case addressing the rights of a non-parent to seek visitation with a child in the custody of the biological parent is the Court of Appeals Decision in *Alison D. v. Virginia M.*, 77 NY2d 651.

In that case, the petitioner, who was not the biological or adoptive parent of the child, who was in the custody of his biological mother, did not have standing to seek visitation with the child. The petitioner was not a "parent" within the meaning of section 70 of the Domestic Relations Law. The petitioner was determined to have no right under section 70 of the Domestic Relations Law to seek visitation, and, thereby, limit or diminish the right of the biological parent to choose with whom her child associated.

The Court of Appeals expressly stated in *Alison D. v. Virginia M.*, *supra*, that "section 70 should not be read to include categories of non-parents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child".

The case of *Alison D. v. Virginia M.*, *supra*, involved a gay couple who had both raised a child, although the child was born to the respondent. When their relationship terminated, the petitioner sought to have visitation with the child, with whom she had developed a substantial relationship, on the basis that she had acted as a "de facto" parent or that she should be viewed as a parent "by estoppel".

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The Court of Appeals, in rejecting the argument by petitioner, held that the biological parents, assuming they are fit, have the right to the care and custody of their child, even in situations where the non-parent has exercised some control over the child with the consent of the parents. (See *Matter of Ronald FF v. Cindy GG*, 70 NY2d 141).

The Court of Appeals went on to state, in citing *Matter of Ronald FF v. Cindy GG, supra*, that “it has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity”. (See also, *Matter of Bennett v. Jeffreys*, 40 NY2d 543).

The Court of Appeals stated, with some emphasis, that “to allow the Courts to award visitation – a limited form of custody – to a third person would necessarily impair the parent’s right to custody and control”.

The Court of Appeals in *Alison D. v. Virginia M., supra*, compared the effect of section 70 of the Domestic Relations Law with respect to the rights of non-parents to the situation in the State of Oregon, where a foster parent, step-parent, or grandparent who has established emotional ties creating a child-parent relationship with a child did have the right to seek visitation. Section 70 of the Domestic Relations Law does not afford non-parents such rights in New York.

In *Matter of Boland v. Boland*, 186 AD2d 1065, the Court expressly stated, citing *Matter of Alison D. v. Virginia M., supra*, that a step-parent was denied standing to seek visitation.

The issue of whether or not contact between a non-parent and a child is in the best interest of the child cannot be reached until the issue of standing has been resolved. In the absence of any determination that the biological parent is unfit, the issue of standing for a non-parent to seek visitation must be resolved in favor of the biological parent and the “best interest” of the child will not be considered. See *Matter of Emanuel S. v. Joseph E.*, 78 NY2d 178.

In *Matter of Bassette v. Saratoga County Commission of Social Services*, 209 AD2d 838, in a discussion with respect to the rights of non-parents to seek visitation, the Court held that a non-parent has no right to seek visitation which would limit or diminish the right of the biological parent, who has not been found to be unfit, to choose with whom their children associate.

The petitioner in the case at bar, Robert Davis, is a step-parent of Kimberly Leubner. Pursuant to Domestic Relations Law section 70 and the Court of Appeals decision in *Alison D. v. Virginia M., supra*, he is not a parent and, therefore, has no standing to seek

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Page 3

visitation with Kimberly Leubner in the circumstances. My client, Leroy Leubner, is the biological parent and he has not been determined to be unfit. Consequently, he has the inalienable right to choose with whom his child associates, notwithstanding the extent to which Robert Davis may have established emotional ties with the child.

Wherefore, it is respectfully submitted that the petition for visitation filed by Robert David must be dismissed and resolved in favor of Leroy Leubner on the basis that Robert Davis is not a parent, as that term is defined under section 70 of the Domestic Relations Law, and there has been no determination that Leroy Leubner is an unfit parent.

Respectfully submitted,

SIMON K. MOODY

SKM:ss
Enclosure

Cc: Florence Ramsey, Esq.
Leroy Leubner