



**IN THE CIRCUIT COURT OF DEKALB COUNTY, ALABAMA**

<b>J.S.,</b>	)	
<b>PLAINTIFF,</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO. DR 2009-900024</b>
	)	
<b>L.B., Jr.</b>	)	
<b>DEFENDANT.</b>	)	

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STAY**

Comes now Plaintiff, by and through undersigned counsel, and objects to a stay as to *Pendente Lite* custody and states as follows:

1. Pending before this Court is the Plaintiff's Petition to Void the Divorce Decree entered in this matter and to Void the Marriage. There are two minor children at issue in this matter. In the Divorce Decree, the Defendant was awarded physical custody of the minor children with the Plaintiff receiving visitation. In 2012, the Juvenile Court exercised jurisdiction over the children and awarded physical custody of the minor children to the Plaintiff with the Defendant to have visitation. At the time of the filing of this Petition, the Juvenile Court of DeKalb County maintained jurisdiction over the minor children. That jurisdiction has now been vacated by the Court of Civil Appeals, resulting in the only order regarding these children being the 2009 Divorce Decree which gave physical custody of the minor children to the Defendant;
2. After the Court of Civil Appeals' Opinion, the Plaintiff filed a motion for *Pendente Lite* Custody of the minor children. It is this *Pendente Lite* motion that is set for hearing on May 29, 2018;
3. The children were born out of wedlock. The Defendant's name is not on the children's birth certificates. The divorce complaint and agreement of the parties

- purport to establish paternity of the children. The underlying marriage is void *ab initio* due to the Defendant being the maternal uncle of the Plaintiff and thus within the prohibited degrees of persons who can legally marry;
4. It is the understanding and belief of the Plaintiff that the Defendant is under investigation for incest and rape in the second degree. The oldest child at issue was conceived when the Plaintiff was 15 years old and the Defendant was over 20 years of age;
  5. Plaintiff agrees that there is a parallel criminal proceeding. However, a parallel criminal proceeding is not the only prong when determining whether to stay civil proceedings. The Court is to "consider[ ] three issues when deciding whether to issue the writ of mandamus and stay the [civil] proceeding: (1) whether the civil and criminal proceedings [are] parallel; (2) whether [the movant]'s Fifth Amendment protection against self-incrimination [is] threatened by his testifying in the [civil] proceeding; and (3) whether the requirements of the balancing test established in *Ex parte Baugh*, 530 So.2d 238, 244 (Ala.1988), [are] met. ..." *Ex parte Flynn*, 991 So.2d 1247, 1253 (2008)
  6. Furthermore, a stay of the entire proceedings is not always appropriate. There are times in which the case can go forward in a limited way. *Ex Parte Ebbbers* 871 So.2d 776, 787 (Ala. 2003). "A court has the discretion to stay civil proceedings, to postpone civil discovery, or to impose protective orders and conditions in the face of parallel criminal proceedings against one of the parties when the interests of justice seem to require. Such interests include the need "to protect a

party or person from annoyance, embarrassment, oppression, or undue burden or expense". *Id.* 787;

7. As for the second prong, the Plaintiff has self-authenticating documentation that establishes the blood relationship between the parties. Furthermore, DNA testing can establish the blood relationship between the Plaintiff and Defendant as well as whether or not the Defendant is the biological father of the children. It is the understanding and belief that there has been DNA seized as part of the criminal investigation. Therefore, there are sufficient other methods of proof without the necessity of the Defendant testifying with the potential for self-incrimination. If he desires to deny paternity, that needs to be asserted so that this Court and Plaintiff can proceed accordingly;
8. The third prong is to balance the interest of the parties or other people who have an interest in the case. *Id.* 790. In this matter, the best interest of children is at issue. The Defendant's right against self-incrimination must yield to the interest of these children, as to their safety and well-being, at least *Pendente Lite*. The Defendant is under investigation for two sex offenses. Furthermore, in 2014, the Defendant was determined not guilty by reason of mental disease and defect in a criminal matter in this jurisdiction in CC 2013-517. *See*, Exhibit "A" attached hereto and incorporated herein. Defendant had additional criminal matters in Tennessee in 2010, one of which included allegations of choking a law enforcement official and attempting to remove his duty weapon. *See* attached Exhibit "B" attached hereto and incorporated herein. According to Hamilton County, Tennessee online records, the Defendant entered a plea to misdemeanor assault. *See*, attached Exhibit "C" attached hereto and

incorporated herein. It is the understanding and belief that the Defendant maintains he has a mental disorder, though he is not under the care of a mental health professional. This is the person who - under the only current order of custody regarding these children – has custody of the two minor children. Therefore, the Defendant’s interest in staying these proceedings must yield, at least for *Pendente Lite* purposes, for the Court to determine custody of these children;

9. Furthermore, to stay the proceedings prior to issuing a *Pendente Lite* custody order results in the children being in the custody of a person for whom they’ve only seen occasionally since the 2012 Juvenile Court intervention. These children have been in the care, custody, and control of the Plaintiff since 2012. To stay the proceedings prior to issuing a *Pendent Lite* custody order will uproot these children, placing them in a home with someone whom they’ve had little to no contact in the last 6 years, and would be a tremendous injustice to those children;
10. As noted above, there have been material changes of circumstances since the 2009 Divorce Decree that require a change of custody permanently and *Pendente Lite*. The protection and best interest of these children outweigh the Defendant’s request for a stay at least *Pendente Lite*.

Wherefore, premises considered, Plaintiff Objects to a stay for *Pendente Lite* custody determination, and reserves any further objections or agreements as to a stay of the remainder of the case after a *Pendente Lite* custody determination.

Respectfully submitted this 28<sup>th</sup> day of May, 2018.

/s/Tanya D. Hallford  
Tanya D. Hallford [HAL078]  
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**CERTIFICATE OF SERVICE**

I hereby certify I have serve a true and correct copy of the foregoing pleading on counsel for Defendant via the Alafile system on the 28<sup>th</sup> day of May, 2018.

/s/Tanya D. Hallford