At a term of the IDV Supreme Court of the State of New York, held in and for the County of Westchester, at Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, NY 10601, on the 14th day of November, 2022.

PRESENT: Hon. Susan M. Capeci, A.J.S.C.

ALLAN KASSENOFF,
Plaintiff,

-against-

CATHERINE KASSENOFF,
Defendant.

DECISION AND ORDER FOLLOWING HEARING
Index #58217/2019

(Mot. Seq. #45 & 47)

In this matrimonial proceeding, the defendant wife moved by Order to Show Cause, signed on December 1, 2021 (Lubell, J.), seeking the following relief: 1) vacating the Amended Third Order Approving Attorney for the Children ("AFC") Compensation; 2) directing a hearing on the fee application of the AFC for the period from October 21, 2020, through September 30, 2021; and 3) vacating that portion of the Amended Third Order Approving Attorney for the Children Compensation which directed payment to the AFC from the proceeds of the sale of the parties former marital property located in New Rochelle, presently being held in escrow by plaintiff's counsel. The signed Order to Show Cause ordered that pending the hearing and determination of this application, the Amended Third Order Approving Attorney for the Children Compensation was stayed.

This Court previously ordered that a hearing be held on the wife's motion contesting the fees charged by the AFC for the period from October 21, 2020, through

September 30, 2021, which totalled $113,331.00, as set forth in the Amended Third Order Approving Attorney for the Children Compensation. By Order dated April 14, 2022 (NYSCEF doc. 2247), the hearing was then limited to the wife's claim contesting the reasonableness of the AFC's fees under the Amended Third Order Approving Attorney Compensation, as the wife had not made a *prima facie* showing of legal malpractice at that time. On June 27, 2019, the Judge then presiding over this matter, issued an Order Appointing Privately Paid Counsel (Carol Most, Esq.), which provided for a division of fees payable to the AFC, with the plaintiff paying 80% and the defendant paying 20%, which remains in effect. The parties each submitted post-hearing briefs on this matter, and the AFC submitted a Reply, which have been considered by the Court. The Court now finds as follows.

At the hearing, Ms. Most testified as to the time she spent on this matter, and provided her billing records, which included, inter alia, time spent reading and sending emails. Although she had not been ordered to do so by the Court, Ms. Most offered to produce all the emails she billed for on this case, to substantiate the reasonableness of her fees. However, she apparently deleted a number of the emails pertaining to this case without providing a reason, other than it was something done by her "IT guy." Ms. Most also testified that she "blacked out" some of the emails that had been sent to her by the father in this case, because they were inflammatory.

A determination of the reasonableness of lawyers' fees is to be determined in consideration of the following factors: time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client

from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved (Matter of Freeman, 34 NY2d 1, 9 (1974); see also Laffey v Laffey, 174 AD3d 582, 586 (2d Dept 2019) (counsel's fees are measured by the fair and reasonable value of the services rendered).

However, an attorney who is discharged for cause is not entitled to compensation (Callaghan v Callaghan, 48 AD3d 500, 501 (2d Dept 2008); see also Campagnola v Mulholland, Minion & Roe, 76 NY2d 38, 44 (1990)). "Although the New York courts have not explicitly defined "cause," the case law reflects that it means that the attorney has engaged in some kind of misconduct, has been unreasonably lax in pursuing the client's case, or has otherwise improperly handled the case" (Garcia v Teitler, 2004 WL 1636982, at *5 (E.D.N.Y. July 22, 2004), aff'd, 443 F.3d 202 (2d Cir. 2006)). "The attorney for the child is subject to the ethical requirements applicable to all lawyers, including but not limited to ... becoming a witness in the litigation" (Rules of the Chief Judge 22 NYCRR § 7.2[b]); Naomi C. v Russell A., 48 AD3d 203, 204 (2d Dept 2008)).

Considering that by her own conduct, the AFC caused her removal from the case, with the resulting necessity of the appointment of new counsel for the children, who will have to familiarize themselves with this involved, highly litigated matrimonial matter, Ms. Most should not be entitled to any fees. The Court must deny her application for fees contained in the Amended Third Order Approving Attorney for the Children Compensation.

It is of significant note that this Court, by Decision and Order dated October 4, 2022, disqualified and removed the AFC in this case, and appointed three separate

attorneys to represent the children individually. As more fully set forth in that Decision and Order, the Court removed the AFC, Ms. Most, for a host of reasons, taken in their totality. One of the reasons noted was her violation of the witness-advocate rule (see Rules of the Chief Judge 22 NYCRR § 7.2[b]), whereby this Court found she improperly acted as a witness against the mother in these proceedings, by arguing nonrecord facts and hearsay to denigrate the mother to the Court (see Cervera v Bressler, 50 AD3d 837, 840–41 (2d Dept 2008)).

In addition, she also created an appearance of impropriety by hiring, as an associate at her small four person firm, the Assistant District Attorney who had just prosecuted the [dismissed and sealed] criminal case against the mother, who would have necessarily had access to confidential information. She had never disclosed the hiring of this former Assistant District Attorney to the Court, or to the mother, even during the course of this hearing, where she was specifically questioned as to how many associates were in her firm and when the last one was hired. She did not implement any screening procedures in her office to prevent disclosure of any confidential information regarding the mother from this associate.

As noted by the Court in prior decisions in this matter, the hostility the AFC had towards the mother was plain, and she took frequent opportunities to denigrate the mother to the Court with nonrecord facts and hearsay. Given her lengthy experience in this area of law, it is all the more troubling that she allowed herself to be swayed in this manner, and that she was unable to see the effect this hostility had on her representation of the children.

Further, although the AFC was never required by the Court to turn over any emails she had billed for in the case, once she stated she would fully disclose her emails to support her billing records, it became relevant that a number of them had actually been deleted without explanation. She also "blacked out" some of the emails that had been sent to her by the father, citing to their inflammatory nature, when she had no duty or obligation to hide anything on his behalf. This action only demonstrates her unusual alignment with the father in this case. It is this Court's view that the AFC abdicated her responsibility to the children by causing her own removal from this case, for all the reasons more fully set forth in this Court's Decision and Order dated October 4, 2022. Accordingly, her application for fees is denied.

This constitutes the Decision and Order of this Court.

Dated: November 14, 2022
White Plains, NY

Hon. Susan M. Capeci, A.J.S.C.