

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

CHRISTIAN E. STEPIEN, :
Appellee/Plaintiff :
 :
vs. : No. 15-1186
 :
SUZANNE M. STEPIEN, :
Appellant/Defendant :
 :

Joseph V. Sebelin, Jr., Esquire Counsel for
Appellee/Plaintiff
Robert Frycklund, Esquire Counsel for
Appellant/Defendant

MEMORANDUM OPINION

Matika, J. - June 30 , 2022

This opinion is provided to the Appellate Court in response to the Appeal filed on May 3, 2022 by the Appellant/Defendant, Suzanne M. Diaz, f/k/a, Suzanne M. Stepien (hereinafter "Diaz"). For the reasons stated herein, this Court would request the Superior Court to quash, or in the alternative, dismiss the appeal and affirm our decision.

FACTUAL AND PROCEDURAL BACKGROUND

This custody action began on June 10, 2015 with the filing of a custody complaint by the Appellee/Plaintiff, Christian E. Stepien (hereinafter "Stepien"). Many years and many filings have come and gone during these contentious custody proceedings. The latest modification of custody filing occurred on February 7, 2020

when Stepien sought a modification of primary physical custody. After not resolving the matter before the Hearing Officer, the matter was scheduled for a Pre-Trial Conference with the undersigned on July 1, 2020. When this conference did not result in a resolution, it was thereafter scheduled for a Custody Trial on November 3, 2020. In the meantime, what brings this matter to the Appellate Court seven years after this began is the filing on July 9, 2020, of "Defendant, Suzanne M. Diaz's Motion for Mental Health Assessment of Plaintiff, Christian E. Stepien Pursuant to Pa.R.C.P. 1915.8¹." As a result, on September 2, 2020, a hearing was held on the Motion for the Mental Health Assessment. At that hearing, over the objection of Stepien, Diaz presented testimony, including from the two minor children outlining a number of incidents which called into question the mental stability of Stepien. After this hearing, the parties were given the opportunity to lodge legal memorandums in support of their respective positions. Thereafter, on September 30, 2020, this Court granted Diaz' request and directed that a psychological evaluation be performed on Stepien. This order also set forth the

¹ Pa. R.C.P. reads in pertinent part, "(a) The court may order the child(ren) and/or any party to submit to and fully participate in an evaluation by an appropriate expert or experts. The order, which shall be substantially in the form set forth in Rule 1915.18, may be made upon the court's own motion, upon the motion of a party with reasonable notice to the person to be examined, or by agreement of the parties. The order shall specify the place, manner, conditions and scope of the examination and the person or persons by whom it shall be made and to whom distributed.

time and expense parameters for how this evaluation was to occur.²

On November 3, 2020, the Custody Trial began, however, it did not conclude that day and a second day was set aside "for the purpose of taking testimony relating to the mental health evaluation of Christian Stepien."³ The second day set aside for this expert testimony was January 26, 2021. On this date, Diaz made an oral motion to vacate the September 30, 2020 Order pertaining to the mental health evaluation as "she no longer wishes to pursue her request that the Plaintiff, Christian E. Stepien undergo a mental health evaluation."⁴ A final order was thereafter issued on February 16, 2021 on Stepien's Petition for Modification. Thereafter, on April 20, 2021, Stepien filed a Motion for Sanctions. In that motion, Stepien argued that he should be awarded attorney fees based upon the fact that Diaz filed the motion to have him evaluated, which he vigorously defended, and then after Stepien complied with his obligations under the Order, Diaz abandoned this part of her defense of the Petition for Modification of Custody filed by Stepien. Stepien believes that he is entitled to these fees pursuant to 23 Pa.C.S.A. §5339 and 42 Pa.C.S.A. §2503.

Diaz argued that Stepien is not entitled to attorney fees as

² See September 30, 2020 Order attached hereto.

³ See Order of Court dated November 3, 2020.

⁴ See Order of Court dated January 26, 2021.

a result of her failure to abandon the mental health evaluation which she claimed was done purely for financial reasons.⁵ In so arguing, she claimed that Stepien cannot recover attorney fees since the order on which he relies had been vacated several months earlier.

On November 29, 2021, this Court issued an order granting Stepien's Motion for Sanctions and awarded him \$1,998.75, the counsel fees expended by Stepien in defense of Diaz' Motion for the Mental Health Evaluation. In a footnote⁶ to that order, this Court briefly explained our rationale for finding in favor of Stepien.

On December 9, 2021, Diaz filed a Motion for Reconsideration pursuant to Pa.R.C.P. 1930.2, which we expressly granted on December 16, 2021 pending further hearing and argument. Stepien filed an answer to this Motion for Reconsideration arguing that not only did the motion have no merit but that the Motion for

⁵ Mother testified to this at the August 11, 2021 hearing. She claimed that despite her husband receiving a \$150,000.00 inheritance during the pendency of the ongoing custody dispute, these monies were "largely exhausted on vehicles, a new home and other necessary purchases." As a result, she could not afford the costs of the evaluation she pursued and demanded be performed on Stepien.

⁶ The referenced footnote read, "At that hearing, the Defendant, Suzanne M. Diaz, f/k/a Suzanne Stepien claimed she did not have the financial resources to pay for the assessment and, if necessary, to also pay for that person to testify at trial. This claim is suspect based upon the testimony involving her household income and assets at that time. Notwithstanding, prior to filing the motion, Defendant had an obligation to investigate the consequences of her motion in the event the Court granted it, including any costs associated therewith. Her failure to do so, prior to the court ultimately entertaining and granting that motion, and then her abandoning the issue resulted in the Plaintiff, Christian E. Stepien unnecessarily expending monies he would not have otherwise needed to expend had the motion not been filed."

Reconsideration should have been filed pursuant to Pa.R.A.P. 1701(b)(3) and not Pa.R.Civ.P.1930.2, as the latter does not permit post-trial relief in domestic matters and it also makes reference to motions for reconsideration being filed pursuant to the above referenced appellate rule.⁷

On April 12, 2022, this Court denied further relief to Diaz on her Motion for Reconsideration and reinstated the Order of November 29, 2021 requiring her to reimburse Stepien the sum of \$1,998.75. Thereafter, on May 3, 2022, Diaz filed the instant appeal. Pursuant to our order directing its filing, Diaz filed a timely concise statement of matters complained of on appeal.

In this concise statement, Diaz claims that this Court "committed an error of law, abused its discretion or otherwise ruled improperly" as outlined in nine (9) separate paragraphs. A review of these claims would suggest that they are in some respect overlapping and/or repetitive. Thus, this Court would summarize these alleged claims, errors, abuses and/or improper rulings as follows:

1. An award for counsel fees without first adjudicating Diaz guilty of contempt, a finding of which could not be established;
2. An award of counsel fees for Diaz' failure to follow

⁷ This Court found that Diaz had followed the proper procedure for seeking reconsideration in accordance with both Pa.R.Civ.P. 1930.2 and Pa.R.A.P. 1701(B)(3).

through on a vacated order;

3. An award of counsel fees without "substantial credible and properly authenticated evidence" in support thereof;
4. By ruling in favor of Stepien when at the hearing evidence was adduced from Diaz' regarding her financial situation that included her husband's \$150,000.00 inheritance; and
5. By determining that Diaz had an obligation to investigate the consequences of her request, financial and otherwise, before she filed her motion for a mental health evaluation of Stepien.

Unless otherwise waived, this Court will address the merits of each claim seriatim.

LEGAL DISCUSSION

A. UNTIMELY APPEAL

As a preliminary matter, but also as a matter which we believe is dispositive, Diaz did not timely file the appeal. In her Notice of Appeal, Diaz references to the November 29, 2021 Order of Court as the Order from which she appeals. Needless to say, this order was expressly reconsidered and vacated in our Order of Court of December 16, 2021. Thereafter, after hearing and argument, we reaffirmed the November 29, 2021 determination and reinstated that Order on April 12, 2022. Thus, it should have been the April 12, 2022 Order that Diaz should have appealed and not the November 29, 2021 Order. Since that was not accomplished and the appeal period

has run on the April 12, 2022 decision, this Appeal should be quashed. [See Pa.R.A.P. 1701(b)(3)(ii)].

B. MERITS OF APPEAL

As noted, on April 20, 2021 Stepien filed his Motion for Sanctions pursuant to 23 Pa.C.S.A. §5339 which reads “[U]nder this chapter, a Court may award reasonable interim or final counsel fees, costs and expenses to a party if the court finds that the conduct of another party was obdurate, vexatious, repetitive or in bad faith.” Diaz argues that the Court was wrong to award such counsel fees.

I. NO FINDING OF CONTEMPT

Diaz first argues that the Court cannot award Stepien counsel fees without first finding her in contempt of a court order. This claim is erroneous. In *Dong Yuan Chen v. Sadi*, 100 A.3d 587, 591 (Pa. Super 2014), the Court stated that “[S]ection 5339 provides the authority for the award of counsel fees and costs in custody matters, not only in cases of contempt, but also in cases where a party’s conduct is obdurate, vexatious, repetitive or in bad faith.” (emphasis ours). Thus, it is not necessary for the Court to find that Diaz was in contempt of a court order before awarding counsel fees.

II. VACATED ORDER

Diaz next argues that because the order, which is the subject of the award of counsel fees, was vacated on January 26, 2021, she

cannot be responsible for the payment of these counsel fees. This Court would agree with Diaz had the basis for the Court's finding of a sanction been as a result of Diaz' conduct after that order was vacated. However, in the case *sub judice*, Stepien's Motion for Sanctions was for Diaz' conduct before the January 26, 2021 Order, Stepien alleges that Diaz' conduct occurred in a time frame between the filing of the Motion for a Mental Health Assessment and the vacating of the Order on January 26, 2021. There, Stepien's motion claimed that as a result of Diaz abandoning her efforts to include Stepien's mental health status as an issue in the custody case, he was entitled to recover counsel fees. All of the actions that Stepien based his motion on occurred prior to that order being vacated. Therefore, Stepien was within his rights to seek these counsel fees and the Court was correct in finding that the award of counsel fees was for Diaz' conduct prior to the Order was vacated of January 26, 2021.

III. COURT'S FINDING OF AN AWARD OF COUNSEL FEES WAS BASED UPON UNSUBSTANTIATED, CREDIBLE AND PROPERLY AUTHENTICATED EVIDENCE

As to this claimed error, this Court believes Diaz is arguing that Stepien failed to produce and the Court improperly awarded counsel fees that were not properly identified on the invoice presented in support of Stepien's motion.

As noted in the hearing, Counsel believed there may have been an error on that invoice. Nonetheless, the Court accepted this

invoice but parced from it charges it felt were not recoverable for the purposes of which this motion was filed. Accordingly, the Court reduced the amount of counsel fees and costs sought to the amount of \$1,998.75 representing fair, reasonable and appropriate fees. This Court does not believe there was error in that calculation.

IV. DIAZ' FINANCIAL SITUATION

This Court believes that Diaz is complaining that the Court, at the hearing on the Motion for Sanctions, should not have examined Diaz relative to evaluating her income and assets available to her at the time she sought the order for the mental health assessment. It should be noted that as part of, if not the main reason Diaz abandoned the issue of Stepien's mental health status for the trial, was her claimed inability to pay the costs of the assessment in accordance with the Order of September 30, 2020.

It should first be noted that Pa.R.Civ.P. 1915.8 addressed the issue of the allocation of costs [Pa.R.Civ.P. 1915.8(a)(i)]. In the Order of September 30, 2020 which granted Diaz' motion, the Court further outlined who was responsible for the initial evaluation, taking into consideration any available insurance coverage, who should be responsible to reimburse/pay the other depending upon the outcome of the evaluation and also that the party intending to call any expert at trial would be responsible

for those costs. With these financial obligations in mind and knowing full well what her responsibilities would include, Diaz pressed forward. Once she abandoned this process and filed the Motion for Sanctions, it was appropriate for the Court to determine if Diaz was credible in her assertion that she could not afford the costs associated with her request. Accordingly, it was appropriate to inquire into her income and assets, including her husband's recent inheritance in determining whether her intent to abandon this process was financially motivated or something else. Therefore, inquiring into and determining that financial distress was not present when the September 30, 2020 Order was issued, was proper.

V. INVESTIGATE CONSEQUENCES BEFORE FILING MOTION

Diaz next argued that it was error for the Court to "retroactively determin[e] that Ms. Diaz had an obligation to investigate the consequences of her motion in the event the Court granted it."

In the Order of November 29, 2021 granting Stepien's Motion for Sanctions, we noted that the award of counsel fees as a sanction for Diaz' abandoning this issue, would not have been awarded had Diaz followed through with what was granted or had she never filed it in the first instance. In the footnote to that November 29, 2021, this Court simply stated, . . . "[Diaz] had an obligation to investigate to consequences of her motion in the

event the Court granted it, including any costs associated therewith." Any party, represented by learned and experienced counsel, needs to know the consequences of the filing of any motion. This Court can only assume Diaz was in fact advised⁸ of the ramifications of filing this motion, having the motion granted, the conditions regarding allocations of costs and the effect of abandoning that motion at a later point. Thus, the comment mentioned here simply refers to the fact that a party must be cognizant of any action they take during litigation; it could have consequences. Questioning a person's mental health status, especially in custody cases is a precarious thing to do. Additionally, placing minor children on a witness stand to testify as to their emotional and mental state as a result of a claimed mental health deficiency in the other parent could be dangerous insofar as the impact on those children is concerned. To succeed, regardless of these impacts, in having a court grant the motion for a mental health assessment, then benefits that party at trial if it is determined that the other party does in fact have such a mental health deficiency. In the case *sub judice*, Stepien vehemently opposed the granting of this motion. Further, he objected to Diaz having the children testify for the very reasons noted herein. Diaz should have been cognizant of these impacts

⁸ This Court did not inquire of this point as we did not feel that it was appropriate to potentially invade the province of the attorney-client privilege.

prior to pursuing this assessment. Further, she should have been equally cognizant of the consequences of the abandoning of this issue and the assessment after subjecting the children and Stepien to this process.

VI. OBDURATE, VEXATIOUS, REPETITIVE OR BAD FAITH CONDUCT

As previously noted, this Court granted Stepien's Motion for Sanctions in the form of counsel fees pursuant to 23 Pa.C.S.A. §5339 which allows for such when a party's conduct was "obdurate, vexatious, repetitive on in bad faith." Interestingly, Diaz does not complain that the Court erred in awarding these fees on that basis that her conduct was not obdurate, vexatious, repetitive or in bad faith. "Issues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Accordingly, for purposes of this Appeal, this critical issue is waived.

CONCLUSION

For the above reasons, this Court requests that the Appeal be quashed or alternatively dismiss the Appeal and affirm our decision.

BY THE COURT:



Joseph J. Matika, J.