

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

SB,		: No. 09-20,268
	Plaintiff	:
		:
vs.		: CIVIL ACTION - LAW
		:
JB-S,		:
	Defendant	: CUSTODY

ORDER

AND NOW, this 3rd day of **November, 2014**, after a hearing which began on July 31, 2014 and which was continued on September 24, 2014, in regard to the Petition for Counsel Fees, Costs, and Expenses Pursuant to 23 Pa. C. S. § 5339 filed by Father. At both hearings Father was present and was represented by John Abom, Esquire. Mother was present and was unrepresented at the hearing which began July 31, 2014. At that time Mother requested a continuance of the hearing to allow for her to secure counsel. The Court initially denied Mother’s request. However, upon learning Mother was under a criminal investigation in a related matter the Court granted Mother’s request for a continuance. Mother did not appear at the time set for the September 24, 2014 hearing.

Pursuant to 23 Pa. C. S. § 5339. “Award of counsel fees, costs and expenses, 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”.

A recent Superior Court case has discussed this statute and its interpretation.

“Here, the court relied on section 5339 of the Child Custody Act as the basis for the award. No case law exists regarding interpretation or construction of this statute. The statute was adopted as proposed, with legislative remarks on the overall goal of the new custody law, but without legislative comment with respect to counsel fees. Section 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." Section 5339 states: Under 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.²³ Pa.C.S. § 5339 (emphasis added). This language is essentially identical to the language in sections 2503(7) and (9) of the Judicial Code, 42 Pa.C.S. § 2503, which allows an award of counsel fees under the following circumstances:

(7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.⁴² Pa.C.S. §§ 2503(7), (9).

The distinction between section 5339 of the Domestic Relations Code and section 2503 of the Judicial Code is simply the addition of the word "repetitive." As one commentator has noted, "[r]epetitive conduct is a serious concern since Pennsylvania liberally allows custody modification actions to be filed[.]"...

Because this is a matter of first impression, we are inclined to look to case law interpreting section 2503 for guidance in determining whether Husband's conduct rose to the level warranting an award of counsel fees to Wife. A suit is vexatious, such as would support an award of counsel fees, if it is brought without legal or factual grounds and if the action served the sole purpose of causing annoyance. Behavior that protracts litigation may nonetheless not rise to the level of obdurate, vexatious and dilatory conduct within the meaning of the statute. Section 2503(9) serves not to punish all those who initiate legal actions that are not ultimately successful, or which may seek to develop novel theories in the law, as such a rule would have a chilling effect on the right to bring suit for real legal harms suffered. Rather, the statute focuses attention on the conduct of the party from whom counsel fees are sought and on the relative merits of that party's claims.

When interpreting the meaning of "repetitive," the trial court relied on a definition from Merriam-Webster's Dictionary: "repeated many times in a way that is unpleasant." Moreover, the trial court opined that it was the intent of the legislature "to award counsel fees under the new custody statute to deter repetitive filings that may affect the best interest of a child and require that the child constantly be placed in the middle of continued custody litigation." The best interest of a child is the foundation of the child custody law, and that includes section 5339. However, although repetition alone may be grounds for imposition of counsel fees, we conclude that the circumstances here do not warrant an award. The trial court correctly points out that great emphasis must be placed on the best interest of the child based on a consideration of all factors that legitimately affect

the child's physical, intellectual, moral, and spiritual well-being. However, the trial court failed to explain in its opinion how the filing of seven petitions to modify custody in the span of a seven-year proceeding legitimately affected the well-being of the child or how the filings in any way altered the status quo.

Dong Yuan Chen v. Saidi, 2014 PA Super 190 (Pa. Super. Ct. 2014)(internal citations omitted)

This Court is well aware of the litigious nature of the custody conflict between the parties. Both parents have made several filings against each other. Father has previously filed two Emergency Petitions for Custody; the first of which Father met his burden of proof and the second was dismissed with the issues to be addressed at a full trial. In the Order of June 6, 2012 the Court raised its concerns that Father may be influencing the child to make allegations about Mother's then boyfriend. At a full trial in June 2012, the Court ordered shared custody. Mother filed a Petition for Emergency Custody in September 2012. Beginning in 2013, Mother petitioned for Father to be held in Contempt regarding his move to another county. Father was held in contempt for failing to timely notify Mother of his move. Mother petitioned to modify the parties' custody Order in August 2013 at which time Mother sought primary custody of the minor child. In a conference in September 2013, Mother continued to disagree with the Court's award of shared custody from June 2012. The parties were before the Court for a full custody trial in April 2014 at which time shared custody was maintained with the caveat that Father return to Lycoming County. Father asked the court for Reconsideration which was denied. Mother again filed Petition for Modification on April 16, 2014. Mother withdrew the Petition. Mother filed a Petition for Modification of Custody on May 27, 2014 due to

Father's return to Lycoming County and her desire for primary custody. The same day, Mother filed a Petition for Contempt regarding Father's return to Lycoming County. The Petition for Contempt was denied. During the first half of 2014, the parties have been in and out of support court with issue of taxes, child support and receipt of their daughter's disability checks.

The issue before the Court today, is whether Mother's behavior specifically as it relates to the filing of the Petition for Emergency Custody on June 5, 2014 was obdurate, vexatious, repetitive or in bad faith. Mother filed her Petition for Emergency custody less than 10 days after already having previously filed a Petition for Modification Custody, which was still pending before the Court. Mother filed for the Emergency Petition three days after this Court dismissed her Petition for Contempt as meritless.

The Court also considers Mother's behavior towards Father outside of her Court filings. Beginning on June 2, 2014 Mother and Father had disagreement about how much help Father should give KB while bathing. Mother told Father he would get court papers soon. (Father's Exhibit 4). The parties continued the arguing regarding Mother communicating with Father's girlfriend. (Father's Exhibit 4). Late in the day on June 2, 2014, Mother and Father's girlfriend had an altercation at which time Mother called the police on Father's girlfriend. Mother told Father she was pressing harassment charges.

On June 4, 2014, Mother inquired as to what time she could pick the child up. Mother threatened Father with contempt and told him "You are a twisted sick Father to my child". Mother also brought up Father "alleging terrible false accusations to the law about my ex hurting KB". Mother further states the she and the child will move "out west" when KB turns 18. Mother sent Father a message regarding her anger over Father's birthday party plans at 10:55 p.m. Mother reported that KB disclosed abuse sometime

after 11:15 p.m. on June 4, 2014 while Child and Mother were rough housing. (Transcript Page 12, l. 13-24). Less than twelve hours from Mother mentioning the previous incident wherein Father raised his concerns of sexual abuse in a previous emergency petition, Mother claims the child disclosed abuse by her Father.

On June 5, 2015 Mother contacted the police. Mother also filed a Petition for Emergency Custody. At the time of the Emergency Custody ex parte hearing, Mother testified regarding the abuse allegation and was granted temporary custody. On that same day, Mother sought to have KB's social security checks returned to her care.

A hearing was held June 12, 2014. Mother appeared without arranging for the police or Children and Youth to be present to testify. *Transcript* of June 12, 2014, page 8, 6, l. 15-18. Mother appeared without the child. *Transcript* of June 12, 2014, page 6, l. 1. Mother did make the child available upon the Court's request. The Court conducted an in camera interview with the child at which time the child disclosed that Mother had told her to tell the Judge "something Dad did " to her. When the child was asked if dad had done that to her, she replied "he didn't". The Court thereafter dismissed Mother's Petition for Emergency Custody.

The Court cannot specifically find Mother's filing of the Emergency Petition to be repetitive. This is the first time Mother has filed on the specific grounds of accusing Father of sexual abuse. The Court does however find that Mother's filing of the Emergency Petition for Custody was obdurate, vexatious and in bad faith. Obdurate conduct is defined as that which is stubbornly persistent in wrongdoing. *In re Estate of Burger*, 852 A.2d 385,395 (Pa.Super.2004). Mother has continued to object to Father's having shared physical custody of the minor child throughout the entirety of this case. Mother filed four separate custody filing from the entry of the final custody Order on

April 3, 2014 until June 5, 2014. The Contempt Petition filed by Mother against Father was denied on its face. Upon Father's return to Lycoming County, which would reinstate his shared custody rights Mother immediately filed to Modify. Because this Court has found that the child was not a victim of abuse but was encouraged to make such a report by Mother, the Court must consider Mother's filing of Emergency Petition as obdurate. A petition is vexatious if it is "without legal or factual grounds and if the action served the sole purpose of causing annoyance". *Dong Yuan Chen v. Saidi*, 2014 PA Super 190 (Pa. Super. Ct. 2014). Similarly to the reason that Mother is found to be obdurate, Mother is vexatious. She has filed the Emergency petition without factual grounds. Mother's sole purpose was to cause annoyance or worse to Father. A party has acted in bad faith when he files a lawsuit for purposes of fraud, dishonesty or corruption. *Holler v. Smith*, 2007 PA Super 195 (Pa. Super. Ct. 2007). The Court finds Mother has acted in bad faith by encouraging the child to make false accusations and filing the Emergency Custody petition based on those false claims.

The Court must consider the Child's best interest. The Emergency Custody filed by Mother did have a negative effect on the best interest of the Child. Mother has subjected the child to multiple interviews and a physical examination regarding the claims of sexual abuse against Father. Mother herself reported that child was "extremely traumatized" regarding these events. *Transcript* of June 12, 2014, page 8, l. 15. In this Court's decision given April 3, 2014 the Court voiced its own concern that the parents' behavior towards each other "is detrimental to your daughter's emotion health". Mother's damaging behavior continued after the trial with the culmination being an Emergency Petition alleging sexual abuse.

Father's attorney presented a bill of Father's expense as it related to defending the Emergency Custody Petition in the amount of \$6,117.50. Additionally Father was charged \$1,711 and then \$1,475 for the final hearing held September 24, 2014. Father has accumulated a total amount of \$9,303 in counsel fees. The Court has reviewed the attorney bill and finds that the costs outlined were reasonable. The Court is well aware of Mother's limited financial circumstance. Mother was unable to secure an attorney to represent her during these proceedings. Mother is a full-time student, employed only part-time making less than \$1000.00 per month. In light of the fact of Mother's income is it unreasonable to assess Mother with more than half the fees accrued by Father.

The Court hereby finds that Mother's filing of the Emergency Custody Petition was obdurate, vexatious and in bad faith. Pursuant to 23 Pa. C. S. § 5339. Further the Court hereby orders judgment in favor of Father and against Mother in the amount of \$4,651.50. If Mother fails to pay this amount Father shall seek execution of the judgment through the normal rules of civil procedure rather than a custody contempt action.

By The Court,

Joy Reynolds McCoy, Judge