No. 35281 - *In Re: John T., Michael T., Natalie T. and Clare T.*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Chief Justice, concurring:

With the majority's resolution of this case, I completely agree. I write separately to reiterate why the facts of this case, in particular, warrant an award of reasonable attorney's fees and to clarify the manner in which circuit courts should proceed upon a party's request for a hearing on a motion for an award of attorney's fees.

I. Attorney's Fees are Warranted in this Case

As observed by the majority, an award of attorney's fees is clearly warranted under the facts of this case. This Court previously has held that "[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted *in bad faith, vexatiously, wantonly or for oppressive reasons*." Syl. pt. 3, *Sally-Mike Props. v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) (emphasis added).

Here, the record is replete with evidence demonstrating Jean K.'s ongoing quest to falsely and maliciously accuse her former husband of sexually abusing their

youngest daughter in spite of the lack of any evidence indicating that he had, in fact, perpetrated such atrocities. In this regard, the circuit court, in its May 11, 2009, order, recounted various examples and consequences of Jean K.'s vexatious conduct:

> [A]fter this abuse and neglect Petition was filed [on March 23, 2007], and after the State chose not to proceed against the Father [Michael T.], the Respondent Mother [Jean K.] again falsely accused the father of sexually abusing [their daughter]. . . .
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> . . . .
>
> Father has incurred thousands of dollars of unnecessary attorneys' fees and costs in the above entitled proceeding because of Jean K[.]'s fraudulent allegations and her assertion of baseless and unfounded claims. Respondent Mother's conduct in this regard is hereby determined to have been vexatious and wanton. Respondent Mother's conduct herein has diverted attention from important issues concerning the welfare of these children, frustrated and delayed closure of this matter, and demonstrates an intent to occasioned [sic] oppress and harass the Respondent [Michael] T[.]
>
> Respondent Mother's conduct is the sole reason that this abuse and neglect proceeding was filed and is still pending. Respondent Mother has steadfastly refused to accept responsibility for her own conduct and her abuse of the children. Her defense has basically been to continue to accuse M[ichael] T[.]
>
> Respondent Mother's sexual abuse allegations against Respondent Father have all been previously determined by this Court, and the Family Court, to be unfounded, baseless and fraudulent. The entirety of Respondent Mother's allegations in this regard are without merit.
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> Respondent Mother's conduct has caused [Michael] T[.] to endure severe financial strain and continuous financial

> instability due [to] the incessant false accusations, court hearings, appeals, etc. . . . [Michael] T[.] has had to unnecessarily incur attorneys' fees and costs to defend himself and the well-being of his family.
>
> Respondent Mother has acted fraudulently, in bad faith, vexatiously, wantonly and for oppressive reasons before the institution of the above captioned matter and throughout these proceedings.

Also included in Jean K.'s course of oppressive conduct are no less than *two* domestic violence petitions and corresponding domestic violence protective orders setting forth Jean K.'s baseless allegations of Michael T.'s sexual abuse of their daughter, as well as Jean K.'s *three* prior appeals to this Court challenging the circuit court's findings that Michael T. was *not* responsible for their daughter's sexual abuse injuries—all three of which this Court *refused*.[1] Perhaps most troubling is that these false accusations of sexual abuse have languished in the court system for over three years! Because of Jean K.'s questionable motives and her unfathomable actions, both the parties' children and Michael T. have been prevented from finally putting this matter behind them and going forward with their lives. In short, the conduct exhibited by Jean K. during the course of the underlying

[1]*See In the Matter of: John, Michael, Natalie & Clare T.*, No. 091302 (W. Va. Oct. 8, 2009); *In the Matter of: John T.; Michael T.; Natalie T.; Clare T.*, No. 090902 (W. Va. Oct. 8, 2009); *In the Matter of: John; Michael; Natalie; & Claire Marie T.*, No. 081815 (W. Va. Nov. 12, 2008). *See also SER Jean K[.] v. Paul Zakaib, Judge*, No. 33836 (W. Va. June 9, 2008) (dismissed upon Court's own motion following entry of order by circuit court); *In the Matter of: John T.; Michael T.; Natalie T.; Claire T.*, No. 090895 (W. Va. Oct. 8, 2009) (Jean K.'s petition appealing from child support order refused).

abuse and neglect proceedings epitomizes the vexatious, bad faith, and oppressive conduct contemplated by this Court's *Sally-Mike* opinion so as to justify an award of attorney's fees and costs to Michael T.

II. Amount of Attorney's Fees is Reasonable

Whether a specific award of attorney's fees is reasonable depends upon a consideration of numerous factors.

> Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Syl. pt. 4, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va 190, 342 S.E.2d 156 (1986).

In light of the facts of the case *sub judice* and the egregiousness of Jean K.'s conduct, the attorney's fees requested by Michael T., which range from $165 to $250 per hour are not, *per se*, unreasonable. *See Horkulic v. Galloway*, 222 W. Va. 450, 466, 665

S.E.2d 284, 300 (2008) (Davis, J., concurring) (observing that attorney's fees of $500 per hour were not *per se* unreasonable). Nevertheless, it is for the circuit court, not this Court, to resolve the question of reasonableness. *See* Syl. pt. 3, in part, *Bond v. Bond*, 144 W. Va. 478, 109 S.E.2d 16 (1959) ("[T]he trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion."). Accordingly, I concur in the majority's decision to remand this case to the circuit court for such a determination.

III. Hearing on Motion for Award of Attorney's Fees

Based upon the record of the lower court's proceedings, the majority has correctly decided to remand this case to the circuit court to permit the parties to present "evidence" regarding Michael T.'s request for costs and attorney's fees "by . . . oral arguments if desired by the parties." Even though a party against whom costs and attorney's fees are to be assessed has a due process right to notice and an opportunity to be heard thereon prior to their imposition,[2] it is imperative for a party to actively enforce

[2]*See, e.g.*, *Czaja v. Czaja*, 208 W. Va. 62, 75-76, 537 S.E.2d 908, 921-22 (2000) ("In failing to accord Appellant's counsel an opportunity to respond to the lower court's basis for assessing fees and costs, the most basic of all protections inherent to our judicial system has been violated."); *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 251, 332 S.E.2d 262, 264 (1985) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." (continued...)

his/her notice and hearing rights instead of sitting on his/her laurels and effectively waiving the process to which he/she is due. Although Jean K. responded to Michael T.'s motion for costs and attorney's fees, her response was not filed until one day before the scheduled hearing thereon. This dilatoriness comes dangerously close to a waiver of the due process rights to notice and a hearing on the issues of costs and attorney's fees. *See, e.g.*, *In re Marriage of Jones*, 187 Ill. App. 3d 206, 231, 134 Ill. Dec. 836, 853, 543 N.E.2d 119, 136 (1989) ("[A] party waives his right to a hearing on attorney's fees where he did not request a hearing before the trial court and is thereby left with the judge's ruling on the basis of the fee petition and affidavits alone."). Therefore, I would caution parties and their counsel in future cases to be ever diligent in their assertion of such rights and to be mindful of their duty to "speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) (internal quotations and citations omitted).

That said, it should be noted that the scope of the remand hearing on the reasonableness of the costs and attorney's fees awarded to Michael T. is not without limitation. Rather than permitting parties to conduct a mini-trial on the issues of costs and attorney's fees, with endless testimony and cross-examination of attorneys and expert

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[2](...continued)
(internal quotations and citation omitted)).

witnesses, a circuit court conducting a costs and fees hearing should afford the parties an opportunity to orally present their arguments on the request for costs and fees and the reasonableness thereof and to submit, in writing, documentation of the costs and attorney's fees requested. Such a practice of narrowing the scope of a costs and fees hearing has been adopted by other jurisdictions in an attempt to prevent the relitigation of the case on its merits. *See, e.g.*, *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1522 (11th Cir. 1986) ("[D]ue process is afforded where . . . the parties have an opportunity to present their arguments as to the propriety of sanctions, submit affidavits on the amount of such fees and costs, with an opportunity for the sanctioned party to file a motion challenging said affidavits." (citation omitted)); *In re Eliscu*, 139 B.R. 883, 886 (N.D. Ill. 1992) (noting that "the requirements of due process as to notice and scope of hearing are based primarily upon the circumstances of the case" (citation omitted)); *Barnett v. Barnett*, 24 Kan. App. 2d 342, 353, 945 P.2d 870, 878 (1997) (limiting scope of attorney's fees hearing). By contrast, a more extensive evidentiary hearing on the issues of costs and fees is permitted only where a case presents exceptional circumstances. *See, e.g.*, 750 Ill. Comp. Stat. Ann. 5/501(c-1)(1) (2010) ("Except for good cause shown, a proceeding for (or relating to) interim attorney's fees and costs in a pre-judgment dissolution proceeding shall be nonevidentiary and summary in nature."); *Hogan v. Hogan*, 58 Ill. App. 3d 661, 668, 16 Ill. Dec. 265, 270, 374 N.E.2d 1040, 1045 (1978) ("While a hearing on the reasonable nature of attorney's fees is not necessary in every case, especially where the trial judge is familiar with the

procedural history of the case, the party contesting the award is entitled to a hearing upon request." (citations omitted)). In the interest of preserving judicial economy, I believe the better practice is to generally limit the scope of a hearing addressing costs and fees while reserving more extensive costs and fees hearings for those extraordinary cases requiring further record development.

For the foregoing reasons, I respectfully concur in the majority's decision in this case.