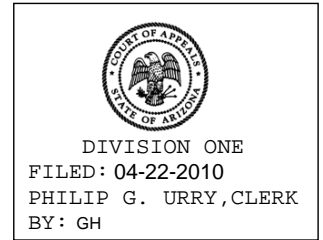


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



In re the Marriage of:) 1 CA-CV 08-0794
) 1 CA-CV 09-0089
STEVEN L. TURCO,) (Consolidated)
)
Petitioner/Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
)
ELISA J. TURCO,) (Not for Publication -
) Rule 28, Arizona Rules of
Respondent/Appellant.) Civil Appellate Procedure)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-050563

The Honorable Carey Snyder Hyatt, Judge

REVERSED AND REMANDED

Franks & Sheldon, P.C.
By Steven D. Sheldon
And Todd Franks
Attorneys for Respondent/Appellant

Phoenix

T H O M P S O N, Judge

¶1 Elisa J. Turco (Mother) appeals from an order of the family court imposing monetary sanctions against Mother and her counsel for violating prior court orders. We have consolidated a separate appeal from a subsequent order that Mother and her attorney pay Steven L. Turco's (Father's) attorneys' fees. For the reasons stated below, we reverse and remand for an evidentiary hearing regarding sanctions and attorneys' fees.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The parties filed for divorce in 2006. Father sought joint legal custody, but Mother opposed Father having any contact with the parties' two minor children and requested sole legal custody. The court appointed a custody evaluator and a therapeutic interventionist (TI) in mid-2006.

¶3 The order appointing the TI stated that the TI:
serves as an expert for the Court for the primary purpose of rehabilitating relationships. The TI provides Court Ordered therapeutic services to the family with the expressed goals of enhancing family functioning through: encouraging rule following behavior, educating, enhancing parental knowledge and awareness of developmental issues, and assisting the children in their development.

The order also directed the parties to bring any allegations of impropriety by the TI to the court's attention before submitting a written complaint to an administrative board. The court ordered that "any threats or intimidation by counsel or the

parties toward the [TI] shall be promptly reported to the Court." The parties were ordered to pay the TI fees equally.

¶14 The decree awarded sole custody of the children to Father with Mother's parenting time supervised by the TI when the TI determined it was appropriate. The court ordered Mother to pay the TI fees up to \$5000. The court then noted, "[s]hould further counseling be required after the \$5000 has been exhausted, a hearing with the Court shall be requested to determine the allocation of the costs." The TI's appointment was renewed soon after the decree was entered. The TI was reappointed pursuant to the same terms as in the pre-decree order, with the exception of the fee payment. The decree would govern the payment of fees as noted above.

¶15 On September 6, 2007, the TI sent a letter to the court asking to recuse herself. She did not state any reason for her request, but noted that the parties were still in need of a TI. Mother filed an objection/response to this request. Mother alleged that the TI was seeking to withdraw to avoid any scrutiny of her performance. In this pleading, Mother asked the court to reconsider whether the TI was entitled to the fees she had requested. Mother argued that the court needed to hold an evidentiary hearing on the TI's request to recuse herself to determine the basis for the request. Before the court ruled on

Mother's request for a hearing, the TI submitted another letter with the court requesting assistance in collecting her fees.¹

¶16 At a status conference in September 2007, the court ordered Father to respond to the TI's request to recuse herself and ordered the TI to remain serving until further order of the court. Father stated his preference that the TI continue due to her substantial involvement in the case.

¶17 Mother submitted a written objection/response to the TI's request for assistance with payment. Mother noted that she had already challenged the TI's right to full payment in Mother's objection to the TI's request to recuse herself. This objection/response to assistance with payment also questioned the family court's jurisdiction to appoint a TI and, therefore, to help collect the TI's fees. Mother also asserted that as a treating therapist, the TI was not entitled to quasi-judicial immunity for the services she provided to the Turco family. Father responded by noting that Mother's opposition to the TI's request to recuse herself and her opposition to the TI's request for payment were inconsistent. Father requested an award of his attorneys' fees pursuant to Arizona Revised Statutes (A.R.S.) sections 12-349 (2003) and 25-324 (Supp. 2009).

¹ This letter is not in the record on appeal.

¶18 In her reply to the objection/response to assistance with payment, Mother stated that to the extent the court viewed her opposition to payment as inconsistent with her opposition to the TI's request to recuse herself, Mother would withdraw her opposition to the TI's request to recuse herself. Mother requested an evidentiary hearing on the TI's request for fees.

¶19 No action was taken on the TI's request to recuse herself or the fee issue. Apparently the TI continued to perform her duties because the TI sent two subsequent reports to the court dated December 3, 2007 and January 24, 2008 recommending (1) that Mother have supervised parenting time, and (2) that the children engage in individual therapy. At a March 2008 status conference, the court noted that the TI would continue "in hopes that the parenting coordinator will allow the process to proceed."

¶10 The issue of the TI's fees arose again in May 2008. On May 13, 2008, the TI sent a letter to the court asking for guidance because the fees had surpassed \$5,000; she asked the court for guidance on how to allocate the fees above that amount. Approximately two weeks later, the TI informed the court that in response to the TI's May 13 letter, Mother's counsel wrote the TI, stating that the TI should consider whether Mother had a viable malpractice defense to the TI's

attempt to obtain additional fees and urged the TI to notify her malpractice carrier. The TI informed the court that she could no longer remain objective in this case and asked to withdraw.

¶11 Father filed a petition for order to show cause re: contempt and sanctions alleging that the letter from Mother's attorney constituted threatening and harassing conduct causing the TI to withdraw. Father requested a hearing and sought to have Mother pay all the TI's fees, the fees of any replacement TI, a \$5000 sanction, and Father's attorneys' fees. In response, Mother claimed that the letter to the TI was not intimidating or threatening. She again argued that the family court lacked jurisdiction to grant the TI quasi-judicial immunity and to restrict the nature of Mother's communication with the TI. Mother noted her prior attempt to bring the issue of the TI's fees to the court's attention.

¶12 Mother moved to dismiss Father's petition for contempt and sanctions. The court held a return hearing on Father's petition for contempt and sanctions. The court did not hear any evidence at this proceeding. The court took the motion to dismiss under advisement and stated that it would rule on what issues, if any, would be heard at an evidentiary hearing. The ruling denied the motion to dismiss and ruled on the merits of Father's petition for contempt and sanctions. The court granted

Father's request for sanctions, finding that Mother's counsel "improperly chose to address his substantive grievance regarding the issue of [the TI's] fees directly, unilaterally, and threateningly with [the TI] herself, instead of filing an appropriate objection to the fee allocation request with the Court." Mother "and/or" her counsel were ordered to pay all the costs of the new TI. In this order, the court set a future status conference to set an evidentiary hearing, if needed, on the allocation of the TI's fees over \$5000 and the appointment of a new TI. The court permitted Father to file an attorneys' fee application, which was ultimately granted in the amount of \$3,000.

¶13 Mother filed two separate notices of appeal from these orders. We consolidated the appeals. We have jurisdiction over the appeal from the award of attorneys' fees pursuant to A.R.S. § 12-2101(C) (2003). This court, however, lacks jurisdiction over the appeal from the civil contempt order. See *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003). We exercise our discretion to treat Mother's appeal from the contempt order as a petition for special action and accept special action jurisdiction. *Id.* (citing *Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35, 36 P.3d 749, 759 (App. 2001)).

DISCUSSION

¶14 Mother claims that the imposition of these sanctions was erroneous because (1) counsel's letter to the TI did not violate any court order; (2) if the letter did violate an order, the court lacked the authority to restrict communication with the TI as a treating therapist because the TI, in the role of a treating therapist, is not entitled to quasi-judicial immunity; (3) the family court violated due process by imposing sanctions without an evidentiary hearing; (4) the sanctions imposed were not expenses caused by Mother or her counsel's actions; and (5) if the sanctions were unwarranted, then the award of attorneys' fees was an abuse of discretion. Father filed a notice of intent not to file an answering brief for financial reasons. He asked this court not to consider his failure to respond as confession of error.

I. Violation of Court Order

¶15 Mother contends that the letter her counsel wrote to the TI was not wrongful and, therefore, did not violate any court order. The family court found that the letter violated the following language from its prior orders:

3. The attorneys may not engage in ex parte communications regarding substantive issues with the TI but rather communications shall be conducted personally or through conference calls, unless otherwise directed by the Court. Procedural issues

and scheduling may be discussed at the direction of the TI....

4. While the TI will expouse [sic] collegial interprofessional relations with counsel, the TI does not have to report to the attorneys and any threats or intimidation by counsel or the parties toward the interventionist shall be promptly reported to the Court. The TI may seek guidance from the Court in order to achieve clarity with regard to the procedural aspects of the intervention should disputes arise....

¶16 The court found that Mother's counsel violated these orders by writing a letter to the TI that said:

Before pressing forward with the fee issue, please consider whether our client as [sic] a viable defense to the fee application, arising out of malpractice. I urge you to place your liability carrier on notice and determine, after consultation with them or counsel they provide you, whether continuing pursuit of the fees is appropriate. Please also consider whether the Court lacks authority to grant judicial immunity to a therapist, as opposed to an evaluator. . . .

The court characterized this letter as "threatening the Court-appointed [TI] with a malpractice lawsuit in an effort to dissuade her from her pursuit of her fee application." The court found this was improper and that counsel should have filed an objection to the TI's fee allocation request as was done in response to the TI's earlier request for assistance with fee payment.

¶17 The letter from Mother's counsel was an ex parte communication with the TI regarding a substantive issue, *i.e.*,

the appropriate fee allocation. This was in clear violation of the court's prior orders. Mother argues that the letter did not contain any threats or harassment. Mother claims that her prior objection to the TI's request for fee assistance and her objection to the TI's request to recuse herself contained the same allegations of malpractice and warning of an independent tort action. We need not address whether the contents of the letter were wrongful, threatening, or harassing.

¶18 Mother and her counsel fail to note the distinction between Mother's prior objections and the letter from Mother's counsel at issue on appeal. The former objections were properly filed court pleadings noting Mother's objections and asking for relief from the court. The latter was an ex parte communication with the TI regarding substantive matters which was expressly forbidden by court order. Because the letter was written directly to the TI in violation of a court order, we need not address whether the contents of the letter constituted threats or harassment. Mother and her counsel were required to raise with the court any objections or responses to the TI's request for assistance in allocating fees. We find no abuse of discretion in the court finding that Mother and her counsel violated these court orders.

II. Court's Authority to Limit Communication

¶19 Mother next claims that even if her counsel's letter violated a court order, the family court lacked the authority to restrict communication with the TI as a treating therapist because the TI, in the role of a treating therapist, is not entitled to quasi-judicial immunity. Mother argues that the Arizona Constitution guarantees her right to seek damages for an injury. See Ariz. Const. art. 18, § 6. Whether or not the family court can grant a treating therapist immunity from such a suit has no bearing on the court's ability to issue orders regarding the form in which parties may communicate with the court-appointed TI. The court's orders did not violate Mother's right to seek redress for any injuries. We do not consider whether Mother could bring a malpractice action against the TI because the trial court did not preclude Mother from doing so in this case.

¶20 Whether or not the TI was acting as a therapist or a court-appointed expert is not relevant for purposes of reviewing the sanctions issue. The TI was court-appointed. Mother did not object to the court's authority to do so. Mother was, therefore, bound by the order regarding ex parte communications with the TI. If Mother had any issues regarding the limitations on her ability to communicate with the TI, she was obligated to

raise these issues with the court that had imposed the limitations before sending adversarial ex parte letters to the TI.

¶21 Furthermore, Mother's letter did not distinguish between fees attributed to the TI's court-expert work versus her work as a therapist. The letter opposed the TI's attempt to allocate *any* fees to Mother. In any event, the fee objections should have been raised in a pleading to the court, as Mother and her counsel did in response to the TI's first fee request. We find no error of law or abuse of discretion in finding that Mother and her counsel violated a court order.

III. Due Process Hearing Requirement

¶22 Mother next claims that the family court violated due process by imposing sanctions without an evidentiary hearing. The court imposed sanctions on Mother "and/or" her counsel after conducting a return hearing on Father's petition for order to show cause re: contempt and sanctions. Although the family court heard argument regarding Father's petition alleging contempt and request for sanctions and Mother's motion to dismiss this petition, the court did not take any evidence or testimony. Mother and her attorney argue that they were entitled to call and confront the TI.

¶23 Our supreme court has held that "indirect contempt requires that the alleged contemnor be given advance notice of the charge, an opportunity to be heard, and present testimony in his own behalf."² *Ong Hing v. Thurston*, 101 Ariz. 92, 99, 416 P.2d 416, 423 (1966); see also *Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 558, ¶ 12, 48 P.3d 505, 508 (App. 2002) (holding that due process required at least the "chance to confront adverse evidence and question adverse witnesses."); *Carroll v. Robinson*, 178 Ariz. 453, 461, 874 P.2d 1010, 1018 (App. 1994) ("At a minimum, due process requires notice and a hearing where the individual has a meaningful opportunity to confront the evidence against him."), called into doubt on other grounds by *State v. Superior Court (Sheldon)*, 185 Ariz. 47, 49-50, 912 P.2d 51, 53-54 (App. 1996).

¶24 In deciding whether Mother and her counsel received adequate due process, we are guided by the following language in *Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 556-57, 880 P.2d 1098, 1102-03 (App. 1993) (citing *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987)): "Whether an additional hearing on sanctions should be required . . . depends on the nature of the case.

² *Ong Hing* defined indirect contempt as "an act committed outside the presence of the court." 101 Ariz. at 98, 416 P.2d 422.

Factors to be considered include 1) the circumstances in general; 2) the type and severity of the sanctions under consideration; and 3) the judge's participation in the proceedings, knowledge of the facts, and need for further inquiry."

¶125 The sanctions Father requested included Mother paying all the current and future TIs' fees, Father's attorneys' fees, and a \$5000 sanction. Throughout the return hearing, the court and the parties referred to the need for an evidentiary hearing regarding whether counsel's letter to the TI warranted sanctions. At the conclusion of the return hearing, the court indicated that it would consider Mother's motion to dismiss the petition for sanctions, narrow the issues, and set an evidentiary hearing. Yet the court, after taking the motion to dismiss under advisement, denied the motion to dismiss and imposed sanctions without an evidentiary hearing. Mother's counsel specifically requested an evidentiary hearing if the court was going to consider the merits of Father's petition for sanctions.

¶126 Mother and her counsel do not dispute the fact that they sent an ex parte communication to the TI, however, they dispute that it was threatening or harassing. Mother and her counsel also argued that because the TI's term was set to expire

shortly and given the TI's prior request to recuse herself, it was not likely the TI would accept a re-appointment. Thus, the time and expense of a new TI becoming familiar with the record was likely to occur regardless of Mother and her counsel's conduct. Mother also pointed out that the TI initially raised the question of how to allocate fees *before* Mother's counsel wrote his letter, so the family court would have had to address this issue in any event.

¶27 These circumstances are pertinent to the amount and nature of the sanctions imposed and indicate a need for an additional evidentiary hearing. See *id.* Mother had no opportunity to question the TI or present any other evidence regarding the propriety of the sanctions. See *id.* at 555, 880 P.2d at 1101 ("[t]he imposition of sanctions should be preceded by some form of notice and opportunity to be heard on the propriety of imposing the sanctions.") (citation omitted). In *Precision Components*, this court held that the trial court provided adequate and fair notice when it informed the attorneys "in detail why it was imposing sanctions and what form the sanctions would take." *Id.* at 556, 880 P.2d at 1102. Mother knew what sanctions Father had requested. Unlike the attorneys in *Precision Components* who did not request an evidentiary

hearing, in the case before us, both parties requested an evidentiary hearing on the sanctions. *Id.*

¶128 The court indicated that it would grant a hearing before imposing sanctions. We hold that the court's failure to do so constituted a violation of due process because Mother was not given the opportunity to question the TI about the correspondence or present evidence regarding the propriety of the sanctions to be imposed.³

IV. Attorneys' Fees Below

¶129 The order imposing sanctions allowed Father to submit an attorneys' fee application for fees and costs associated with filing the petition for sanctions. The court subsequently awarded Father \$3000 in attorneys' fees incurred in relation to this issue. On appeal, Mother contends that this award should be reversed if we reverse the imposition of sanctions.

¶130 The award of attorneys' fees appears to have been tied to the imposition of sanctions. Because we are remanding for an evidentiary hearing on sanctions, the attorneys' fees issue shall also be reversed and reconsidered on remand.

CONCLUSION

³ Having held that Mother is entitled to an evidentiary hearing regarding the propriety of the sanctions, we need not address her claim that she should not bear the entire expense of bringing a new TI up to speed.

¶131 We find that Mother and her counsel violated an order prohibiting ex parte communication with the TI. However, we reverse the imposition of sanctions and attorneys' fees and remand for an evidentiary hearing because the family court did not allow Mother or her counsel an opportunity to question adverse witnesses or present any other evidence regarding the appropriate sanctions.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DIANE M. JOHNSEN, Judge