

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

IN RE: ESTATE OF RICHARD GIRIO,	: NO. 41-23-0758
Deceased.	:
	: ORPHAN’S COURT
	:
	: Motion for counsel fees

OPINION AND ORDER

This matter came before the Court for hearing on August 23, 2024, on the Motion of David Girio (son of Richard Girio) and Suzanne Girio-Judge (daughter of Richard Girio), co-executors of the estate of Richard Girio (hereinafter collectively “Executors”) for an award of counsel fees against Dorothy Andersen (hereinafter “Andersen”) pursuant to 42 Pa.C.S.A. §2503, which was filed July 17, 2024. The underlying litigation came earlier before this Court for hearing on the Petition of Andersen as spouse to take against the will of Richard Girio. The issue presented in that litigation was the contention of Andersen that she was the common law spouse of Richard Girio. By Opinion and Order date July 8, 2024, the Court ruled that she was not. In reaching that conclusion, the Court made the following Findings, which are set forth at length in that Opinion.

1. Richard Girio died testate on December 8, 2023.
2. A Last Will and Testament was filed and named his son, David Girio, and his daughter, Suzanne Girio-Judge, as executors of his estate (hereinafter the “Estate”).
3. David Girio and Suzanne Girio-Judge were issued Letter Testamentary to act as executors of the Estate by the Register of Wills of Lycoming County on or about December 18, 2023.
4. On January 12, 2024, Andersen filed an Election of Spouse To Take Against Will and Conveyances.
5. Beginning in approximately June of 2003, Richard Girio and Andersen commenced a committed relationship, which included cohabitation over many years.
6. On approximately October 31, 2001, Richard Girio made a gift of two (2) rings to Andersen. Andersen did not make a gift of rings to Richard Girio at that time.

7. On approximately October 31, 2001, Richard Girio and Andersen privately made vows of love to each other. Andersen recalls the vows as “I love you and I want to spend the rest of my life with you.” Andersen’s testimony regarding those vows did not include words of present intent to marry.
8. Richard Girio and Andersen attended a public ceremony in Rome, Italy, where the Pope gave a general Papal Blessing to the members of the crowd. No vows were a part of that public ceremony.
9. Andersen testified that neither she nor Richard Girio told anyone about their vows.
10. Andersen testified that she and Richard Girio never secured a marriage license.
11. Andersen testified that neither she nor Richard Girio participated in any public wedding ceremony nor public exchange of wedding vows.
12. Andersen testified that neither she nor Richard Girio celebrated any wedding anniversary.
13. Richard Girio and Dorothy Andersen did not represent themselves publicly as husband and wife. They did, however, encourage their family members to refer to them as family, such as “call me Uncle Dick, or call me Aunt Dot.”
14. Andersen made periodic contributions to Richard Girio for household expenses.
15. Andersen and Richard Girio maintained separate bank accounts and generally did not co-mingle their personal funds.
16. For many years during her committed relationship with Richard Girio, Andersen accepted monthly checks from the Social Security Administration on the account of her former spouse.
17. Investment accounts held by Richard Girio listed his marital status as “divorced.”
18. Both Richard Girio and Andersen filed tax returns as single persons.
19. Richard Girio did not refer to Andersen as his wife in his conversations with his children.
20. Richard Girio was formerly married, and divorced.
21. Richard Girio was a practicing Catholic throughout his life. His former marriage was not annulled by the Catholic Church.

QUESTION PRESENTED:

WHETHER MOVANTS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO 42 Pa.C.S.A. §2503.

ANSWER TO QUESTION PRESENTED:

MOVANTS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS PURSUANT TO 42 Pa.C.S.A. §2503.

DISCUSSION:

The American Rule of Attorney's Fees

Pennsylvania follows what is commonly known as the "American Rule," that a successful litigant cannot recover attorneys' fees from an adverse party, unless there is either an express agreement between them, statutory authority, or some established exception. *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 482-83 (Pa. 2009)(citing *Mosaica Charter School v. Commonwealth Department of Education*, 813 A.2d 813, 822 (Pa. 2002)). In this matter, Executors base their claim for attorneys' fees upon the text of 42 Pa.C.S.A. §2503.

The Statute in Question

42 Pa.C.S.A. §2503 provides that "the [] participants shall be entitled to a reasonable counsel fee as part of the taxable costs" in ten (10) enumerated circumstances, including "(7) any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of any matter" or "(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."

The Motion does not specify whether it is filed under 42 Pa.C.S.A. §2503(7) or (9). Presumably, Executors seeks relief under either subsection, or both.

The underlying litigation has already been resolved against Andersen. The question remains whether her conduct, either in filing her Petition to Take Against the Will, or her prosecution of her claim, was so arbitrary, vexatious or in bad faith as to justify an award of attorney's fees under 42 Pa.C.S.A. §2503.

Counsel for Executors base their claim for fees upon their contention that Andersen's claim of a common law marriage lacked substantial evidentiary support, and therefore that

it was asserted in bad faith. Such is not the test for an award of attorney's fees. In civil litigation, defendants routinely contend that the claims asserted by plaintiffs lack adequate evidentiary support. Where a defendant concedes that a claimant has a legitimate claim, significant litigation rarely results. It is the settled law of this Commonwealth that an award of counsel fees under 42 Pa.C.S.A. §2503(7) requires "a trial's court's specific finding of dilatory, obdurate, or vexatious conduct." *Township of South Strabane v. Piecknick*, 686 A.2d 1297, 1301 (Pa. 1996). Furthermore, 42 Pa.C.S.A. §2503(9) permits "imposition of fees and costs for conduct that is 'otherwise ... in bad faith'" and bad faith means "fraud, dishonesty or corruption." *Cnty. of Fulton v. Sec'y of Commonwealth*, 292 A.3d 974, 1014 (Pa. 2023)(quoting *MFW Wine Co., LLC v. Pa. LCB*, 276 A.3d 1225, 1240 (Pa. Commw. Ct. 2022)).

In this matter, the Court makes no such finding. Andersen lived with Richard Girio in a committed relationship for many years. He professed his love for her, bought her rings, and introduced her to his family as his companion. Counsel for Andersen contended that those facts were sufficient to establish a common law marriage. The Court concluded that they were not. The fact that Andersen's evidence of a common law marriage was legally unpersuasive does not equate to bad faith. Further, the Court is not persuaded that the conduct of Andersen's counsel throughout the litigation was arbitrary, vexatious or in bad faith. Counsel filed appropriate pleadings, complied with Court Orders, and conducted the hearing on Andersen's Petition in a professional manner. Asserting a legal claim on behalf of a client, and losing it at trial, does not equate to bad faith.

ORDER

AND NOW, this 26th day of August, 2024, based upon the reasons set forth above, the Motion by Executors for Counsel Fees and Costs (filed-stamped July 17, 2024) is **DENIED**.

BY THE COURT,

William P. Carlucci, Judge

WPC/aml

cc: Recorder's Office
Douglas N. Engelman, Esquire
Joseph F. Orso III, Esquire