

APPENDIX A:

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

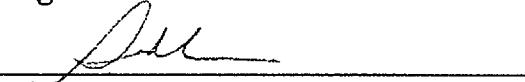
Matthew Tassone, :
Plaintiff-Appellant, :
v. : No. 18AP-912
: (C.P.C. No. 17DR-4399)
Zephynia Tassone, : (REGULAR CALENDAR)
Defendant-Appellee. :
:

JUDGMENT ENTRY

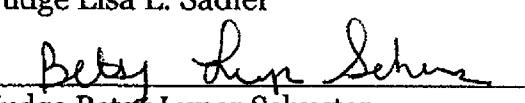
Based on *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, *Prakash v. Prakash*, 181 Ohio App.3d 584, 2009-Ohio-1324 (10th Dist.), and *Yazdani-Isfehani v. Yazdani-Isfehani*, 170 Ohio App.3d 1, 2006-Ohio-7105 (4th Dist.), the appeal of Matthew Tassone, defendant-appellant, is dismissed for lack of a final appealable order.



Judge Susan Brown



Judge Lisa L. Sadler



Judge Betsy Luper Schuster

The Supreme Court of Ohio

FILED

SEP -3 2019

CLERK OF COURT
SUPREME COURT OF OHIO

Matthew Tassone

v.

Zephynia Tassone

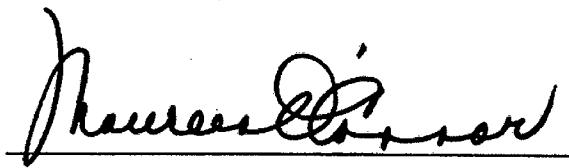
Case No. 2019-0846

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

It is further ordered that appellant's motion to stay proceedings in the trial court pending this appeal is denied.

(Franklin County Court of Appeals; No. 18AP-912)



Maureen O'Connor
Chief Justice

IN THE FRANKLIN COUNTY, OHIO, COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH

ZEPHYNIA TASSONE, : Case No. 17 DR-4399

Plaintiff, : Judge Gill
Vs.

MATTHEW TASSONE, : Magistrate Black
Defendant. :

DECISION AND JUDGMENT ENTRY

This matter is before the Court on October 17, 2018, pursuant to the Defendant's *Motion to Set Aside Magistrate's Order Granting Plaintiff's Motion for Psychological Evaluation* filed October 8, 2018. Plaintiff is represented by attorney John Ruiz-Bueno III and Defendant proceeded pro se. Attorney Leslie Armstrong appeared as Guardian ad Litem (GAL) on behalf of the minor child, Lucia Tassone (DOB 5/15/12).

I. RELEVANT PROCEDURAL HISTORY, BACKGROUND, AND FACTS

On November 30, 2017, Plaintiff filed a *Complaint for Divorce* along with a *Motion for Psychological Evaluation*. Therein, Plaintiff requested an order appointing a "forensic psychological custodial evaluator." In light of this arguably unclear request this Court notes that the magistrate required Plaintiff to clarify what her exact request was on June 15, 2018, prior to the Motion proceeding to hearing. As such, the Magistrate specifically noted:

At a prior hearing, the court agreed with defendant and questioned plaintiff's counsel as to his intention regarding the motion. The court and defendant were informed that plaintiff was seeking a custodial evaluation and not a psychological evaluation. The court then informed both parties that it would only hear testimony pertaining to a custodial evaluation and that plaintiff was barred from later attempting to request or present evidence concerning a psychological evaluation of defendant. The court also informed the parties that a motion seeking clarification of plaintiff's motion was unnecessary as the court had just resolved the issue.

Magistrate's *Order* of September 28, 2018 at 2.

Nonetheless, shortly after this June 15, 2018 hearing, the Defendant filed a *Motion* requesting the Plaintiff to amend her *Motion for Psychological Evaluation* to state with reasonable particularity the reason for said motion. Thereafter, Plaintiff's original Motion along with several other pending matters came for trial before the magistrate on July 17, 2018. The magistrate issued his *Order* on September 28, 2018 and granted Plaintiff's *Motion for Psychological Evaluation* in part. Therein, and pursuant to R.C. § 3109.04(C), he ordered both parties to contact Dr. David Lowenstein, no later than October 5, 2018 and "both parties and the minor child shall be evaluated in a custodial evaluation which shall include measurements deemed necessary by Dr. Lowenstein including a psychological evaluation of the parties and minor child (if necessary)." (*Order* of September 28, 2018 at p.8)

On October 8, 2018, the Defendant filed his present *Motion to Set Aside* the magistrate's order specifically as it relates to the psychological evaluation. The Defendant's *Motion* came before this Court on October 17, 2018. Both parties, Plaintiff's counsel and the GAL appeared and asserted oral arguments. The Court then took the matter under advisement.

II. APPLICABLE LAW

A. Motion to Set Aside a Magistrate's Order

Ohio Civ. R. 53(D)(2)(b) Motion to Set Aside Magistrate's Order

Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

R.C. §3109.04(C)

Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

A. FRANKLIN COUNTY DOMESTIC COURT LOCAL RULE 34.

Appeals from Magistrate's Orders

Magistrates may issue orders as provided by Ohio Civil Rule 53. Parties may appeal a magistrate's order by filing a motion to set aside the order, which shall be heard by a Judge. Parties shall not file a motion to set aside temporary orders issued pursuant to Ohio Civil Rule 75(N) prior to the Magistrate conducting an oral hearing pursuant to Ohio Civil Rule 75(N)(2).

IV. DECISION

The *Magistrate's Order* was issued on September 28, 2018 and Defendant's *Motion* was filed on October 8, 2018, and thus was timely filed under the rules. In addition, the *Motion* states Defendant's reasons with particularity. The Defendant raises several issues in his Motion to Set Aside, both procedural and substantive. The record demonstrates a partial *Transcript* from the July 17, 2018, hearing was filed into the record for this Court's review. The seventeen-page *Transcript* excerpt consists of Defendant's cross examination of Plaintiff, as it relates to Plaintiff's leaving the child in Defendant's care ends with:

"THE COURT: Do you have any other questions?
MR. TASSONE: Yeah, I do."

This *Transcript* excerpt is the only transcript filed in the record. Nonetheless, this Court has reviewed the file and evidence in the record and it does not find Defendant *Motion* well taken.

First, the Defendant had notice of Plaintiff's *Motion* as the magistrate held a hearing to clarify Plaintiff's request and identified the clarification in his *Order*. (See *Magistrate's Order* of September 28, 2018 at p. 2.) The magistrate held a hearing in which Plaintiff's request was clarified and the matter was continued for trial on Plaintiff's *Motion*. This Court also notes that no transcript from the June 15, 2018 hearing relating to the clarification of Plaintiff's request record was filed to demonstrate any issues with improper notice. The magistrate was clear in his Order as it relates to the clarification of Plaintiff's request and the case law is consistent "In the absence of both a transcript and an affidavit, the trial court must accept the magistrate's findings of fact and may only examine the legal conclusions drawn from those facts." (*Ramsey v. Ramsey*, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, ¶ 18.) Thus, the Court finds that the Defendant was on notice of Plaintiff's request for a custodial evaluation.

Next, the Defendant's raises concerns with Order and its distinction between an evaluation order under Civil Rule 35 and an order under R.C. §3109.04(C). For example, the Defendant takes issue with the Plaintiff offering Gordon Harris, Ph.D as his own expert witness under Civil Rule 35 in an unsigned proposed order. (See Plaintiff's Exhibit A filed October 8, 2018.) However, Gordon Harris Ph.D was not appointed, and instead Dr. David Lowenstein was ordered to conduct the custodial evaluation. Further, the magistrate did not order the evaluations under Civil Rule 35, but instead supported his *Order* with authority under R.C §3109.04(C) with caselaw, which this Court further cites:

A court making allocation of parental rights and responsibilities shall take into account that which is in the best interest of the children. See R.C. 3109.04(B). The best interest of the children naturally includes the psychological health and stability of the parties. R.C. 3109.04(C) states: " Prior to trial, the court *may* cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to

submit to medical, psychological, and psychiatric examinations. * * *"
(Emphasis added.)

The use of the word "may" in the statute clearly indicates that the decision whether or not to order psychological evaluations is up to the discretion of the trial court. See *Heyob v. Newman*, 1987 Ohio App. LEXIS 9956, (Dec. 8, 1987), Highland App. No. 638, unreported, 1987 WL 26726. We find no authority that holds that a trial court cannot order an evaluation pursuant to R.C. 3109.04 after a party has filed a Civ.R. 35(A) motion.

Harness v. Harness, 143 Ohio App.3d 669, 675, 2001-Ohio-2433 (4th Dist.).

Additionally, *Harness* was cited by the Ohio Fifth District Court of Appeals in *Masten v. Masten*, in which the trial court was presented with very similar arguments as those now presented by Defendant. The *Masten* Court upheld an appellees request for a psychological evaluation in her motion to terminate shared parenting. *Masten v. Masten*, 5th Dist. Fairfield No. 16-CA-4, 2016-Ohio-5738, ¶ 12. The *Masten* Court overruled Appellants argument that the trial court did not comply with Civ. Rule 35(A) and the court instead held that R.C. §3109.04(C) specifically gives the court the authority to order psychological evaluations in cases involving custody. This Court finds it valuable to reiterate the facts in which the *Masten* Court upheld the psychological order:

In her pro-se motion to terminate shared parenting, appellee asked for a psychological evaluation of both parties and of the child, and requested an order restraining appellant from aberrant behavior with the professional engaged to help the child. In her memorandum in support of her motion, she alleged that appellant was engaged in a vendetta that has been harmful to the child, and appellant harassed the office of a local children's counselor she had engaged to assist the child. She further represented that she had observed "elevated levels of behavior" by appellant that was disconcerting to herself, the child, and to other professionals. Appellant responded in his pro se motion to terminate custody that the child had been examined at Children's Hospital in Columbus, and physicians there did not determine a need for psychological care of the child, and if stress has resulted in problems with the child, they were caused by appellee. Based on the information before the court, we find that the court did not abuse its discretion in ordering a psychological evaluation of both parties to attempt to understand the issues in the case.

Masten, at P. 12.

Thus, the magistrate may issue his *Order* under R.C. §3109.04(C) and now this Court turns to the appropriateness of the order in light of a review of the record. The Defendant's argument as it relates to Civil Rule 35 is not well taken.

From the early inception of this case the parties have been embroiled in extremely contentious litigation which has included substantial and ongoing accusations questioning mental and emotional health issues on both sides. Both parties' allegations and actions throughout this litigation have independently raised significant concern to this trier of fact. For purposes of example and support in its determination herein, the Court highlights some of the allegations and actions. By no means is this list exhaustive.

Plaintiff raises issues of concern for Defendant's overall mental health and custodial appropriateness. On November 30, 2017, Plaintiff requested a divorce on the grounds of Defendant's gross neglect of duty, alleging that Defendant's unstable and unnatural behavioral patterns raise concerns for the well-being of the child. (See *Complaint* and *Motion for Psychological Evaluation*.) The Plaintiff has described Defendant's escalating behavior in her *Affidavit for Temporary Orders*, including, name calling, physical violence, explosive anger, paranoia and antisocial behavior. (Plaintiff's *Affidavit* of January 16 at p. 2-4.) She has alleged that the Defendant is emotionally unstable and is or has been physically, emotionally and mentally abusive in front of the minor child. (Id. at 5-6.) She asserts that the Defendant "pulls Lucia into his paranoia, often expressing very negative views about other people and the world to her, affecting her ability to socialize." (Id. at 6.).

Plaintiff has additionally asserted that Defendant is alienating the minor child. (Plaintiff's *Memorandum Contra* of June 20, 2018 to *Defendant's Motion to Set Aside* at p. 3). Plaintiff alleges that Defendant's behavior throughout the course of this litigation, particularly noting clear

examples of mental instability displayed in the courtroom make it abundantly clear why Plaintiff required certain legal safeguards in place before exposing her daughter to Defendant prior to any court order being issued." (Plaintiff's August 31, 2018 *Memorandum* at p. 2.)

Likewise, Defendant asserts significant actions which raise concern regarding Plaintiff's mental health and custodial appropriateness. On December 11, 2017, Defendant filed a *Motion for Emergency Custody* and asserted that absent emergency relief, the child (if left in Plaintiff's care) would be subjected to irreparable harm with respect to her physical, mental and psychological well-being. Two days later the Defendant filed an *Answer and Counterclaim* and alleged Plaintiff to be guilty of gross neglect of duty and extreme cruelty. He filed a *Motion for Contempt* and alleged that Plaintiff refused to allow Defendant any contact with the minor child, and concealed her whereabouts. (Defendant's Motion of December 13, 2017 at p.2). The Defendant has alleged that Plaintiff has caused the minor child to miss 20 days of school causing her to be labeled a "habitual truant." Defendant has described Plaintiff's actions as "educational neglect." (Defendant's Motion to Set Aside Magistrate's Order of May 31, 2018, at p.6). He has described Plaintiff's actions as "tantamount to kidnapping and coercion and her Counsel's actions are tantamount to assisting in coercion...." (Defendant's *Motion for Relief from Judgment* filed April 19, 2018 at p.11.)

The Defendant stated that the "Plaintiff has demonstrated a willingness to alienate the minor child from her father so long as the alienation serves the interest of Plaintiff...Plaintiff has engaged in a pattern whereby Plaintiff is willing to neglect the emotional and educational needs of the minor child; Plaintiff is willing to alienate Lucia from her father; Plaintiff is willing to engage in any conduct, regardless of its harm to the minor child, so long as it suits Plaintiff's interest."

(Defendant's *Memorandum* of June 8, 2018 at p. 6-7.)¹ The Defendant has raised concerns and fears for the minor child's (and his own) safety in the presence of Laura Solly and that Plaintiff uses Ms. Solly as a means to interfere with his parenting time. (Defendant's *Memorandum of Support* of June 14, 2018 at p.2-3).

The Defendant alleged that the Plaintiff made false reports of abuse against him in relation to his parental care of the minor child. (Defendant's *Motion for Contempt* of August 24, 2018 at p. 3.). The Defendant also asserted that the Plaintiff's claims that the child witnessed domestic violence in the home, are "bogus." (Id.) Defendant alleges that the Plaintiff has lied to medical professionals and reported false symptoms to medical professionals. The Defendant alleges that the Plaintiff's actions herein rise to the level of abuse of the minor child. (Defendant's *Motion for Contempt* of September 7, 2018 at p. 5.). As the Plaintiff "did act with cruelty and indifference towards the minor child's educational and emotional well-being. (Defendant's *Motion for Contempt* September 7, 2018 at p.5).

The magistrate's *Order* identified similar concerns warranting a custodial evaluation and possible psychological evaluation if deemed necessary as part of the custodian evaluation pursuant to R.C. §3109.04(C). (See *Order* at 5.). Moreover, this Court is mindful that in determining the best interest of the child, it *shall* consider all relevant factors which includes the mental and physical health of all persons involved in the situation pursuant to R.C. §3109.04(F)(1)(e). The totality of the allegations herein and this trier of fact's experience with the parties directly leads this Court to conclude that a full custodial evaluation may be probative to its statutory directive. Moreover, while factual findings must wait until a full evidentiary final divorce hearing, the sheer volume, content, and nature of allegations and actions made herein, more than sufficiently

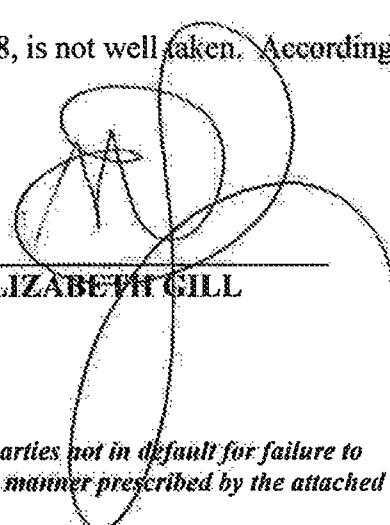
¹ Identical allegations asserted in Defendant's June 11, 2018 *Memorandum in Support* on the page identified as 6 and 7.

independently demonstrate to this Court that a custodial evaluation (with the possible inclusion of psychological evaluations) are necessary to assist the Court in allocating parental rights and responsibilities for the minor child in her best interest under R.C §3109.04, R.C §3109.051, and R.C. §3119.23.

V. CONCLUSION

The Court has thoroughly, carefully, and independently reviewed the entire file, Defendant's *Motion*, and applicable law and does not find that the magistrate committed an error of law or error in fact in his September 28, 2018 *Order*. The Court FINDS that Defendant's *Motion to Set Aside the Magistrate's Order* filed October 8, 2018, is not well taken. Accordingly, the Court hereby DENIES and DISMISSES the same.

IT IS SO ORDERED.


JUDGE ELIZABETH H. GILL

Praecept: To the Clerk of Courts

Pursuant to Civil Rule 58(B), you are here by instructed to serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal in the manner prescribed by the attached instructions for service.

cc:

John Ruiz-Bueno III, Attorney for Plaintiff
Matthew Tassone, Defendant
Leslie Armstrong, Guardian Ad Litem
Magistrate Black

Court Disposition

Case Number: 17DR004399

Case Style: ZEPHYNIA S TASSONE -VS- MATTHEW TASSONE

Motion Tie Off Information:

1. Motion CMS Document Id: 17DR0043992018-10-0899960000

Document Title: 10-08-2018-MOTION TO SET ASIDE
MAGISTRATES ORDER - DEFENDANT: MATTHEW TASSONE

Disposition: MOTION DENIED

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS AND JUVENILE BRANCH**

ZEPHYNIA S. TASSONE

PLAINTIFF,

CASE NO: 17 DR 4399

vs.

JUDGE GILL

MATTHEW TASSONE,

MAGISTRATE BLACK

DEFENDANT.

MAGISTRATE'S ORDER

This matter is before the court upon the following motions:

Defendant's motion for protective order filed on July 9, 2018;

Defendant's motion to compel plaintiff to amend her motion filed on June 19, 2018;

Motion for a protective order filed by defendant on June 14, 2018;

Motion to compel discovery filed by plaintiff on June 4, 2018;

Motion for a vocational expert filed by plaintiff on November 30, 2017; and

Motion for Psychological Examination filed by plaintiff on November 30, 2017.

Both parties were properly served with the motions and appeared in court on July 17, 2018. A transcript of the proceedings was made by court reporter Cathy McClure. Due to a scheduling conflict the Guardian ad litem could not be present. Both parties waived the Gal's appearance and agreed to proceed on the motions listed above. The court has considered all the evidence presented by each party and conducted an in-camera inspection of the defendant's medical records to determine the appropriateness of plaintiff's request for access.

Following the hearing in this matter, the assigned Judge issued a Case Management Order on August 7, 2018 which addresses some of the issues raised by each party in their motions to compel discovery. In addition, the guardian ad litem has filed her own request for a psychological evaluation

of Mr. Tassone pursuant to O.R.C. §3109.04. In her motion, the GAL indicates that her request would be moot if plaintiff's request is granted.

Plaintiff filed her motion for a psychological evaluation on November 30, 2017. In her motion, plaintiff asks the court to appoint a forensic psychological custodial evaluator to perform a full psychological evaluation of the parties. Prior to the hearing on these motions, defendant correctly raised concerns about the nature of plaintiff's motion and what exactly plaintiff was seeking: a psychological evaluation vs. a custodial evaluation. At a prior hearing, the court agreed with defendant and questioned plaintiff's counsel as to his intention regarding the motion. The court and defendant were informed that plaintiff was seeking a custodial evaluation and not a psychological evaluation. The court then informed both parties that it would only hear testimony pertaining to a custodial evaluation and that plaintiff was barred from later attempting to request or present evidence concerning a psychological evaluation of defendant¹. The court also informed the parties that a motion seeking clarification of plaintiff's motion was unnecessary as the court had just resolved the issue.

Despite the above discussion, defendant filed a motion on June 19, 2018 (four days after the hearing) asking that plaintiff be compelled to amend her motion to reflect a specific request for a custodial evaluation. Defendant also filed a memorandum of fact and law supporting his motion. In his memorandum, defendant cites to a previous memorandum contra filed by his then counsel, Mr. Horvath, on March 14, 2018. Defendant cites to this prior memo and its discussion of the "good cause" requirements of Civil Rule 35(A). Defendant's memo then goes on to address the nature of plaintiff's motion, his due process rights, alleged lies perpetrated by Mr. Ruiz-Bueno III, an allegation or reference to possible collusion between Mr. Ruiz-Bueno III and the GAL, and previous statements

¹ The GAL indicates that she has had similar conversations with defendant concerning the difference between a psychological and custodial evaluation and the nature of plaintiff's request -See GAL's motion for psychological evaluation filed on August 21, 2018.

by Mr. Ruiz-Bueno III that suggest his motion was originally intended as a request for a Civil Rule 35(A) psychological evaluation.

Clearly, the court agreed with defendant's characterization of the original motion filed by plaintiff. Had the court not found plaintiff's motion to be unclear, it would not have asked him, on the record, to clarify what type of an evaluation he was seeking. Despite Mr. Ruiz-Bueno III's belief that he had cited a statute in his motion, he in fact did not cite either the civil rule or the Ohio Revised Code. Mr. Ruiz-Bueno III's motion asks that a forensic psychological custodial evaluator be appointed. This would seem to suggest a custodial type evaluation. His motion then states, "...to perform a full psychological evaluation of the parties." This sentence would seem to suggest a Civil Rule 35(A) psychological evaluation rather than a custodial evaluation.

The question then becomes whether this lack of clarity and specificity has impacted defendant's due process rights and his ability to receive a fair hearing and argue against said motion. In his memorandum, defendant acknowledges that the GAL had a conversation with him and indicated she had sought clarification from plaintiff's counsel and had informed the defendant of the results of that conversation² which were consistent with the discussion the Magistrate had with both parties in during the June 15th hearing. The whole purpose of the Magistrate's discussion was to ensure that defendant was provided a specific statement by Mr. Ruiz-Bueno III so that defendant could adequately prepare for the hearing that occurred on July 17, 2018. Even considering all the prior hearings, statements made by Mr. Ruiz-Bueno III in other hearings, and Judge Gill's May 23, 2018 Order referencing the November 30, 2017 filing by plaintiff as a Motion for Psychological Examination, the court cannot understand how defendant can claim he was unaware of the exact nature of the July 17, 2018 hearing after the Magistrate specifically cautioned both parties one month prior that he would only hear

² Defendant goes on to suggest that there may be collusion between plaintiff's counsel and the GAL since Mr. Ruiz-Bueno III began discussing a custodial evaluation instead of a psychological evaluation after the discussion with the GAL.

Defendant argued at trial and in a subsequent writ of mandamus filed with the Supreme Court of Ohio that plaintiff's request is subject to Ohio Civil Rule 35(A). Rule 35(A) indicates that the court may order a party to submit to a physical or mental examination if the mental or physical condition of the party is in controversy. The rule further states that such an order may be made only upon a motion and for good cause shown. Defendant further argues that plaintiff has failed to show good cause and her motion should therefore be dismissed. Additionally, defendant's March 14, 2018 memo in opposition, cited by defendant in his memorandum of fact and law, addresses defendant's argument that although O.R.C. §3109.04(C) provides general authority to order such examinations, Civil Rule 35 sets the procedure the court must follow when exercising that authority. Defendant's memo cites the *Shoff*³ case, an unreported case from Franklin County in 1995 to support his proposition that Civil Rule 35 applies. However, the *Shoff* case is distinguishable from the present case. In *Shoff*, there was a

³ 1995 Ohio App. LEXIS 3145 (July 27, 1995), Franklin App. No. 95APF-01-8, unreported, 1995 WL 450249.

evidence regarding a custodial evaluation and would not allow Mr. Ruiz-Bueno III to argue for a psychological evaluation based upon Mr. Ruiz-Bueno III's representations that day to the court. Even if a reviewing court were to determine that Defendant did not receive proper notice or opportunity to present his case at the July 17, 2018 hearing, the court notes that O.R.C. §3109.04(C) does not require the filing of a motion by either party as, "...the court may cause an investigation to be made...."

O.R.C. §3109.04(C) states, "Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial...."

request for testing which was granted and then the wife requested additional testing pursuant to Civil Rule 35(A).

This court finds, consistent with existing case law, that O.R.C. §3109.04(C) does not contain a requirement that “good cause” be shown and further that an evaluation pursuant to the statute is different from a psychological evaluation requested pursuant to Civil Rule 35(A).

In *Harness v Harness*, 143 Ohio App. 3d 669, at 675, the court states, “R.C. 3109.04(C) does not contain any requirement that good cause be shown for a mental examination ordered under this section.” In *Masten v Masten*, 2016-Ohio-5738, at 10, the court specifically notes that, “R.C. 3109.04(C) specifically gives the court authority to order psychological evaluations in cases involving child custody....” *Masten* goes on to cite *Harness* for the proposition that the use of the word “may” in O.R.C. §3109.04(C) “...clearly indicates that the decision whether or not to order psychological evaluations is left to the discretion of the trial court.”

The purpose of an investigation pursuant to O.R.C. §3109.04(C) is to assist the court in determining the best interests of the minor child. Any relevant information that might be provided through a custodial evaluation in this case would be proper. This case involves significant allegations by both parents concerning the other parent’s parenting abilities. These allegations include accusations that the child was unreasonably withheld from the defendant at the outset of the case, accusations of physical violence between the parties, and concerns about plaintiff’s absence for work at the beginning of the minor child’s life. The court finds it is in the best interest of the minor child that the court and the GAL have all available information and that a custodial evaluation would assist the GAL in making her recommendations and would assist the court in rendering its ultimate decision.

In her motion for a vocational evaluation, plaintiff requests an order appointing Dr. Bruce Growick to perform an evaluation into defendant's income earning ability. Defendant was in the military when the parties met and testified that he was discharged some time in 2013. He is currently enrolled in college studying political science where he has achieved Satisfactory Academic Progress. Defendant testified he did not have a set graduation timeline and was likely to change his major in the future. Although defendant was employed at the very beginning of this case earning \$13 per hour he voluntarily left that job to ensure he had a schedule conducive to exercising parenting time with the minor child⁴.

Since defendant is presently unemployed while attending college, it is appropriate that a vocational evaluation occur so that plaintiff may present evidence as to defendant's earning potential and the court may have evidence on which to base any potential awards of child or spousal support.

There are three discovery related motions currently before the court. Plaintiff's motion to compel discovery filed on June 4, 2018 and defendant's two motions for protective orders filed on June 14, 2018 and July 9, 2018. Based upon the Case Management Order filed by the Judge on August 7, 2018, plaintiff's motion is moot. The Judge has given each party additional time to comply with all discovery requests.

Defendant's two motions for protective orders are not moot and are addressed below. Defendant's motion filed on June 14, 2018 seeks a protection order due to the unreasonable number of limitless, overbroad, and overburdensome requests made by Mr. Bueno III as well as Mr. Bueno's consistent demand for privileged information. The motion for a protection order filed on July 9, 2018 makes the same arguments but provides additional details as to the objections defendant has to

⁴ Defendant has repeatedly objected to the court's characterization of his departure from employment as "voluntary." The court uses that term to indicate that defendant was not terminated or forced to leave his employment by his employer.

plaintiff's requests for admissions, interrogatories, and documents. The court notes that plaintiff filed a memorandum contra on July 10, 2018 in response to the request for a protection order. It is unfortunate that the parties in this case cannot even get through basic discovery without a plethora of motions filed back and forth.

Based upon the court's review of the discovery requests submitted as exhibits to defendant's request for protection order, the court finds that plaintiff's counsel has not strictly adhered to the requirements of the civil rules. Although that may not bar defendant from being required to answer some of the interrogatories and document requests propounded to him, the court finds in this case that a general protective order is granted as to the existing request for documents and interrogatories. Subject to the terms of the Case Management Order and any amendments thereto, plaintiff must resubmit the request for interrogatories and production of documents without compound questions and subparts which exceed the numbers allowed by the civil rules.

The court has reviewed the medical records provided by defendant and finds that some of the information may be relevant to the case and some of the documentation is not relevant to the case. The court further finds that it is appropriate to provide the GAL with the documents the court deems relevant so that the GAL may review them. Should the GAL, after reviewing the provided documents, determine that any of the information she has viewed is relevant to the issue of custody or parenting time, she may inform both parties as such and seek the court's permission to disclose those documents to plaintiff's counsel. If the GAL determines that none of the information is pertinent to the issue of custody or visitation, the documents shall be returned to defendant and shall not be disseminated to plaintiff's counsel.

Despite the above findings, the parties are advised/reminded that the case management order filed on August 7, 2018 requires them to provide: names and addresses of all prospective lay and

expert witnesses and a list and copies of lay documents, records and other exhibits of any nature that may be offered as evidence at trial. They are to provide any expert reports. And, a failure to provide these items may result in the Judge not allowing the party to present them as evidence. In other words, the success or failure of a motion to compel or a protection order finding certain requests objectionable does not relieve either party of their obligation to provide any documents necessary for their trial.

Based upon the above, the court orders the following:

Plaintiff's motion for psychological evaluation filed on November 30, 2017 is granted in part. Both parties are instructed to contact Dr. David Lowenstein at 614-443-6155, 691 South 5th Street, Columbus, Ohio 43206 no later than October 5, 2018 to schedule their initial appointments. Both parties and the minor child shall be evaluated in a custodial evaluation which shall include all measurements deemed necessary by Dr. Lowenstein including a psychological evaluation of the parties and the minor child (if necessary). The parties shall equally divide the costs of the custodial evaluation.

Defendant's motion compelling plaintiff to amend her psychological evaluation motion filed on June 19, 2018 is denied.

Plaintiff's motion for vocational evaluation filed on November 30, 2017 is Granted. Plaintiff shall pay 100% of the fees required to conduct said evaluation. Defendant shall contact Dr. Growick's office no later than October 5, 2018 to schedule his initial appointment.

Plaintiff's motion to compel filed on June 4, 2018 is rendered moot by the Case Management Order filed by Judge Gill on August 7, 2018 and the above findings regarding defendant's motions for protective orders.

Defendant's protection orders regarding the request for interrogatories and production of documents are granted in part. The protection order related to defendant's medical records is also granted in part.

IT IS SO ORDERED.



MAGISTRATE BLACK

September 28, 2018
DATE

cc:

John C. Ruiz-Bueno III
Attorney for Plaintiff

Matthew Tassone
Defendant

Leslie Armstrong
Guardian ad Litem

Court Disposition

Case Number: 17DR004399

Case Style: ZEPHYNIA S TASSONE -VS- MATTHEW TASSONE

Motion Tie Off Information:

1. Motion CMS Document Id: 17DR0043992018-07-0999960000
Document Title: 07-09-2018-MOTION FOR PROTECTIVE ORDER
- DEFENDANT: MATTHEW TASSONE
Disposition: MOTION GRANTED IN PART

2. Motion CMS Document Id: 17DR0043992018-06-1999960000
Document Title: 06-19-2018-MOTION - DEFENDANT: MATTHEW TASSONE - DEF MOTION FOR AN ORDER COMPELLING PL TO
Disposition: MOTION DENIED

3. Motion CMS Document Id: 17DR0043992018-06-1499840000
Document Title: 06-14-2018-MOTION FOR PROTECTIVE ORDER
- DEFENDANT: MATTHEW TASSONE
Disposition: MOTION GRANTED IN PART

4. Motion CMS Document Id: 17DR0043992018-06-1499750000
Document Title: 06-14-2018-MOTION FOR PROTECTIVE ORDER
- DEFENDANT: MATTHEW TASSONE
Disposition: MOTION GRANTED IN PART

5. Motion CMS Document Id: 17DR0043992018-06-0499930000
Document Title: 06-04-2018-MOTION TO COMPEL DISCOVERY -
PLAINTIFF: ZEPHYNIA S. TASSONE
Disposition: MOTION IS MOOT

6. Motion CMS Document Id: 17DR0043992017-11-3099830000
Document Title: 11-30-2017-MOTION - PLAINTIFF: ZEPHYNIA S. TASSONE
Disposition: MOTION GRANTED
7. Motion CMS Document Id: 17DR0043992017-11-3099840000
Document Title: 11-30-2017-MOTION FOR PSYCHOLOGICAL EXAMINATION - PLAINTIFF: ZEPHYNIA S. TASSONE
Disposition: MOTION GRANTED IN PART