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Case Law Update

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CASE LAW UPDATE - 2019

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ADOPTION

In Re: Adoption of B.I., 157 Ohio St.3d 29, 2019-Ohio-2450 (Jan. 2019)

Facts: KI and GB are the natural parents of BI, born in 2007. The parents were never married. Sometime shortly after BI was born, the father was ordered to pay child support. In 2009 Father was sent to prison. In 2010 Mother requested the Clermont County Juvenile Court to terminate Father's child support obligation and to reduce his arrearages to zero. The Court did so.

Mother married and in 2016 her husband, the step-father, filed a petition in the Hamilton County Probate Court seeking to adopt BI. In his petition he alleged that the Father had not paid support for a period of one year or longer immediately preceding filing the petition and that under R.C.3107.07(A) his consent to the adoption was not required.

The Probate Court Magistrate found that even though Father was not subject to a child-support order under a judicial decree, he still had money available and an obligation as a parent to provide child support within his means.

During the one-year period leading to filing the adoption petition, the Father was still in prison receiving $18 per month as prison income, plus an additional $5,152 deposited into his prison account during that year by family and friends.

The Probate Court overruled the Magistrate, finding that a valid zero support order provides justifiable cause for failure to provide maintenance and support under R.C.3107.07(A). Step-father appealed.

The Appellate Court affirmed finding that a no-child-support order or zero-child-support order supersedes any other duty of support *required by law*, and therefore the parent cannot fail without justifiable cause to provide maintenance and support of a minor child. Step-father appealed to the Ohio Supreme Court. Affirmed.

Decision: The Supreme Court accepted this case as both a discretionary appeal and a conflict case. Here are the prevailing views in conflict.

Position 1: The Hamilton County Probate Court claimed that if a father/child-support obligor has an order that required him to pay nothing, then that excuses him from his support obligation and his actual consent would be required for the step-parent adoption to occur.

Position 2: Other districts have claimed there is a statutory duty of support, formerly a common-law duty that still applies even if there is an order setting child support at zero.

In the Supreme Court's analysis, they start off by reminding us this case is not about child support, but it is about the more important issue of the severance of parental rights. Under R.C. 3107.07(A) consent of a parent to an adoption is unnecessary if the Court "finds by clear and convincing evidence that the parent has failed without justifiable cause to provide…for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding…the filing of the adoption petition." Because this deals with the termination of parental rights the Court strictly construes the statute for the retention of those rights by the natural parent.

The Supreme Court set out a three-part analysis to determine whether a parent has failed to provide child support as required by law or judicial decree.

- First, the Court must determine what the law or judicial decree required of the parent the year immediately preceding either filing the adoption petition or placing the minor in the home of the petitioner.
- Second, the Court must determine whether during that year the parent complied with his or her obligation under the law or judicial decree.
- Third, if during that year the parent did not comply with his or her obligation under the law or judicial decree, the Court determines whether there was justifiable cause for that failure.

Here the Court said the issue was whether the existence of a no-support order means that the parent subject to it was under no obligation to provide maintenance and support. Stated differently the Court said "the crux of the issue before us is this: if a court has issued a decree relieving a parent of any child-support obligation, is there a separate obligation that arises by law under which that parent still is required to provide maintenance and support to the child? Their answer is no."

The Court looked at R.C.3103.03(A) which contains the declaration that all spouses and parents have an obligation to support themselves, each other, and their minor children from their own property and labor. This statute subsumed "the common law duty to support one's minor children." R.C.3103.03 sets forth a parent's obligation to support his or her children absent a child support order. It then says another statute comes to the forefront when a marriage ends and that is R.C.3109.05 which grants the power to the trial court to make child support orders. R.C.3111.13(C) and 3111.29 gives the court the same power when the parents of the child were never married. Therefore, a court order establishing child support establishes the parent's obligation. "R.C.3013.03(A) imposed a general obligation on the Father to support BI from his own property and labor. However, once the parties invoked the jurisdiction of the juvenile court to establish parentage, calculate child support pursuant to the guidelines, and issue an order for child support pursuant to the guidelines, the court's decree thereafter superseded the general obligation of support set forth in R.C.3103.03(A)."

The court also looked at the criminal implication in R.C.2919.21(A)(2) which reads "no person shall abandon or fail to provide adequate support to…the person's child who is under age 18…." This is essentially the same obligation posed under R.C.3103.03(A). The Supreme Court then asked its own question on this "but can there be a violation of

R.C.2919.21(A)(2) if a court has modified the parent-child support obligation to zero? Ohio Courts say no."

In their further reasoning the court stated: "if we concluded that another source imposes on that parent a separate obligation to provide child support, then the parent would not be able to rely on a valid court order setting forth child support responsibilities."

There were three dissenting opinions. Chief Justice O'Connor's dissent points out that the majority creates a legal fiction with the term "no-support order." She said there are three factually distinct scenarios. "Orders terminating previously ordered support, zero-support orders, and orders modifying a previously ordered support amount zero." She joined Judge Fisher's dissenting opinion where he states that the majority ignored R.C.3107.07(A). He states that "if the language is unambiguous and definite, we apply it in a manner consistent with the plain meaning of the statutory language. We do not look to the canons of statutory construction when the plain language of a statute provides the meaning." He then wrote "thus, under the plain language of R.C.3107.07(A) a parent's consent to an adoption is not required if the parent *either* has failed to provide support for the minor as required by law *or* has failed to provide support for the minor as required by judicial decree. The parent's failure to fulfill *either* of the two obligations identified in R.C.3107.07(A) is sufficient for the court to move on to the next step of the analysis and examine whether the parent had "justifiable cause" for the failure." He goes on to say that R.C.3107.07(A) requires two steps. One, examine the relevant judicial decree and step two, determine the level of support required by law other than by judicial decree.

PROCEDURE

McWilliams v. McWilliams, 9th Dist. Case No. 29172, 2019-Ohio-2415 (June 2019)

Facts: The parties were married in 1985 and in 2017 wife filed for divorce and served husband by certified mail with the complaint and summons. She also served him with the order scheduling an uncontested divorce hearing for August 22, 2017, which indicated that it would convert into a pre-trial upon husband making a notice of appearance, which he did. He filed no answer. A second pretrial was scheduled for November 2017 and the day before the pretrial wife asked for a continuance and indicated to the court the parties were close to reaching an agreement. A new pretrial was set for March 7, 2018. On November 8, 2017, the day of the scheduled second pretrial, wife drove husband to her attorney's office where husband reviewed and signed a separation agreement. Then wife filed to accelerate the final hearing and the court set the matter down for an uncontested divorce hearing on December 12, 2017. Husband did not appear at that hearing, wife appeared with counsel. That same day the clerk of courts issued a Civ.R. 58 (B) notice with the certified copy of the decree of divorce upon the husband by regular mail. No appeal was taken. Three months later husband filed a 60(B) motion which the court denied finding that husband failed to establish he could have any relief. Husband appealed. Affirmed.

Decision: Husband's first assignment of error was that he did not have notice of the December 12, 2017 hearing, and this hearing was actually a default hearing to which he is entitled to notice. In denying the appeal the court determined that husband received notice and a certified copy of the final decree of divorce of December 2017. The issues raised by him in his motion for relief from judgment were obvious at that time and husband could have asserted those arguments in a timely direct appeal of the final decree. A motion for relief from judgment was not the proper route. “Errors which could have been raised in a direct appeal cannot serve as the basis for a motion for relief from judgment." *Ward v. Hingle* quoting *Kelm v. Kelm*.

Stevens v. Stevens, 9th Dist. Case No. 17 CA80084-M, 2019-Ohio-264 (Jan. 2019)

Facts: Husband and wife were married in 1996 and had no children together. In May 2015 the marital home burnt to the ground and husband was ultimately convicted of aggravated arson. He was incarcerated and remained so during all times relevant to this appellate action.

- In June 2017 Wife filed a complaint for divorce. Husband was served with the summons and complaint and a notice of uncontested or case management hearing set for August 9, 2017.
- Husband moved to participate by telephone and for leave to file his answer in standard, wife filed an opposition.
- On August 9, 2017 the trial court held a hearing denying husband's motion to appear by telephone, granting his motion to file his answer instanter, and went forward with the hearing.
- On September 14, 2017 the magistrate issued a decision granting the divorce to wife.

- On September 27, 2017 husband moved for a 45 day extension of time to file objections.
- On October 23, 2017 husband filed his objections to the magistrate's decision but filed no transcript.
- On November 7, 2017 the trial court denied husband's motion for an extension of time.

Husband filed a notice of appeal on December 1, 2017 challenging the denial of his motion for an extension of time and the divorce decree.

Decision: This being a Medina County case, the appellate court *sua sponte* considered its jurisdiction to hear an appeal contesting the divorce, noting that no Civ.R. 58 (B) notice was sent and noted on the docket. The court concluded that it had jurisdiction.

The Court then dismissed the appeal finding he failed to timely file objections to the Magistrate's Decision and failed to develop a plain error argument on appeal.

Benedetti v. Benedetti, 9th Dist. Case No. 29038, 2019-Ohio-3988 (Sept. 2019)

Facts: Wife filed for divorce from husband. In October 2015, while the divorce was pending, wife filed an emergency motion for the return of the minor children and to suspend all of father's companionship time and all of his all contact with the children. The court scheduled a *meeting* with counsel for both parties the following week and because of the meeting the court issued a judgment entry granting wife's sole temporary custody and ordering father to get a psychological evaluation. In April 2016 the court entered a decree of divorce granting custody of the children to wife and granting parenting time to husband subject to his first completing the ordered psych evaluation. It also required him to pay child support. In December 2017 the CSEA moved to have father held in contempt for the nonpayment of the child support. On April 17, 2018 the trial court found father in contempt for failure to pay child support. Father appealed. Affirmed.

Decision: Husband first argued that the court erred when it suspended his parenting time in 2015. The appellate court looked to App.R.3(A) which designates a judgment order or part thereof appealed from. Husband's appeal here was only to the April 17, 2018 order finding him in contempt for failure to pay child support, and not to the 2015 custody order. Father then raised that the divorce decree was void and unenforceable because it was ambiguous and confusing. He cites *Brown v. Brown* for the proposition that an ambiguous order may be declared "void for uncertainty and, therefore, not a final, appealable order." But the court found that the *Brown* court used the wrong nomenclature and that instead the judgment entry should have been deemed erroneous and voidable but not "void for uncertainty." See: *Geauga Sav. Bank v. McGinnis,* 11th Dist. Trumbull Nos. 2010-T-0052 and 2010-T-0060, 2010-Ohio-6247. The appellate court went on to observe that the distinction between void and voidable: "a void judgment is considered a legal nullity and may be attacked collaterally, a voidable judgment, although imposed here regularly or erroneously, has the effect of a proper legal order unless it is successfully challenged on direct appeal."

Smith v. Smith, 9th Dist. Case No. 28961, 2019-Ohio-129 (Jan. 2019).

Facts: Husband and wife were married in 2012 and had 4 children. In November 2016 they filed a petition for dissolution. Wife was represented by counsel and husband was not. In January 2017 the Court granted a decree dissolution which incorporated the parties separation agreement and shared parenting plan. Neither party filed a direct appeal of the decree. In December 2017 husband moved to vacate the judgment under Civ.R. 60(B)(4), (5). He argued that the separation and shared parenting plan prepared by wife's counsel, were unconscionable and against public policy. Both documents provided that the minor children were covered under Medicaid even though husband made $132,000 per year. There was no provision for either party to pay cash medical support.

In addition, husband would pay:

- the mortgage on the marital residence, with no termination date;
- wife's utilities for 17 years;
- homeowners' insurance for the wife, with no termination date,
- all repairs and upkeep for the home, with no termination date;
- all expenses for the heated inground pool, with no termination date;
- all yard maintenance, with no termination date;
- all housecleaning services, with no termination date;
- wife's car lease;
- wife's car insurance, with no termination date;
- $800 monthly for college fund for the children, with no termination date;
- a private health insurance plan for wife, with no termination date;
- private school tuition for 4 children through high school;
- all expenses for the children for 17 years;
- money to pay for Christmas presents, with no termination date;
- $1500 per month in cash to wife for household expenses, with no termination date;
- $200 per month to wife's IRA premiums on a $2 million life insurance plan in which wife as beneficiary, with no termination date.

The trial court denied husband's Civ.R. 60(B) motion without holding a hearing. Husband appealed. Reversed and remanded.

Decision: in order to obtain relief through Civ.R. 60(B) a party must show it has a meritorious defense or claim if the relief is granted; the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and the motion is made within a reasonable time and where the grounds for relief are Civ.R. 60(B)(1),(2), or (3), not more than one year after judgment was entered.

Husband asked for relief under the Civ.R. 60(B)(4) (when it is no longer equitable to enforce the judgment) and Civ.R. 60(B)(5) (any other grounds) applied. He argued that the separation agreement and parenting plan were unconscionable and against public policy. They were unconscionable because of the requirements of what he had to pay, and against public policy because they allowed wife to keep the children on Medicaid.

The appellate court found that the provisions requiring the children to be covered by Medicaid when there were sufficient funds for the parents to provide health insurance was against public policy and relief under Civ.R. 60(B)(5) was proper.

Notably, the court stated "Here, husband has a meritorious defense to present if the decree was vacated. The decree, which incorporated the parties' separation agreement and parenting plan, is unquestionably grossly inequitable, and was clearly designed to take advantage of the fact that husband was unrepresented."

The appellate court further wrote "We conclude that merely vacating the problematic clause concerning Medicaid in this case would not provide justice to either party. It is clear that the entire agreement was drafted in such a way as to increase the likelihood that the children would be eligible for Medicaid."

Lumbog v. Suansing, 9th App. Case No. 29135, 2019-Ohio-1871 (May 2019)

Facts: In May 2017 Wife filed for divorce; in May 2018 the matter proceeded to trial before an assigned magistrate who issued a decision determining the divorce should be granted and addressing division of property, spousal support and child support. The magistrate filed a decision on May 31, 2018; on June 15, 2018 Wife filed her objections. Husband filed to dismiss the objections as untimely. The trial court issued a ruling on the objections concluding that any objections had to be filed on or before June 14th and overruling the objections as untimely. Wife appealed. Affirmed.

Decision: Wife argued that Civ.R. 6(A) and (D) should apply to extend the deadline in Civ.R. 53(D). Civ.R. 6(D) provides: "Whenever a party has a right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party and the notice of papers served upon that party by mail or commercial carrier service…three days shall be added to the prescribed period." Here the period for filing of objections is not based upon service of notice when the notice is served by mail, but is premised upon the date of filing the magistrate's decision not upon the service of notice of the mailing of the decision.

McCormick v. Lu, 9th Dist. App. No. 29094, 2019-Ohio-513 (Feb. 2019)

Facts: In 2016 wife filed a complaint for divorce from her husband in the Franklin County Common Pleas Court, Domestic Relations Division. In August 2017 a Notice of Bankruptcy Stay was filed in the Franklin County Court. In April 2018 husband filed for divorce in the Summit County Domestic Relations Court. Wife moved to dismiss the case arguing that the same cause of action was still pending in Franklin County. The trial court granted her motion to dismiss and husband appealed. Affirmed.

Decision: The appellate court affirmed, relying on *State ex rel Phillips v. Polcar*, 50 Ohio St.2d 279 (1977) "As between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties."

Academy of Nursing Homes, Inc. v Ohio Dept. of Medicaid, 10th Dist. Case No. 16AP-102, 2016-Ohio-1516 (Apr 2016)

Facts: Plaintiff's representative is ordered to appear at a deposition under an Order to Compel issued by the trial court. Plaintiff argued that its representatives did not have to appear because of the attorney-client privilege. Trial court orders witnesses to appear. Plaintiff appeals the order to the Court of Appeals. Defendant moves to dismiss the appeal because the Order to Appear at the deposition was not a final appealable order. Motion to dismiss denied.

Decision: Although most discovery proceedings do not qualify as a provisional remedy and cannot cause an interlocutory appeal, R.C 2505.02(A)(3) specifically notes that a proceeding that results in discovery of privileged matter is a provisional remedy. The provision of a right to an interlocutory appeal from such orders stems from the protected information once releasing cannot be nullified. The party resisting discovery will have no adequate remedy on appeal. The "proverbial bell" cannot be unrung and an appeal after a final judgment on the merits will not rectify the damage. An order that compels the final and unfettered discovery of privileged material even if that discovery has yet to take place under an order has effectively determined the action regarding the provisional remedy and requires the disclosure of allegedly confidential information.

RETIREMENT

Walsh v. Walsh, Supreme Court of Ohio, ___ Ohio St.3d ___, 2019-Ohio-3723 (Sept. 18, 2019).

Facts: Husband and wife were married in August 1994 and separated in 2000. They did not divorce until 2013. The terms of their divorce were made by agreement. Husband had served in the Navy for 20 years and was entitled to a military pension. Wife would receive a share of his pension based upon the marriage term of 6 years. The decree further required that a consulting firm would prepare a QDRO and that the court would retain jurisdiction over the QDRO. However, after submission to of the divorce decree to the consulting firm preparing the QDRO, the consulting firm determined that it was impossible to draft a QDRO in a way which the military would directly pay to wife.

Specifically the divorce decree did not specify wife's share of the pension in percentage terms and because the decree stated the parties were married for 6 years, it could not satisfy the military's requirements that the marriage last for at least 10 years, and the service member was engaged in active military service before it could issue a direct-pay-to-wife order. (The 10/10 rule).

In 2015 Wife moved for relief from judgment under Civ.R. 60 (B) (4) and (5). Wife asked that the decree be amended to state the party's actual date of marriage and date of divorce rather than the agreed-upon dates so it would meet the 10/10 rule. At an evidentiary hearing that followed a QDRO consultant testified to a coverture fraction that wife would be entitled to, and also testified that wife could not receive direct payments, and the court would have to order husband to directly pay wife.

The magistrate granted the motion for relief from judgment and made two significant alterations to the divorce decree: first, it changed the term of the marriage to be from August 10, 1994 through August 10, 2004 and then stated the coverture fraction wife was to receive (15% of husband's retirement pay per month). The court the trial court approved the magistrate's decision. Husband's objections were overruled. Husband appealed.

On appeal, the 11th District affirmed the trial court's decision concluding that the trial court had retained jurisdiction over the QDRO and could modify the terms of the divorce decree regarding the pension. Although the appellate court noted that a trial court does not have continuing jurisdiction to modify a property division in a divorce decree, in a situation such as this the court may "clarify and construe" the property division in order to carry out its judgment. The dissenting opinion stated it was improper to establish a fictional termination of marriage date to circumvent federal law.

Husband appealed to the Ohio Supreme Court. Reversed.

Decision: The Supreme Court looked to R.C. 3105.171(I) which provides that a property division made in a final decree of divorce is not modifiable "except upon the express written consent or agreement to the modification by both spouses." In this case, the domestic relations court granted relief from judgment under Civ.R. 60(B) to modify a decree that divided pension benefits even though both parties had not agreed to the modification. The Supreme Court concluded the trial court lacked authority to modify the decree. In so ruling the Supreme Court cited its decision in *Morris v. Morris*, 148 Ohio St. 3d 138 (2016), in

which they stated that a trial court could not use Civ.R. 60(B) to modify an award of spousal support in a decree of divorce or dissolution when the decree did not contain a reservation of jurisdiction. They went on to say "although *Morris* dealt with spousal support, rather than a property distribution, the same principle applies: Civ.R. 60(B) cannot be used to alter the statutory requirements for the modification of the decree. Because R.C. 3105.171(I) does not permit modification absent the consent of both parties, Civ.R. 60(B) cannot provide a work around.

Schoch v. Schoch, 9th Dist. Case No. 18 CA011382, 2019-Ohio-1394 (April 2019)

Facts: the parties were married 1998 and divorced in 2018. In 2016 husband, who had been an employee of the Cleveland RTA, went on disability retirement. Wife worked in the senior care positions. The largest assets being divided were the marital residence, the marital portion of husband's OPERS account, his deferred compensation account, and personal collections each had accumulated during the marriage. The trial court determined the value of the marital residence was $124,000, even though the appraiser did not testify and the appraisal was objected to. The Court found that husband invested money in this property prior to the marriage. The court recognized that husband's OPERS account was a marital asset and awarded 100% to husband without determining its value. The court then assigned a zero value to each party's collection and that awarded each his/her collection. The court then awarded husband attorney's fees based upon wife's conduct during the proceedings. Wife appealed. Affirmed in part and reversed in part.

Decision: Wife first argues that the court erred in determining the value of the marital residence after it excluded the appraisal. In overruling that assigned error the court pointed out that although the report of the appraiser was excluded because the appraiser was not present to testify, both parties testified to the value of the property and each referenced the appraisal in their own testimony. The appellate wrote: "a witness who offers an opinion regarding the value of property must ordinarily be qualified as an expert, but an owner of property may testify about its value without being so qualified" Citing *Corrigan v. Corrigan*.

About attorney's fees the court stated that the trial court has broad discretion to award fees and they were justified here because part of the misconduct of wife included her hiding husband's jewelry out of state, destroying property, and agreeing to settlement conferences and then not appearing.

The appellate court sustained the assigned errors relating to the lack of the values of the party's collections and of the OPERS account. In citing *Wenger v. Wenger* the court wrote: "while courts have a duty to determine the value of all marital assets when fashioning a property distribution. A trial court is not privileged to omit valuation altogether. When a trial court does so, it may affect the entire division of property, and when valuation is omitted, this court cannot effectively review the property division. *Zona v. Zona,* 9th Dist. Case No. 05CA0007-M, 2005-Ohio-5194

In Re: Archer v. Dunton, 9th Dist., Case No. 29091, 2019-Ohio-1971 (May 2019)

Facts: The parties were divorced in 1993 after 18 years of marriage. Their separation agreement provided that Wife could have one-half of Husband's pension through the Ohio Police and Fire Pension Fund as of the date of divorce and provided that "should Ohio law be amended so as to allow a Qualified Domestic Relations Order, or similar order, on state-administered pension plans, then said order shall be filed on Husband's pension plan." The agreement also required 30-days' notice to Wife if Husband elected to receive a lump sum instead of periodic pension payments. In 2003 the trial court issued a division of property order (DOPO) that set forth the amount payable to Wife as alternate payee or an amount distributed to her if Husband elected a lump-sum distribution. Husband however chose a third option and that was to participate in a Deferred Retirement Option Plan (DROP) instead of receiving his pension benefits. So instead of receiving his monthly pension payments his payments were deposited into an interest-bearing account instead of being paid to him and he continued to work with future pension contributions deposited into his DROP account.

In 2016 Husband moved to set aside the DOPO under Civ.R. 60(B)(5) and Wife moved to modify the DOPO to reflect Husband's participation in DROP. The trial court addressed Husband's motion and granted Husband's relief from judgment but did not address Wife's motion to modify. On appeal the judgment was reversed finding that Husband's alleged mistake by the trial court could not be supported under Civ.R. 60(B) and also stated that the court had not yet considered Wife's motion to modify the DOPO. In June 2018 the trial court issued an order concluding that the funds in Husband DROP account were not marital property and denying Wife's motion to modify the DOPO on that basis. The trial court also found that the DOPO contradicted the divorce decree and permitted Husband to submit an amended DOPO. Wife appealed. Reversed and remanded.

Decision: Wife argued that she may receive a percentage of Husband's DROP account because the post-divorce DROP is funded, in part, by marital property, to which the court agreed. In siting the *Hoyt* case the Appellate Court said there are three methods generally used to divide the marital portion of a pension.

- On one end the courts may determine the present cash value of a spouse's share and award the non-participating spouse that amount by allocating other marital assets or structing a cash payout. In this method, also referred to as the "frozen" method, the non-participating spouse does not share in the growth of the account.
- On the other end, the court may reserve jurisdiction and determine the parties' shares during retirement using the traditional coverture fraction (ratio of the years employed during the marriage divided by the total years of employment). This is described as the non-participating spouse receiving a smaller percentage of a larger pie and is the "coverture" method.
- A third way to determine it is called the "frozen coverture" method and is a hybrid. In this way the court determines the value of the pension account as if it were frozen on the divorce date. A "frozen coverture" calculation does not cap the non-participating spouse's benefits at a sum certain. The non-participating spouse shares in the growth over time due to investment of her share of the portion of the retirement fund that represents marital asset.

For an employee who has selected the DROP program, at the conclusion of their required term of service they will receive, on a deferred basis, the retirement benefits earned during the marriage and that could have been earlier received but for the election to participate in DROP. Finding here that Husband's marital portion of this pension did not change in character because he participated in DROP, Wife could have a portion of the DROP account attributable to her share of Husband's benefits earned during the marriage.

In her second assignment of error, Wife complains that the trial court exceeded its authority in granting Husband relief he had sought under Civ.R. 60(B)(5) and which the Appellate Court had denied. The Appellate Court found that since it had determined that Husband could not establish that he may have relief under this Rule it was error for the trial court to effectively revisit his motion and grant him that relief.

Hoffman v. Tustin, 9th Dist., Case Nos. 28799, 29104, 2019-Ohio-2546 (June 2019)

Facts: In 2011 wife filed for divorce from husband which complaint was tried in 2013 and a Decree of Divorce was entered. An appeal was taken, and the Appellate Court affirmed in part and reversed in part remanding the case to determine the duration of the marriage and to revisit the determination regarding the equitable division of marital property.

After a remand hearing the trial court issued a decree of divorce on April 8, 2016. The trial court ordered that the defined contribution retirement plans to be divided equally, with wife to transfer to husband $103,436.62 to equalize the value of the accounts. It also provided that wife's pension plan was to be divided equally between the parties by a Qualified Domestic Relations Order.

QDRO's were prepared using the *de facto* marriage termination date of December 31, 2011, but when they were submitted to FirstEnergy Corp. the parties were told that the plan administrator could not calculate gains and losses on any account prior to January 1, 2014.

Thereafter an amended savings plan QDRO was prepared replacing the date of December 31, 2011 with January 1, 2014, and was submitted to the trial court by wife without approving husband. The trial court filed the QDRO's for both the savings plan and the pension plan on September 1, 2017, the FirstEnergy plan having the new date of January 1, 2014. Husband moved to set aside the QDROs which he did not approve. Husband also appealed (before there was a ruling on the Civ.R. 60(B) motion). The appellate court stayed the matter and remanded the case related to husband's Civ.R. 60(B) motion. In June 2018 the trial court denied the motion for relief from judgment and husband filed a second appeal identical to the first appeal and it is was consolidated into one appeal. Affirmed.

Decision: Husband's appeal dealt with the Court denying his motion for relief from stay without a hearing. In denying the motion the trial court had noted that it did not have to grant an evidentiary hearing if husband did not allege operative facts to justify the relief from judgment. Although husband correctly argued that the valuation date was changed to January 1, 2014 from December 31, 2011, he failed to show he had any passive growth during that period.

Taylor v Taylor, 115 N.E.3d 831, 2018-Ohio-2530 10th Dist. (June 2018)

Facts: Parties were married in 1969 and divorced on June 29, 2016. The court retained jurisdiction to sign a QDRO or other order to divide Husband's military pension. On October 2, 2017 the trial court signed a Military Retired Pay Division Order MRPDO dividing the Husband's retirement and providing for survivor benefits to the wife. Husband appealed that order. Affirmed.

Decision: Wife argued that the Husband had not timely filed his notice of appeal and therefore the Court of Appeals did not have subject matter jurisdiction to hear the appeal. In finding that the appeal had been filed timely the Court of Appeals found that since the divorce decree contemplated issuing a QDRO it did not resolve the division of retirement accounts including the division of military benefits and therefore the divorce decree was not a final appealable order. The Military Retired Pay Division Order filed on October 2, 2017 is a final appeal order as it resolves the final issue of the division of retirement benefits. Therefore, the Husband's notice of appeal is timely.

Estate of Parkins v Parkins, 3rd Dist., Case No. 1-18-50, 2019-Ohio-1941 (May 2019)

Facts: The parties sign a separation agreement incorporated into the decree of divorce which provides for an equal division of the estate**.** Parties sign a divorce agreement wherein to equalize the marital estate. Wife agrees to transfer to the Husband $87,000.00 by way of a "PLOP" (partial lump sum option payment) from the Wife's OPERS account upon her retirement from the State of Ohio. A DOPO is prepared and sent to OPERS. OPERS rejects the DOPO because of errors in the drafting of the DOPO. 10 days after OPERS rejects the DOPO the Husband dies. Wife claims that under R.C. 3105.86 the alternate payee's rights under an approved DOPO terminate on the death of the alternate payee. Estate of the Husband files a declaratory judgment against the Wife seeking payment of the $87,000.00. Trial Court grants the declaratory judgment and orders the Wife to pay the $87,000.00. Wife appeals that decision. Affirmed.

Decision: Although the husband's death may have terminated the right to use a DOPO to collect money from wife, the husband's death did not affect the viability of the underlying property settlement. A divorce decree is an actual order which divides property whereas a QDRO or DOPO is merely a tool used to execute the divorce decree. The denial of implementing a DOPO does not alter a divorce decree and the reference to a PLOP or DOPO does not extinguish the underlying obligation. The wife's underlying obligation to the husband remains valid even if the vehicle for dividing property may have to be changed.

CHILD SUPPORT

McDerment v. McDerment, 9th Dist. Case No. 18CA011369, 2019-Ohio-2609 (June 2019)

Facts: The parties were divorced in September 2016, father was ordered to pay child-support. Multiple post-decree motions were filed by the parties and after several days of hearing the motions, the court entered a judgment modifying child and holding father in contempt. Father appeals. Affirmed on procedural issues and reversed in part.

Decision: Father argued that the trial court erred in deviating upward in its calculation of child support. The court found that R.C. 3119.22 are mandatory and must be literally and technically followed. Here the court recalculated child support under R.C. 3119.79 and then deviated from that amount and failed to find that the amount would be unjust or inappropriate and, therefore, there was no finding that the guideline amount was not in the best interests of the children.

Father also argued that the trial court erred in finding him in contempt for failure to pay his share of out-of-pocket medical expenses for the children. The decree of divorce stated: "the parents shall share liability for the ordinary and extraordinary expenses of the children who are not covered by private health insurance or cash or medical support." That provision does not address how out-of-pocket health care expenses are to be shared between the parties for children who are otherwise insured. To establish contempt requires 3 steps (1) establish that a valid court order exists; (2) knowledge of the order by the defendant; and (3) a violation of the order. See *Henry v. Henry*. Here there was no order about sharing of out-of-pocket expenses for children insured by a health care plan.

Behning v. Behning. 9th Dist. Case No. 287 to 1, 2019-Ohio-1429 (April 2019)

Facts: Mother and father were married, had two children, and obtained a divorce in Texas. Mother was granted custody of the daughter and father was granted custody of the son. After the divorce father and son moved to Ohio while mother and daughter remained in Texas. In 2011 father initiated proceedings in Ohio to modify parental rights and responsibilities and for child support services and included a motion to register the child custody determination issued by the District Court of Dallas Texas. The motions were set for hearing in January 2014. Just prior to that hearing the parties resolved all issues which agreement was entered into the record in January 2014. It required mother to pay child support of $389 beginning January 2012 and increasing to $448 per month in November 2013. On August 6, 2014 the Ohio trial court accepted the transfer of documents from the court in Texas. After this agreement was reached and journalized in Ohio, the Texas court entered an order reducing father's child support obligation to $350 per month.

On August 29, 2014 mother filed a motion in Ohio seeking to vacate the prior Ohio agreed entry or to modify her support obligation based on this change. In December 2014 she moved to dismiss her prior motion to vacate and confirmed her request for modification in seeking a deviation from the monthly payment amount. At the hearing on the motions in January 2015 the magistrate heard no testimony or take evidence, instead relied on arguments from counsel for the parties. After the hearing the magistrate issued a decision that found that under a split parenting worksheet father should pay mother $267 per month in support. Father objected on four grounds:

1. The Ohio trial court lacks jurisdiction to enter orders regarding the daughter who resides in Texas;
2. The magistrate erred by using a split custody worksheet when child support for one of the two children is being calculated by a foreign court;
3. There had been no change in circumstances since the February 2014 support order;
4. It was error for the magistrate to order a modification without an evidentiary hearing. In the trial court's ruling on the objections it found that only Texas had jurisdiction regarding the parties' daughter.

The Ohio trial court acknowledged father's objections based on lack of jurisdiction, failure to consider father's support obligations in the worksheet, and because there had been no change in circumstances. But the trial court did not specifically acknowledge or address father's objection to the lack of an evidentiary hearing. The trial court then recalculated the support and ordered mother to pay father zero dollars per month in child support and father to pay mother zero dollars in child support for the daughter. Father appealed. Reversed and remanded.

Decision: In finding that the trial court did not sustain or rule on the father's objection to the absence of a change in circumstances and omitted a ruling on father's objection to the lack of an evidentiary hearing, the trial court's ruling was not a final appealable order.

Cauthen v Cauthen, 3rd Dist., Case No 9-17-01, 2017-Ohio-5846 (July 2017)

Facts: Parties are divorced in California and Husband per the divorce decree is ordered to pay to the Wife $ 589.00 per month for child support. Post- divorce both the ex-wife and the ex-husband with the children relocate to Ohio. Parties reside together from 2006 until 2012. During that period of time no child support is paid by the ex-husband. The ex-wife is employed, and the ex-husband stays at home and cares for the children. In 2012 the parties separate and the ex-husband moves out of the home. Ex-wife through an action filed with the CSEA seeks child support and repayment of arrearages for the period from 2006 until 2012. CSEA determines child support arrearages and orders husband to repay the arrearages. Two years later husband moves to seek to reduce his child support arrearages for the time that he cared for the children (2006-2012). Trial court grants the motion. Wife appealed. Affirmed.

Decision: Wife at the trial court level and at the court of appeals argued that the by granting the husband's motion for a credit that granting the motion amounted to a retroactive modification of child support. Trial court and Court of Appeals rejected that argument. Both Courts held that the purpose of child support was for the support of the children. Where the custodial parent does not provide for the support of the children and the child resides with the non-custodial parent who provides in kind support for the children, the custodial parent is not entitled to judgment for the support arrearages for such time as that the full support was provided by the non-custodial parent.

Yant v Roebuck, 3rd Dist., Case No 12-16-14, 2017-Ohio-2591 (May 2017)

Facts: Trial court establishes a child support order against the father. In establishing the support order, the trial court finds that the Wife was voluntarily unemployed and imputes minimum wage to the Wife based on the Federal minimum wage and not the Ohio Wage. The Ohio minimum wage of $ 8.10 per hour whereas the Federal Minimum Wage is $ 7.25 per hour. Husband appealed. Affirmed

Decision: R.C 3119.01(c)(11)(a)(i)-(ix) does not restrict the trial court using the Federal Minimum Wage as opposed to the Ohio Minimum Wage. Husband also argued that the trial court committed error when in calculating the Husband's income the trial court averaged the husband's income for the years 2013-2015 but excluded the husband's income in 2016 wherein the husband had zero income. In affirming the trial court's decision to exclude the husband's income in 2016 the Court of Appeals said that excluding the husband zero income in 2015 was reasonable and not an abuse of discretion that the Husband voluntarily chose not to work in 2016.

Slaughter v Hoover-Grier, 2017-Ohio-2770, 90 N.E.3d 333 (App. 10 Dist. May 2017)

Facts: Mother in a parentage action seeks child support from the Father of the children. Mother testifies that her day care is $225.00 per week. Mother also testified that sometimes her mother pays for day care. Trial court based upon on the Mothers testimony doesn't include day care expenses in the child support calculation. Wife appeals. Reversed.

Decision: In reversing the trial court's decision the Court of Appeals said that even if the wife's mother paid the child's day care there was no authority statutory or otherwise requiring that day care expenses be paid directly from the parent's income. To support its decision the Court referred to the case of *Johnson v McConnell* from the 2nd District. There the Court of Appeals agreed that although the source of funds to pay day care may be considered by the trial court, that a parent receives financial assistance doesn't disqualify those expenses from being included in the child support calculation.

Rowe v Rowe, 9th Dist. Case No. 16AP0062, 2018-Ohio-1103 (March 2018)

Facts: Under the Parties decree of divorce the Father was to provide health insurance to benefit the minor children. Father loses his job and as a result has no health insurance. Mother by this time had remarried and when father loses job Mother's new husband puts step children on his policy of health insurance. Mother then files to modify child support obligation to include the cost of health insurance provided by the new husband. trial court grants the motion and orders Father to pay cash medical plus % of insurance premium offset by cash medical. trial court also makes the child support retroactive to the filing. Husband appealed. Affirmed.

Decision: Court of Appeals affirmed the decision which found that although the Father was contributing to the cost of health insurance by paying cash medical the cash medical was not the father's "fair share" and that it was equitable and in the children's best interest

for father to pay a percentage of the health insurance based upon the percentage of income found on line 16(a) and 16(b) of the worksheet.

***A.S v J.W*,** 6th Dist., Case No. L-17-1099, 2018-Ohio-1001 (March 2018)

Facts: Mother files to modify child support. trial court to determine Father's income added to Father's base income of $ 94,000.00 the 3-year average of Husband's commissions. Adding the husband's base income and 3-year commission average the trial court found the Father's income to be $ 370,000.00 per year. Based upon this income the trial court ordered husband to pay $ 4,000.00 per month. Father appeals, Affirmed.

Decision: In affirming the trial court's decision the Court of Appeals first noted that R.C 3119.05(D) speaks only to the calculation of income from over time and bonus and not commission, citing the Poling Case from the 10th District the Court of Appeals. When the trial court included commissions in determining gross income during this calendar year, the trial court committed error because commissions are not included within the definition of R.C 3119.05(D).

However, even if the trial court could not include commissions in determining gross income the trial court had the authority to average the father's income to calculate gross income under R.C 3119.05(H). Because the Father's income somewhat contradicted the last several years income averaging under 3119.05(H) was appropriate. Further the trial court was not limited to a 3-year lookback period in its averaging of income.

The Court also affirmed the trial court's use of extrapolation to determine child support although the Court of Appeals recognized that District's such as the 8th have expressed significant doubts whether a court fulfills its statutory duty to determine child support on a case by case analysis as required by R.C. 3119.04(B) when it by rote extrapolates a percentage of income to determine child support (Citing *Siebart v Tavarez*)

***Burns v. Burns*,**12th Dist. Case No. CA2017-08-129, 2018-Ohio-2262 (June 2018)

Facts: Parties shared parenting plan provided Mother was to claim the parties' child as a dependent from the date that the shared parenting plan was signed and "each year thereafter." In 2016 the child became emancipated. In the year following the child's emancipation the Father claimed the child as a dependent for tax purposes. Mother files a motion for contempt on the grounds that the Husband claimed the child as a dependent. Trial court denies the motion. Mother appealed. Affirmed

Decision: A shared parenting plan is a contract and the rules of contract construction apply to carry out the intent of the parties as that intent is evidence by the contractual language of the plan. Determining the tax exemption is based upon R.C. 3119.82 which provides that a parent may claim a child as a dependent for tax purposes *who is the subject of a child support order*. Applying the rules of contract construction, the phrase in the shared parenting plan "each year thereafter" is tied into a child support order. The phrase "each year thereafter" applies to those years where a child support order is in effect. Once the child turned 18 and was emancipated the provisions regarding which parent may claim the child as a dependent no longer apply.

***Matlock v Matlock*,** 2nd Dist., Case No. 28278, 2019-Ohio-2131 (May 2019)

Facts: Father granted custody of both children because mother plead guilty to child endangerment. Mother loses her job and when she discloses to her new employer that she had a criminal conviction she is not rehired. Mother then files to modify and reduce her child support obligation. Trial court does not find that wife is voluntarily unemployed and reduces child support based on her lack of income. Father appealed. Reversed. Reversed.

Decision: Whether a litigant is voluntarily unemployed or voluntarily underemployed is a question of fact for the trial court. The party who claims that the other parent is voluntarily underemployed must prove so. R.C 3119.01(C)(7) defines potential income for persons voluntarily underemployed and lists 11 criteria to be used to decide the income to be imputed. Voluntary unemployment or underemployment warrants no downward modification of child support. To warrant a modification of child support the change of circumstances generally must not result from an involuntary action.

Here the Mother admitted that she knew that would not be re-employed due to her conviction. A parent seeking to avoid the imputation of income "must show an objectively reasonable basis for terminating or otherwise diminishing employment." Reasonableness is measured by examining the effect of the parents' decision on the interests of the child. Children should not be made to suffer because of a parent's wrongdoing. In reversing the trial court's decision, the appellate court concluded that the wife's decrease in income was involuntary and the result of her intentional criminal actions.

Sweeney v Sweeney, 1st Dist., Case No C-180076, 2019-Ohio-1750 (May 2019)

Facts: The parties reach on all terms of shared parenting except child support. Trial court hears the evidence on child support and father testifies he sold his car dealership and placed the proceeds in savings. He testified that he now sells cars and earns less. The trial court finds that father is voluntarily underemployed and imputes income to the him. The court also imputes 4% interest on the money which father received from the business sale and sets his child support obligation. Father appealed. Reversed.

Decision: A voluntary reduction in income cannot establish that potential income should be imputed to the parent. The test is not only whether the change was voluntary, but also whether it was made with due regard to the parent's income-producing abilities and his duty to provide for the continuing needs of the children. The record must demonstrate an objectively reasonable basis for reducing employment income, where "reasonableness is measured by examining the effect of the parents' decision on the interest of the child." The goal is to protect and insure that the best interest of the children and the parent's subjective motivations for being voluntarily unemployed or underemployed play no part in the determination whether protentional income is to be imputed to that parent in calculating his or her support obligation.

The Trial Court erred when it classified the savings account as a non-income producing asset which then allowed the court to attach its own interest rate to those funds. Since R.C. 3119.01(C)(11)(b) does not permit the imputation of income from income-producing assets, the court erred in doing so. Assets deposited into an account earning in interest

are in fact income producing and do not fall with the rubric of income producing assets under former R.C 3119.01(C)(11)(b).

Misra v Mishra**,** 10 Dist. Case No 17AP 306, 2018-Ohio-5139 (Dec. 2018)

Facts: Just before the divorce is filed the husband transfers $500,000 to wife who deposits those funds into a saving account in India. Wife testified that she had only earned $675 in interest even though banks in India were paying 9.25%. Wife had a degree in psychology but worked as a part-time day-care worker. Trial Court found the Wife to be voluntarily underemployed and imputed interest income on the $500,000.00 at 9% per year or $ 6,000.00 per year. Wife appeals that decision. Reversed.

Decision: In reversing the decision of the trial court the Court of Appeals stated that the under R.C 1343.03 and R.C 5703.47 interest to be imputed is based on the tax rate determined by the Tax Commissioner based upon the federal short term interest rate rounded to the nearest whole number plus 3 per cent determined as of October 15 of each year. That rate then becomes the interest rate used during this calendar year. In this year federal short-term interest rate was .66 rounded to 1% plus 3% for a total interest rate of 4% to be used to impute interest income to the Wife's funds.

N.W v M.W., 8th Dist., Case No. 107503, 2019-Ohio-1775 (May 2019)

Facts: Parties obtained a dissolution of their marriage with a shared parenting plan. The parties further agreed that the Husband would pay spousal support for 4.5 years at $12,500.00 per month and child support of $1,200.00 per month. When the spousal support ended Wife moved to modify and increase her child support. At the time of the motion the Husband's income is $500,000.00 per year. The wife was self-employed and owned a Math Franchise where she tutored after school children in math. Wife expected to break even in 2017. A vocational evaluation was conducted, and it was determined that the Wife could earn $55,000.00 per year. Trial Court sets child support at $ 7,000.00 per month. Both Husband and Wife appeal. Affirmed.

Decision: Because the parties' income exceeded $ 150,000.00 per year R.C 3119.04 does not require the court to extrapolate to determine the proper support. Rather, R.C 3119.04 requires the trial court to determine the child support amount on a "case by case" basis considering the "needs and the standard of living of the children who are the subject of the child support order and of the parents" citing R.C 3119.04.

For R.C 3119.04 the children's "needs" include food, clothing, shelter, medical care and education. The lifestyle of a child goes beyond mere needs; it reflects the level of comfort that the child would have enjoyed beyond basic necessaries had the parents remained living together. It is sometimes called the child's "qualitative" needs.

Citing the *Phelps* case out of the 8th District which stated that a qualitative analysis focuses on observation and descriptions of a child's lifestyle. Although the word "qualitative" does not necessarily provide for precise determinations, its use recognizes that circumstances between the children can vary based on their parents income, and the court may fashion a support order accordingly and on a case-by-case basis.

CONTEMPT

Fisher v Fisher, 7th Dist. Case No 17HA 0008, 2018-Ohio-2477 (June 2018)

Facts: Father files a contempt of court action against Mother for not allowing Father to visit with their children. Trial court appoints a GAL. Father as part of his trial preparation retains a psychologist to testify as an expert witness to conduct a forensic psychological evaluation. Under a court order the GAL reports were kept confidential. Father moves to allow his expert to review the GAL reports to give the expert a "better understanding" of the underlying issues. Trial court denies the motion. Father appeals. Affirmed.

Decision: Rule 48 of the Rules of Superintendence governs the role and duty of a GAL. Rule 48(D) requires that the GAL provide the court with information and an informed recommendation. Sup.R 48(F)(2) provides that written reports may be accessed in person or by phone by the parties or their legal representatives. In affirming the decision of the trial court, the Court of Appeals observed that parties and their attorneys may read the GAL report. The Rule does not address providing the GAL report to other witnesses. Doing so is not within the scope of the GAL's duties nor does it comply with the scope of the GAL's role in protecting the child and aiding the court.

SPOUSAL SUPPORT

Evans v. Evans, 5th Dist. Case No. 18-CA-39, 2019-Ohio-4141 (Oct. 2019)

Facts: The parties were divorced in 2014. In their separation agreement, incorporated in the decree, ownership of a business was given to wife including the business assets and liabilities. It provided wife would assume responsibility for delinquent taxes exceeding $200,000. Wife agreed to this apparently because she expected the profits from the business to be sufficient to pay this liability. But shortly after the termination of the marriage the business closed for unspecified reasons. The government contacted husband demanding payment on the overdue taxes which some had grown considerably with interest and penalties. In 2017 husband filed for contempt for wife's failure to pay the tax debt. In 2018 wife moved for relief from judgment under Civ. R. 60 (B). While husband's motion for contempt was pending, the trial court issued an order denying the motion to vacate the judgment under Rule 60(B). Wife appealed. Appeal dismissed.

Decision: The appellate court considered the waiver of spousal support and the characterization of the tax debt as a domestic support order and reasoned that the mandates of *Morris v. Morris*, 140 Ohio St. 3d 138, would prevent this relief. In *Morris* the court stated that "a trial court does not have jurisdiction under Civ. R. 60(B) to vacate or modify an award of spousal support in a decree of divorce or dissolution when the decree does not contain a reservation of jurisdiction to modify the award of spousal support." Here the decree has no reservation of jurisdiction - it expressly provides that jurisdiction is not reserved and the terms are not modifiable.
The appellate court next looked at this as a property division rather than spousal support and determined that R.C. 3105.171(I) imposes the same restriction on jurisdiction "a division or disbursement of property or a distributive award made under this section is not subject to future modification by the court except when the express written consent or agreement to the modification by both spouses." The appellate court concluded that the trial court had no jurisdiction to consider the Wife's motion to vacate and therefore the order issued is a nullity and there is no final appealable order for the appellate court to consider. The appeal was dismissed.

C.S. v. M.S., 9th Dist. Case No. 29070, 2019-Ohio-1876 (May 2019)

Facts: Husband and wife were married over 25 years. For most of the marriage wife stayed at home to care for their 2 children but reentered the workplace in 2011 when the children were older. She earned $16,000 on average for the 3 years immediately preceding their divorce. Husband worked 10 to 12 hours per day, year-round throughout the marriage. His three-year average salary as a sales manager was over $146,000, including bonuses. But for spousal support the trial court imputed an annual income of $102,000 to husband, deciding not to include husband's bonus income. The trial court held that it would be inherently unfair for a wife who works 186 school days and less than 8 hours per day to reap the benefit of husband's 12-hour days, year-round. The trial court increased the wife's income for the spousal support calculation to $20,000 and awarded her spousal support of $2,916.67 per month.

During the marriage the parties purchased in 1966 Mustang and a 1967 Mustang for $20,000 and $8,000, respectively. Husband used his labor and energy in restoring them. At the time of trial, they were appraised at $13,000 and $38,000 respectively. The trial court awarded wife $14,000, which is one-half of the purchase price of the vehicles. The trial court did not award wife any part of the increase in value reasoning that wife offered no proof that husband used any marital funds to restore the vehicles and it was all done with his sole efforts. Wife appeals: reversed and remanded

Decision: For spousal support the appellate court found that the trial court was obligated under R.C. 3105.18(C) to consider husband's income from all sources, which would include his bonus income, and further to consider that each party contributed equally to the production of marital income. Citing the case of *Nguyen v. Coy* the appellate court found "because the trial court misapplied the law *** the ruling of the trial court was arbitrary and the court therefore abused its discretion with regard to its spousal support analysis."

Concerning the value of the Mustangs the appellate court referred to the 10th District case, *Lindsay v. Lindsey:* "when parties contest whether an asset is marital or separate property, the asset is presumed marital unless it is proven otherwise." Then in reliance on *Aldermen* also from the 10th Dist. the court stated, "the spouse seeking to have certain property declared separate property bears the burden of proving that the property is separate, not marital, property." The trial court's finding ignored the presumption that an asset is marital property unless proven otherwise. In citing *Middendorf* the court stated, "when the efforts of one spouse contribute to the active appreciation of the asset, the increased value is characterized as marital property and subject to division."

Daubenmire v. Daubenmire, 9th Dist. Case No. 18 CA 0045-M., 2019-Ohio-372 (June 2019)

Facts: The parties were divorced in 2014 after 19 years of marriage. The parties agreed that effective July 1, 2014 husband would pay $1,140.50 per month through the Medina County CSEA. Husband, who was obligated pay the home mortgage, post-decree, would increase his spousal support payment by $1,214.40 once the mortgage debt was retired. The court reserved jurisdiction to modify spousal support and stated that spousal support shall be terminated upon the first happening of: wife's death, husband's death, or wife's remarriage.

On a child support worksheet husband stated his income at $169,560; Wife 's was listed as zero income. Nine months after the divorce husband moved the trial to modify spousal support and child support obligations based on a change in his circumstances. To support the motion husband stated his income had decreased from $109,760 a year before the divorce to $49,141 the year the divorce was granted. After hearing the matter, a magistrate denied the motion to modify and opined that husband's tax returns were not reliable evidence for a change of circumstances, noting that husband had failed to report income. Husband objected. The trial court overruled the objections. In doing so the court noted that his income to determine his support obligations have been subject of an agreement that husband knew that his income fluctuated and assumed that risk when he listed his income at $169,560. Husband appealed. Affirmed.

Decision: Citing both the *Manos* and *Mandelbaum* cases the court noted there must be a reservation of jurisdiction to modify an award of spousal and that the moving party must demonstrate a substantial change in circumstances that neither the trial court nor the parties contemplated the time of the original award that renders the existing award no longer reasonable or appropriate. The threshold issue was whether there was a substantial change in circumstances not contemplated during the parties' agreement. In determining that husband did not meet this threshold the appellate court looked to the stipulated figure significantly higher than husband's adjusted gross income for the year prior to the divorce and could find no apparent relationship between the 2 income figures. It also noted that husband had actual or constructive knowledge when he signed the separation agreement that prior year was unusually profitable and nevertheless stipulated to the higher income amount.

Fuller v. Fuller, 9th Dist., Case No. 28891, 2018-Ohio-5313 (Dec. 2018)

Facts: The parties divorced in 2002 after being married for 28 years. Husband is a stock broker for Merrill Lynch and did not work outside the home. He was 54 at the time of the divorce. The separation agreement incorporated into the divorce decree addressed spousal support in two ways: Husband was to pay as spousal support of "the sum of $8,500 per month until a) wife's death; b) husband's death; c) wife's remarriage; d) subject to the continuing jurisdiction of the Summit County Domestic Relations Court which shall specifically retain jurisdiction to modify the amount of spousal support based upon a change of circumstances of either party…spousal support was based upon husband's anticipated 2002 income of $244,000 plus his F Cap distributions and Wife's imputed income of $24,000." Strangely, later in the separation agreement there was, in the section *Relinquishment of All Rights in Estate*, this provision: "Notwithstanding the generality of any of the foregoing, any spousal support shall survive the death of the Husband and be a charge against the Husband's estate."

The Magistrate found that the Husband had neither retired nor had his income decreased and therefore denied Husband's motion. Husband filed objections asserting that he would have retired at age 62 or 65 and would not have had to pay spousal support. Therefore, any payments beyond that time were a "windfall" to wife. The trial court sustained Husband's objection, set spousal support at zero dollars per month, and awarded Wife $17,000 representing two months of spousal support received in early 2017. Wife appealed. Reversed and remanded.

Decision: The Appellate Court quoted *Kimble v. Kimble*, 97 Ohio State 3rd, 424 "the difference between a modification and a termination of alimony is a distinction without a difference. Modification and termination of an alimony award are simply different points of degrees on the same continuum. Thus, we conclude that a motion to terminate spousal support falls within the definition of a modification, since it seeks to alter, change or reduce the support award." But the 9th Dist. cited its prior case *Guggenmiller v. Guggenmiller*, 9th Dist. Loraine No. 10CA009871, 2011-Ohio-3622 which found the Supreme Court's holding in *Kimble* did not eliminate the distinction between terminations of support based on a change in circumstances of the parties [to which an R.C.3105.18(E) analysis would apply] and those based on a specific condition subsequent. The Court also referred to *Manley v. Manley*, 7th Dist. Columbiana, No. 17 CO 0036, 2018-Ohio-2773 in which case the court distinguished between modifications of spousal support, which require showing a change

in circumstances, and terminations, based on a showing that a condition later set out in the parties' decree had been satisfied. The *Manley* court decided in its conclusion *"therefore although modification and termination may be on the same continuum, it does not necessarily mean that when a divorce decree lists circumstances which will result in the termination of spousal support and also separately retains jurisdiction for modification of spousal support listing circumstances which could result in modification, those circumstances can be used interchangeably for termination and modification.*"

In sustaining Wife's assignment of error, the 9th District. found "accordingly the judgment effectively ordered a modification, rather than a termination, of spousal support. Husband, however, did not move for a modification. Instead, he sought a definitive termination of his obligation. Because the Domestic Relations Court ordered a modification of spousal support, it exceeded the scope of release sought by Husband. Accordingly the order of modification cannot stand."

In her dissent Judge Hensal quotes *Sherlock v. Myers*, 9th Dist., Summit No. 22071, 2004-Ohio-5178 "*pro se* litigants should be granted reasonable leeway such that their motions and pleadings should be liberally construed so as to decide the issues on the merits, as opposed to technicalities." And points out that in this case Husband acted *pro se*, completed a standard check-box post-decree motion form provided by the Domestic Relations Court. Because none of the choices matched the type of relief he wanted, he marked "other" and explained that he wanted the court to "terminate his spousal support obligation due to a substantial change in circumstances." And pointed out that at the hearing the Magistrate explained to the Husband they were there on a motion to modify his spousal support obligation."

Clayburn v Clayburn, 2nd Dist. Case No. 27476, 2017-Ohio-7193 (Aug 2017)

Facts: Parties were married for 30 years and at the time of the final hearing the parties had comparable income but the Court found that the Husband had a greater earning capacity based upon his career in the military prior to retirement. Although the trial did not order spousal support the trial court reserved jurisdiction to award spousal support for 10 years. Husband appealed. Affirmed.

Decision: In affirming the decision of the trial court the Court of Appeals found that a trial court does not abuse its discretion when the trial court retains jurisdiction over spousal support even when no support is ordered.

Cottle v. Pourzanjani, 5th District Case No. 17CAF050030, 2018-Ohio-461 (Feb.2018)

FACTS: At the time of the divorce the Husband was a dentist. Husband was ordered per the divorce decree to pay spousal support of $3,100.00 per month for 60 months effective May 2014. The court reserved jurisdiction to modify the support. In August 2015 husband sold his dental practice and took a position at the OSU Dental School and is paid $94,000.00 per year. At the time of the divorce Husband was earning as a dentist in private practice $150,000.00 per year. Husband files to modify and reduce his spousal support. Trial Court denies the motion. Husband appeals. Affirmed.

DECISION: In affirming the trial court's decision to deny the motion to modify spousal support the Court of Appeals held that the modification of spousal support is appropriate only when there has been a substantial change in circumstances neither party contemplated when the existing award was made. Based upon the evidence the trial court found that the husband's change in circumstance was not only voluntary and purposely brought about by the husband, but the change was also contemplated by the parties. The Husband's change in employment was not involuntary because the Husband intentionally reduced his annual income to pursue his "dream job."

The evidence was also that during the parties' marriage the parties had contemplated a career change for the husband. Despite this finding the Court of Appeals affirmed the finding of the trial court there was a change of circumstance but that after considering the factors in R.C. 3105.18(C) that found that the original order of spousal support was appropriate.

Zifer v. Huffman, 5th Dist. Case No 2017 AP 06-0017, 2018-Ohio-322 (Jan. 2018)

Facts: Husband ordered to pay spousal support. At the time of the order he was a pharmacist. Thereafter Husband lost his job at CVS because Husband incorrectly fills a prescription. Husband doesn't pay is spousal support because he had lost his job. Wife files contempt. Husband argues that he could not pay spousal support because he had lost his job. Trial Court finds Husband in contempt. Husband objects to the Magistrate's Decision of a finding of contempt. Trial Court reverses the Magistrate's decision and finds no contempt. Wife appeals. Affirmed:

Decision: In order for an obligor to raise the defense of "inability to pay spousal support" the obligor must provide that he did not voluntarily create the disability for avoiding payment. Here the Husband's decision not to complete a mis-filled report, while voluntary, resulted from his negligence and not an intentional act. The Husband did not fail to file the report intending to create a reason to be terminated. Husband did not voluntarily create the event triggering his termination to avoid the payment of his spousal support.

Ogle v Ogle, 10th Dist. Case No. 17AP-560, 2018-Ohio-5141 (Dec. 2018)

Facts: Husband was ordered to pay permanent spousal support of $3,600.00 per month. Five years after the Order was issued Husband elects to take a voluntary retirement which included "enhanced benefits" if Husband elects to take a voluntary early retirement benefit. Husband accepts early retirement with enhanced benefits. Normal retirement age is 65. Husband then files to modify and reduce his spousal support obligation. Trial Court grants the husband's motion and reduces the husband's spousal support obligation to $ 1,500.00 per month. Wife appeals. Affirmed.

Decision: Under Ohio law an early retirement can be an involuntary decrease in a person's salary when the party demonstrates that it was economically sound to take an early retirement. Citing *Tissue v Tissue* 8th District Case No 83708 (1989). If a party retires to defeat the spousal support obligation the retirement is considered "voluntary underemployment" and the party's pre-retirement income is attributed to that party. If the evidence does not demonstrate "a purpose to escape an obligation of spousal support

and the decision appears to be reasonable under the circumstances, then the trial court should not impute additional income to the retired party. Citing *Chepp v Chepp* 2nd Dist. Case No.2008CA 6388 (2001).

Before imputing income to a retired party, the trial court must make a finding that the retired party's decision to retire was based on an intent to defeat an award of spousal support. However, if there is no evidence of a purpose to escape a support obligation and the decision to retire appears to be reasonable under the circumstances the trial could should not impute additional income to the retired party.

Hague v Kosicek, 11th District Case No. 2018-A-0060, 2019-Ohio-2089 (May 2019)

Facts: Under the terms of the separation agreement Husband agreed to pay spousal support until wife dies, remarries or Wife cohabitates. In January 2018 Husband dies. Wife files a claim against Husband's estate alleging that the Husband's estate is liable for the payment of spousal support. Estate rejects the claim. Wife sues the estate arguing that the termination events only apply to her death, remarriage or cohabitation. Wife argues that because there was no express language that provided for the termination of spousal support on the Husband's death that R.C. 3115.18(B) (and which holds that spousal support terminates upon the death of either party unless the order expressly provides differently). Trial court rules that the Husband's obligation to pay spousal support ended upon the Husband's death and the Husband's estate is not liable for the payment of on-going spousal support. Wife appealed. Affirmed.

Decision: In affirming the trial court's decision the Court of Appeals acknowledged there is a split of decision on this issue.

In *Forbes* (6th District) WD-04-056, where the divorce decree did not include the husband's death as a terminating factor "the court clearly expressed its intent for spousal support to continue after the Husband's death."

However, other Courts conflict with *Forbes* such as *Woodrome* (12th Dist. 2001) and *Budd* (9th Dist.). In finding the decision in Forbes to be "unpersuasive" the Court of Appeals for the 11th District held that R.C.3115.18(B) can only be satisfied when the terms of the award expressly state that the payment is to extend beyond the payor's death. Absent express language, the duty to pay spousal support ends when the payor dies. In affirming the decision of the trial court, the Court found that the language of the divorce decree does not expressly provide that the husband's obligation to pay spousal support after his death.

ALLOCATION OF PARENTAL RIGHTS

In re: S.D., 9th Dist. Case No.18CA011449, 2019-Ohio-3313 (Aug. 2019)

Facts: Mother and father had a dissolution of their marriage and signed a shared parenting plan for their 3 minor children. One year after the dissolution D.V. moved to intervene and for legal custody of one child. The parties agreed he could have temporary custody of S.D. and later, after a magistrate hearing, at which neither mother or father were present, the magistrate ordered D.V. to prepare the judgment entry granting D.V. legal custody of the child and ordering mother and father to pay child support to D.V. Mother and father both appealed. Reversed and remanded.

Decision: The mother and father argued the trial court erred by adopting the magistrate's decision without including the right to object language which is mandatory under Civ.R. 53(D)(3)(a)(iii). The appellate court agreed and reversed and remanded.

Creque v. Iopollo, 9th Dist. Case No. 28909, 2019-Ohio-1333 (April 2019)

Facts: Mother and father, who were never married, had a daughter born in 2000. In May 2016 father filed for a change of custody and mother filed for modification of child support and to show cause due to father's child support delinquency. After a hearing the court awarded custody to father, terminated his child support obligation and overruled mother's motions. Mother filed timely objections which were overruled. Mother appealed. Affirmed.

Decision: Mother's objections to the award of custody of the child to father were overruled as moot. By the time the appellate court heard the case the child had turned 18 and was emancipated.

Mother argued that the magistrate improperly limited the hearing to 90 minutes and that father took more than half of that time. In citing *Bohannon v. Bohannon*, in which the 9th Dist. Court determined that a trial court has inherent authority to control its own docket and manage cases, and this includes limiting the time to present the cases, the court overruled the assigned error because neither party objected to the time limit at the commencement of the hearing.

The mother also claimed the trial court erred when it did not grant her an increase in child support between filing her motion and the decision awarding custody to the father. The appellate court cited the record showing that during that period of time father had more than paid expenses of the child, including purchasing a $10,000 car for the child, making insurance payments on the car and giving the child $100 per week in spending money and paying $5,000 towards the child's tuition.

In her last assignment of error mother argued that father should have been held in contempt for his failure to pay child support. Mother did not have certified records from the child support enforcement agency to show father owed or when he owed it. Father testified that at one-point mother said he owed $10,000, and the next time he saw her he paid it. The trial court had found that father did not knowingly violate the child support order.

Webber v. Webber, 9th Dist. Case No. 29073, 2019-Ohio-1084 (March 2019)

Facts: Father and mother were married in October 2014 and had one child, MW, who was born in October 2015. Mother filed for divorce in September 2017 and the divorce was granted May 21, 2018. After considering the factors in R.C. 3109.04 (f)(1) the trial court to designated mother as residential and parent legal custodian of MW. Father was granted supervised companionship time within MW for 3 hours per week. Father appealed. Affirmed.

Decision: Father's sole argument is that the allocation of parental rights responsibilities in the divorce decree violated Article IV, Section 3, of The Ohio Constitution which establishes the organization and jurisdiction of the Court of Appeals in the State of Ohio. But father advanced no argument to support the assigned error and how the judgment of the trial court violated that section of The Ohio Constitution. Although the Court of Appeals must determine an appeal on its merits it is hampered if the appellant court fails to identify in the record the error in which the assignment of error is based or fails to argue the assignment separately as required under App.R.16(A).

In *Sherlock v. Myers,* 9th Dist. Summit No. 22071, 2004-Ohio-5178, the court wrote: "pro se litigants should be granted reasonable leeway such as their motions and pleadings should be liberally construed so as to decide issues on the merits as opposed to the technicalities." The court said that a *pro se* litigant is presumed to know of the law and correct legal procedure so he remains subject to the same rules and procedures to which represented litigants are bound. He is not given greater rights than represented parties.

***Hernandez v Cardoso*,** United States Court of Appeals (7th Cir) Case No. 16-3147 (Dec 2016)

Facts: Husband files complaint under the Hague Convention for the return of the child to Mexico. In response to the complaint the Wife raised a defense to the return of the child under Section 13(b) alleging the husband physically abused the wife in the child's presence. trial court conducts an in camera interview of the children wherein the child confirms the allegation of abuse. trial court denies the complaint for the return of the child to Mexico presented a grave risk of physical and psychological abuse to the child.

Decision: In denying the complaint for the return of the child to Mexico the Court of Appeals found that repeated physical and psychological abuse of child's mother by the child's father in the presence of the child (especially young children) is likely to create a risk of psychological harm to the child.

Weaver v Walsh, 10th Dist., Case No 16AP 743, 2017-Ohio-4087 (June 2017)

Facts: Parties have a shared parenting plan. When the shared parenting plan was executed the Husband was paying child line child support Wife files to terminate the shared parenting plan. In return, the Husband files to modify his parenting time under the plan and to also reduce his child support. Trial court modifies the parenting time and awards the husband an additional over night with the children. However, the trial court denies the motion to reduce child support. Husband appealed. Affirmed.

Decision: R.C 3119.24 permits a trial court to deviate from the guideline amount of child support if the calculated child support would be unjust or inappropriate for the children, either parent or is not in the children's best interest because of the extraordinary circumstances of the parents. There is no authority which requires a trial court to deviate from the child support guidelines simply because a deviation would be permissible or even desirable. A parent automatically may not have a downward deviation even if the extraordinary circumstances listed in 3119.23 are present. The trial court did not abuse it's discretion by requiring the husband to pay guide line child support even though the husband had extended parenting time.

Sisson v Sisson, 6th Dist. Case No. H-17-002, 2017-Ohio-5692 (June 2017)

Facts: Wife moves to modify parenting time. trial court orders each party to deposit $750.00 to pay for an attorney advocate for the children. Wife cannot pay the $750.00 for the attorney advocate alleging that she did not have sufficient funds. trial court dismisses the wife's motion because she didn't post the $750.00. Wife appealed. Affirmed.

Decision: Trial court dismissed the Wife's motion under Civil Rule 41(B). Civil Rule 41(B) provides that when the Plaintiff fails to prosecute or comply with the civil rules or any court order the Court may order on its own motion after notice to Plaintiff's counsel dismiss the action or claim. Court of Appeals found that the Plaintiff was told by the trial court it would dismiss if the deposit was not made and the Court of Appeals found that the Plaintiff did not try to deposit any amount towards the children's legal fees.

Winn v Wilson, 12th Dist. Case No CA2017-04-052, 2018-Ohio-1010 (March 2018)

Facts: Parties had a shared parenting plan wherein the children lived with the Father and visited with the Mother on weekends and holidays. After the shared parenting plan being issued both parties filed motions to terminate the shared parenting plan and be named as the children's residential parent. After a hearing on the matter, the trial court terminates the shared parenting plan and designates the Mother as the residential parent and orders the Father to pay child support retroactive to filing the motion to terminate the shared parenting plan. Father appeals, affirmed in part, reversed in part.

Decision: In affirming the trial court's decision the Court of Appeals noted that the trial court characterized the Father's relationship with the children as "complicated because the new wife's relationship with the children and gave "great weight to that relationship and its effect on the children. The trial court found that the new wife had "overstepped" her bounds as a step parent by advocating for father, publishing confidential psychological evaluations, sending inflammatory emails to extended family and registering the children for extracurricular activities on her own.

Smith v Smith, 2nd Dist. Case No. 27849, 2018-Ohio-1531 (April 2018).

Facts: In 2003 the Parties execute a shared parenting plan to provide for the care of their one child. In 2015 the Mother files to terminate shared parenting and be named as the residential parent. During the 14 years that the shared parenting plan was in effect the Mother had alternating weekend parenting and week to week during the summer. The evidence was that the parties did not communicate well, that the Father was overly protective of the child and talked negatively about the mother. Child was interviewed by the Court and expressed to the Court he wanted to live with Mother. Father objects to the termination of the shared parenting plan. Trial court after hearing the evidence terminates the shared parenting plan and names the Mother as the residential parent. The Father was awarded alternating weeks of parenting time. Husband appeals. Affirmed.

Decision: R.C 3109.04(E)(2) permits a court to terminate shared parenting at the request of one or both of the parents if the court determines that the shared parenting plan is not in the best interest of the child. In affirming the decision of the trial court the Court of Appeals addressed the preference of the child to live with his mother and the weight to be afforded to that preference. According to the trial court the child was a teenager and was enough that his preference was entitled to significant weight. The Court also observed that although the parents failed to follow the shared parenting the plan the child was "an outstanding young man" despite their failure.

M.K. v A.K., 5th Dist., Case No 17-CA-0002, 2017-Ohio-8458 (Nov 2017)

Facts: Father files for custody of the children. GAL appointed and does investigation. The GAL testifies that the mothers home unsanitary (dirty, smells of dog feces) children wear torn and dirty clothing. Trial court grants father's motion and designates father as residential parent. Mother appeals. Affirmed

Decision: Although R. C 3109.04 doesn't define the phrase "change of circumstances" Ohio Courts have held that the phrase "change of circumstance" is intended to denote an event, occurrence or situation with a material and adverse effect upon the child(ren). The "change of circumstance" must be one substance and not slight or inconsequential. The purpose of requiring there be a change of circumstance is to prevent a constant re-litigation of issues already determined by the Court. For there to be a change of circumstance the change need not be quantitatively large but must have a material effect on the child(ren).

Fisher v Fisher, 7th Dist. Case No 17HA0008, 2018-Ohio-2477 (June 2018)

Facts: Father files a contempt of court action against Mother for not allowing Father to visit with their children. Trial Court appoints a GAL. Father as part of his trial preparation retains a psychologist to testify as an expert witness to conduct a forensic psychological evaluation. Under a court order the GAL reports were kept confidential. Father moves to allow his expert to review the GAL reports to give the expert a "better understanding" of the underlying issues. Trial Court denies the motion. Father appeals. Affirmed.

Decision: Rule 48 of the Rules of Superintendence governs the role and duty GAL. Sup.R.48(D) requires that the GAL provide the court with information and an informed recommendation. Sup.R 48(F)(2) provides that written reports may be accessed in person or by phone by the parties or their legal representatives. In affirming the decision of the trial court, the Court of Appeals observed that parties and their attorneys may read the GAL report. The Rule does not address providing the GAL report to other witnesses. Doing so is not within the scope of the GAL's duties nor does it comply with the scope of the GAL's role in protecting the child and aiding the court.

Nemitz v Nemitz, 2nd Dist. Case No 28040, 2019-Ohio-306 (Feb. 2019)

Facts: The parties had shared parenting of their children. In February 2017 Wife files to terminate the shared parenting plan. A GAL is appointed and following the GAL investigation the GAL recommends that the shared parenting plan remain but be modified so the Husband would have parenting time on alternate weekends from Friday to Tuesday. The parties generally agree to the recommendation of the GAL. Trial Court after hearing the evidence doesn't terminate the shared parenting plan but modifies the shared parenting plan and awards to the Husband parenting time on alternate weeks from Thursday to Tuesday. Husband appealed. Affirmed.

Decision: Husband argued that under R.C 3109.04(E)(1)(a) in order for a shared parenting plan to be modified there must be a threshold finding that a change of circumstance has occurred. However, according to the Court of Appeals a shared parenting plan can also be modified under R. C 3109.04 (E)(1)(b), R.C 3109.04(E)(2)(a) and R.C.3109.04 (E)(2)(b). R.C 3109.04 (E)(2)(b) allows a trial court to make a modification of a shared parenting plan if the court determines that the modification is in the children's best interest. A modification under R. C 3109.04(E)(2)(a) does not require that the Court find there has been a change of circumstance only that the modification is in the children's best interest.

***In Re G.B.*,** 2nd Dist. Case No 27992, 2019-Ohio-236 (Jan. 2019)

Facts: Wife files a post-decree contempt against her husband for not allowing visitation. Husband moves to modify child support. Trial Court in lieu of a hearing directs that each party file memoranda to support their respective motions (and responses to the other party's motion). Each party files a memorandum regarding the pending issues. Trial Court without a hearing denies the Wife's motion for contempt and orders wife to pay child support. Wife appeals. Reversed.

Decision: It is within the trial court's decision whether to provide a litigant seeking a contempt finding an evidentiary hearing. A court abuses its discretion when a judgment is unreasonable, arbitrary or unconscionable. Most often a trial court's judgment constitutes an abuse of discretion because it is unreasonable with an unreasonable judgment being one where there is "no reasoning process supporting the judgment. A trial court assuming factual issues exist, abuses its discretion by denying a contempt motion without conducting an evidentiary hearing. Conversely a trial court does not abuse its discretion by overruling a contempt motion without conducting an evidentiary hearing when the record, in the absence of a hearing allows such a determination. Based upon

the circumstances, overruling the Wife's contempt motion was an abuse of discretion because the judgement does not articulate the court's rationale in denying the motions.

ATTORNEY'S FEES

H.C. v. R.R., 9th Dist. Case No. 28956, 2019-Ohio-212)) January 2019)

Facts: In January 2017 the trial court ordered mother to pay father's attorney fees for $25,000 for her frivolous conduct throughout the proceedings. The payments were to be made in 20 monthly installments of $1,250 per month with the first payment due the first day of the month after the judgment entry was filed. Mother appealed. The appellate court affirmed the trial court's imposition of sanctions, and reversed on other grounds. During this first appeal mother received a stay of the decision.

On remand, mother moved the trial court to set a new effective date for her monthly payment obligation to father. She did not dispute the amount owed. She argued the court should not require her to make a lump sum payment to father for the amount accrued between the January 2017 judgment and the January 2018 decision by the appellate court. Father opposed Mother's motion, arguing it was an impermissible attempt to modify the court's final judgment of January 2017. The trial court granted mother's motion setting a new effective date of January 2018. Father appealed. Judgment setting the new starting date of the payments was vacated.

Decision: On appeal father argued that changing the effective date of the set out in the January 2017 judgment entry was a modification of that judgment entry. Mother argued this was not a modification but rather a "clarification." The appellate court cited *In re J.W.* "in most civil cases, the trial court loses jurisdiction over the parties and their dispute upon entry of final judgment, except to enforce a judgment." In *Allstate Ins. Co. v. Witta* "this court has consistently treated actions taken by the trial court subsequent to the entry of a final judgment that are not within the scope of the Ohio Rules of Civil Procedure as void." The court vacated the trial court entry resetting the commencement date for payments.

PARENTAGE

In Re: T.D., 9th Dist., Case No. 16AP0035, 2018-Ohio-204 (Jan 2018)

Facts: In 2005 Mother gave birth to T.D. At the time she was married to Robert Brick. Genetic testing later determined that Anthony Wilson was T.D.'s father. After 2010 Mr. Wilson and Mother agreed to a shared parenting plan. In 2014 Mr. Wilson moved the Court for reallocation of parental rights alleging that Mother had moved outside of Wayne County and had not notified him of her new address. The Court granted Mr. Wilson temporary emergency custody after Mother had moved T.D. to Texas without providing the notice required. Mother appealed. Affirmed.

Decision: On appeal Mother challenged Mr. Wilson's paternity of T.D. The Appellate Court found that Mother agreed in October 2010 to Mr. Wilson's paternity and noted that she agreed that T.D.'s name should be changed and that Mr. Wilson would be listed as T.D.'s father on the birth certificate. It concluded that Mother did not preserve this issue for the trial court's jurisdiction over Mr. Wilson's paternity action for appellate review.

Mother then argued that the trial court did not have sufficient evidence to determine Mr. Wilson is T.D.'s father noting that the paternity test that established relationship was never made part of the record. The Appellate Court found that if Mother argued that the trial court's paternity determination was not supported by sufficient evidence, they note she stipulated to that finding.

Mother then challenges the Juvenile Court's initial jurisdiction over the action which the Appellate Court stated she had forfeited. To the extent that she challenged the trial court's jurisdiction over the post-decree emergency motion, the Appellate Court noted that the trial court retained continuing jurisdiction to modify its orders including its custody designation.

In a footnote, the Appellate Court noted that the original judgment was in 2010 but did not include language required by Civ.R. 58(B). Upon reviewing the trial court record, the Appellate Court agreed and stated that Mother has timely exercised her right to appeal the decisions in her case.

CIVIL PROTECTION ORDERS

DeMarco v. Pace, 11th Dist. Case No. 2019-G-0197, 2019-Ohio-3727 (Sept. 2019)

Facts: In February 2019 the trial court overruled mother's objections to a magistrate's decision that declined to proceed to a full hearing on a petition for a domestic violence civil protection order on behalf of her minor child once the court learned of pending custody proceedings regarding the same child before the Tennessee court that originally allocated parental rights and responsibilities between the parties. Following the procedures stated in the UCCJEA the Ohio trial magistrate consulted with the Tennessee court and counsel for mother and father and after the Ohio magistrate learned that the Tennessee court had denied mother's motion to transfer custody matters to Ohio and ordered the case to remain in Tennessee, issued its ruling and directed the mother to file for a DVCPO in Tennessee. The magistrate stated that the trial court had only temporary emergency jurisdiction to issue orders protecting the child was left only one course of action and that was to issue an interim order. This would allow mother to file a petition in the proper forum in Tennessee. Mother appealed. Affirmed.

Decision: The appellate court agreed with the trial court that the UCCJEA statutorily divested subject matter jurisdiction of the Ohio Court to proceed to a full CPO hearing.

PROPERTY DIVISION

Budd v. Budd, 9th Dist. Case No. 28863, 2019-Ohio-1972 (May 2019)

Facts: We can refer to this case as *Budd v. Budd*, Part 6: The Final Chapter.

The parties' thirty-year marriage ended in 2006. In 2012 the Court decided dividing the parties' assets and ordering wife to pay spousal support to husband. After several appeals and remands, the trial court decided in July 2013 ordering wife to pay $1,500 per month in spousal support to husband for 120 months and ordering husband to pay wife a property-division award of $185,750 to be paid in installments of $1,548 per month for 120 months. Wife appealed that decision because the property division was to be paid to her over 10 years without requiring husband to secure that amount or to pay interest. On appeal the court remanded the matter because "there was no discussion in the entry that husband would be unable to make a lump sum payment or that it would be inequitable to require husband to pay interest on his long-term payments or to secure the award."

Prior to the trial court issuing a new decision, wife filed a motion to terminate her spousal-support obligation. Wife also asked for the court to award her spousal support. The trial court found that it would be inequitable to require husband to acquire life insurance to secure the property division award because the insurance quotes were too high. It found that it would be inequitable to require husband to pay interest on the property division because wife avoided paying spousal support for more than 7. Wife appealed. Affirmed.

Decision: The court found there is no requirement that a trial court award interest on monetary obligations which arise from property divisions. In rejecting wife's arguments that husband could pay the amount in a lump sum from his 401(k) or by insurance the appellate court stated, "while other options may have existed, a trial court does not abuse its discretion simply because another judge could have reached a different conclusion."

In looking at Wife's request to modify spousal support the court noted that her motion was filed in 2015 and therefore her argument that she retired in 2016 had not occurred at that time. Even if she had been able to raise that the court was not limited to just considering her retirement income but could have considered the $200,000 that she had inherited from her father, and income from all sources which she may be receiving. The appellate court also rejected wife's motion for spousal support because it was not supported with citations to the record nor proper authority.

Reisinger v. Reisinger, 9th Dist. Case No. 18CA01-1444, 2019-Ohio-2268 (June 2019)

Facts: Husband and wife were divorced in 2008 after 28 years of marriage. They had 2 children then emancipated. Husband was to pay wife $310,000 in installments under a schedule incorporated into the decree. Within 4 months after the finalization of the divorce wife filed her first of several contempt motions against husband for failure to make these payments. In October 2017 wife filed another motion for contempt alleging husband had made no payments to her since May 2016 and the balance remaining was over $204,000. She also moved to appoint a receiver to sell a parcel of property that husband had acquired by inheritance after the divorce and which he transferred to RCE Farm LLC, an entity solely owned by husband. Wife asked that that company be joined as a party

defendant. The trial court did not enter judgment joining the LLC as a party. In July 2018 the magistrate found husband in contempt, recommended a sentence and set purge conditions. The magistrate also granted the motion for receiver and on the same date the trial court issued a separate judgment appointing a receiver and setting forth the terms of the receivership. Husband objected to the magistrate's decision. On November 15, 2018 the trial court overruled each objection and entered judgment finding husband in contempt and set purge conditions allowing the husband to purge the contempt by "complying with the former payment arrangement and cooperating with the appointed receiver in relation to the sale of the inherited property." The trial court did not order the joinder of the LLC in its judgment entry. Husband appeals. Reversed in part.

Decision: On appeal husband argued that the LLC held title to the property and was a necessary party not joined. The appellate court found that even though the trial judge had ruled on husband's objection relating to joinder, it had not entered judgment joining the LLC as a party.

Husband next argued that it was error to appoint a receiver. The appellate court determined that because this issue was intertwined with the joinder of the LLC it was premature to consider this.

The husband next argued the court's decision modifying the property division. Here the court found that the trial court's actions were an enforcement of the property division not a modification and therefore this the trial court acted properly.

Finally, the husband argued that his inability to pay this debt is a defense to a finding of contempt. The burden of showing an inability to pay falls upon the husband. Here the evidence reflected no good faith or bona fide attempts by husband to make even nominal payments to wife. He did not introduce documentation regarding his past or present income and expenditures and only testified in general terms about the state of the farm industry he was engaged in. More important he testified that even though his inherited property was transferred to a LLC under his exclusive control he could not use that because he was "not selling it."

Dixon v. Fraley, 9th Dist. Case No. 28787, 28793, 2019-Ohio-3971 (September 2019)

Facts: Husband and wife had their marriage dissolved in July 2010 and the decree incorporated a separation agreement signed by both parties. The agreement provided for the division of property and included a provision for the trial court to retain jurisdiction to modify the property division in the event that either party failed to make full disclosure. In June 2011 Wife moved to enforce the decree, alleging husband had not fairly and accurately disclosed his assets and income in the affidavit he presented to the trial court. In November 2011, wife moved to enforce the decree and included a motion for partial relief from judgment under Civ.R. 60(B). In December 2011, a hearing was held regarding the timeliness of wife's 60(B) motion. The trial court found that the motion was timely because it *related back to the motion filed by wife on June 8, 2011*. An evidentiary hearing was held in November 2013 and a magistrate's decision was issued on April 29, 2014. The decision awarded $65,605.50 against husband by a stipulation of the parties, $48,500 against husband for wife's share of the 2009 tax return, and $40,000 against husband for

wife's attorney fees. Both parties filed objections overruled by judgment entry August 29, 2017. Wife appealed and husband cross-appealed. Reversed.

Decision: On appeal husband argued that the trial court lacked jurisdiction to grant a motion for relief from judgment filed more than one year after the decree of dissolution. The appellate court stated "the trial court's finding that the November 2012 motion 'related back' to the motion to enforce the decree filed on June 8, 2011, is not supported by the Ohio Rules of Civil Procedure. The doctrine of 'relation back' is normally limited to the amendment of pleadings pursuant to Civ.R. 15(C). Moreover, even though the trial court may have had discretion to allow for wife to supplement her June 8, 2011, motion to enforce the decree with the subsequent amended motion to enforce the decree, we cannot extend its application to the requirements of Civ.R. 60(B)."

Garrett v Garrett, 12th Dist. Case No. CA2015-09-024, 2016-Ohio-262 (Jan 2016)

Facts: Husband's grandmother gives to Husband a gift of 8 acres so grandson (husband) can build a home on the gifted land. Husband takes out loan of $38,000 to construct a home and gives the $38,000.00 to the grandmother who then gives the money back to her grandson. Husband's parents build the home for their son. Wife does work on house. Trial court finds home the Husband's separate property. Wife appealed. Affirmed.

Decision: Court of Appeals finds that the grandmother created an inter vivos gift of the land to the son. In affirming that finding the Court of Appeals found that to create an inter vivos gift these elements have to be established: 1) intent of the donor to make the gift; 2) delivery of the gift to the done; 3) acceptance of the gift by the done; Evidence of the gift must be established by clear and convincing evidence and the party asserting the existence of the gift of the burden of proof.

***Smith v Smith*,** 7th Dist., Case No. 14CA-0901, 2016-Ohio-3223 (May 2016)

Facts: During the Parties marriage husband obtains a line of credit on a premarital parcel of real estate. Husband uses money from the line of credit to purchase 3 other properties. During the parties' marriage, the parties through their labor and effort improve the value of the properties. The trial court as a part of its decision awards to the wife ½ of the appreciation in each property. Husband appealed. Affirmed.

Decision: The husband had argued that because the funds to improve the property came from the line of credit on his separate property that the appreciation is his separate property. The Husband also argued that because he could trace his separate property interest in the 3 parcels of real estate this traceability destroys the marital property nature of the 3 parcels of real estate. In rejecting this argument the court of appeal found that because the appreciation in the property was not passive but was do the labor of one or both of the spouses that the appreciation caused by the labor of one or both spouses contributes to the appreciation of the separate property that creates a marital interest in the separate property (see R.C. 3105.171(A)(3)(a)(iii).

Smith v Smith, 12th Dist., Case No CA2016-08-059, 2017-Ohio-7463 (Sep 2017)

Facts: Parties owned and operated a pallet building company. Husband lets the building insurance lapse. He was switching company when a fire destroys the entire building. Husband obtains a loan and rebuilds the building destroyed by fire. Wife later on files for divorce. Wife claims that the husband failure to maintain fire insurance was financial misconduct. trial court agrees, finds that the husband committed financial misconduct for letting the insurance lapse, and orders the husband to pay the building loan as his separate non marital debt. Husband appealed. Reversed.

Decision: The Court of Appeals finds that that to find a party guilty of Financial Misconduct under 3105.171(e) there must be a) some wrongdoings and b) there must be an intent to interfere with the other spouse's property rights. Here there was no evidence there was any evidence that the husband engaged in any act intended to defeat or diminish the wife's interest in the martial estate. The decision to allow the fire insurance to lapse was a poor business decision but poor decision is not financial misconduct.

Miller v Miller, 6th Dist. Case No S-16-27, 2017-Ohio-7646 (Sep 2017)

Facts: Wife inherits $ 276,000.00. Wife pays off the residence mortgage ($71,000.00) and then also pays off some business debt and debts associated with their vehicles. Husband files for divorce. trial court finds that the wife had traced her inheritance into the residence by paying off the residence mortgage and finds that the wife had a separate property interest of $71,000.00. Husband appeals, Reversed.

Decision: Court of Appeals reverses the trial courts finding that the wife had a separate property interest of $ 71,000.00. Court of Appeals held that the trial court had failed to apply the marital gift presumption to the case. The marital gift presumption arises where a family member is benefited by a transaction and in that instance a gift is presumed. Here the transaction which caused the marital gift presumption was the wife paying of the residence mortgage. That act of paying of the residence mortgage benefited the Husband who is a family member. In the marital-gift-presumption the burden of proof is on the donor to show that the transaction was not a gift.

Collins v Collins, 8th Dist. Case No 105945, 2018-Ohio-1512 (April 2018)

Facts: Husband was ordered in the divorce decree to pay wife a property settlement of $80,000.00. Husband doesn't pay the property settlement as required. Wife files a contempt of court. Trial Court finds husband in contempt and sentences Husband to 30 days in jail. 30 days are suspended on the condition that Husband pays $20,000.00 and then $ 1,000.00 per month for 60 months. Husband appeals. Affirmed.

Decision: At trial and on appeal, the Husband argued that he could not be sentenced to a jail term for failure to pay the $80,000.00 marital property obligation. To support that position the Husband cited the *Sizemore* 12th District case. In *Sizemore* the appellate court held that using contempt to imprison a party for failing to pay a lump sum judgment would

violate Article 1, Section 15 of the Ohio Constitution which provides that "no person shall be imprisoned for a debt in any civil action unless in the case of fraud."
In electing not to follow the *Sizemore* decision the Court of Appeals for the 12th District relied upon the case of *Pugh v Pugh*, 15 Ohio St.3d 136 (1984) which held that both alimony and property settlement provisions of a divorce decree are orders of the Court. The Court of Appeals therefore reasoned that an order holding a spouse in contempt of court and sentencing him to jail for failure to pay a property settlement does not violate the constitutional provisions against imprisonment for debts.

Hornbeck v Hornbeck, 2nd Dist. Case No. 2018-CA-75, 2019-Ohio-2035 (May 2019)

Facts: The parties lived together form May 2000 to April 2003 when they married. During the marriage wife was a "stay at home" mother taking care of the Husband's daughter. Husband worked at a trucking company and the Wife did at-home babysitting. Prior to the parties "ceremonial marriage" the Husband had purchased a home, which the parties occupied, and a rental property. At the divorce the Wife moves the court consider May 2000 as the "date of marriage" for valuation. Trial Court denies the Motion. Wife appeals. Reversed.

Decision: In reversing the trial court's decision not to use a date earlier than the marriage date for valuation, the Court of Appeals noted that the majority of appellate districts in Ohio. Citing its decision in *Drumm v Drumm*, the appellate court found that R.C.3105.171(A)(2)(b) establishes no standard or other criteria to guide the court in determining whether and when use of the dates specified in Division (A)(2) would be inequitable. The section appears to reiterate the general grant of "full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters, conferred on the courts if common pleas by R.C 3105.011. In applying R.C 3105.171(A)(2)(b) to employ a date for valuation of assets prior to other than and in addition to the interests that are created by marriage. R.C 3105.171(A)(2)(b) reasonable requires that one spouse acquired a substantial interest in the property of the other even before the marriage commenced. That finding must be based on some evidence of an investment or contribution by one spouse creating that form of interest in the property of the other.

Here, the in reversing the trial court the appellate court noted that wife was employed before the marriage and had substantial savings and a 401(K). When they moved in together, they were engaged and planned to marry. After moving into together the parties pooled their finances, and the Wife contributed to the improvements in both homes. In addition, the evidence was that the Wife was by agreement a stay at home mother and performed parental duties for the Husband's daughter. Finally, the evidence was that the wife from her separate property contributed to improvements to the home, paid the husband's credit cards, paid insurance on the home and life insurance property tax payments and utilities.

Cook v Cook, 5th District, Case No 18 CAF 09 0072, 2019-Ohio-1961 (May 2019)

Facts: Wife sells her pre-marital home and nets $203,000.00, which she turns over to husband. Husband uses the $203,000.00 as a down payment of a home he purchases.

Husband argues that the $203,000.00 was a gift to him by the wife. Trial Court finds that the $203,000.00 was the Wife's separate property. Husband appeals. Affirmed.

Decision: In affirming the trial court's decision the appellate court rejected the Husband's argument that the trial court did not properly apply the "family gift presumption." The family gift presumption having been defined as when a transaction is made that benefits a family member there is a presumption that the transaction was intended as a gift. According to the appellate court the family gift presumption has not been applied in domestic relations matters. Instead according the court, in a domestic relations matter the donee spouse must prove by clear and convincing evidence that the donor spouse made an inter vivos gift. In this case the wife testified that she never intended to make a gift of the $ 203,000. The wife testified that the husband didn't have money for a down payment and she didn't have credit. So, the parties agreed that the Wife would provide the down payment and he would provide the credit to obtain a mortgage. Husband argued that the funds were a gift to him. The magistrate found the wife's testimony to be more credible.

MISCELLANEOUS

Anderson v. Anderson 4th Dist. Case No 16CA 357, 2017-Ohio-2817 (May 2017).

Facts: In June 2016 the Parties agreed on all issues in the divorce. Magistrate then takes evidence on grounds, terms and waived the right to object to the Magistrate's decision. Husband dies on July 30, 2016. On August 19, 2016 the Wife through her counsel files the divorce decree. Trial court thereafter adopts and approves the decree of divorce. Wife appealed. Affirmed.

Decision: ORC 2311.21 generally provides that death abates actions in libel and slander. ORC 2311.21 has also been applied to divorce cases and Courts have held that when a party dies the divorce action is abated. However, the Supreme Court of Ohio has created an exception to the death abates at divorce situation. The exception is that death abates no divorce action when the death occurs after the decision is rendered but the death occurs before the decision is journalized. In such circumstances, the divorce decree may be journalized by a *nunc pro tunc* entry.

***Kemp v. Kemp*,** 5th Dist. Case No. 18 CAF 08 0063, 2019-Ohio-1581 (April 2019)

FACTS: On October 30, 2017 and prior to the commencement of trial the wife discharges her attorney. Case is set for trial on January 23, 2018. Trial court grants the motion and allows counsel to withdraw on January 17, 2018. Wife files for a continuance because her counsel had not delivered to the wife her file. Trial court calls discharged counsel and directs that the file be delivered to the wife. Thereafter the trial court denies the request for a continuance. Trial court conducts a 3-day trial where wife represents herself. Wife appeals the decision of the trial court denying her request for a continuance. Affirmed.

DECISION: In determining whether a trial court abused its discretion in denying a motion for a continuance an appellate court should follow factors; (1) length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to the witnesses, opposing counsel and the court;(4) whether there is a legitimate reason for the continuance;(5) whether the defendant contributed to the circumstances causing the need for the continuance (6) other relevant factors.

In affirming the trial court's decision to deny the continuance the appellate court noted that wife had contributed to the circumstances causing the need for a continuance. The court observed that the wife had filed her counsel in October 2017 but had delayed seeking new counsel or obtaining her file until shortly before the trial date. Further the wife was aware in July 2017 of the December trial date but waited a week before the rescheduled trial date to request a continuance of the trial.

Klockner v. Klockner, 9th Dist. Case No. 29236, 2019-Ohio-1739 (May 2019)

FACTS: Wife files for divorce. Husband files no answer. While the case is pending the parties discuss a temporary order. Husband believes that based upon his conversations

with his wife that the wife will be dismissing her complaint for divorce and the parties will be proceeding with a dissolution of marriage. Wife doesn't dismiss her complaint for divorce. The case is set for a final hearing. Husband is notified of the final hearing but doesn't show up. Trial Court grants a divorce to the Wife and divides the property and awards spousal support. Husband files a 60(B) which is denied. Husband appeals. Affirmed.

DECISION: To prevail on a motion for relief under Civil Rule 60(B) the movant (husband) must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted ;(2) the party may have relief under of the grounds stated in Civ.R 60(b)(1) through 5 and (30 the motion is made within a reasonable time. These requirements are independent and in the conjunctive; the test is not fulfilled if the requirements is not met.

In affirming the dismissal of the Husband's motion, the Court observed the Husband had presented a meritorious defense. The burden of proof is on the movant to allege operative facts with enough specificity to allow the court to decide whether the movant has met that test. A movant's burden is to not only allege a meritorious defense he/she need not prove that he/she will prevail on that defense. Here, the Husband had argued that he had a meritorious defense but did not explain what the defense might be.

Kilbarger v. Kilbarger, 4th Dist. Case No 18CA14, 2019-Ohio-247 (Jan. 2019)

FACTS: Parties were divorced on May 7, 2018. Husband filed for a new trial which was denied on August 6, 2018.

On September 5, 2018 the Husband fax files his notice of appeal. September 5, 2018 was the deadline for filing a notice of appeal. Clerk of Courts accepts the notice of appeal and time stamps the notice of appeal as received on September 5, 2018. Wife files to dismiss the Husband's appeal because a notice of appeal could not be fax filed and therefore the notice of appeal was not timely. Husband argues that the rules of court allow for a fax filing. Motion granted and appeal dismissed as not being filed timely.

DECISION: The Court of Appeals in dismissing the Husband's appeal acknowledged that Hocking County Local Rule 37 allows that pleadings and other papers may be filed with the Clerk of Court by fax. However, the Supreme Court of Ohio has held that unless a local rule of the appellate court expressly permits filing a notice of appeal by electronic means a party appealing a trial court order must file a paper copy of the notice of appeal with the clerk of the trial court under App.R. 3. The 4th Appellate District had not adopted a local rule allowing for electronic filing of a notice of appeal.

The Court of Appeals also rejected the Husband's argument that because the Clerk of Courts had accepted the notice of appeal and filed stamped the notice that the notice of appeal was filed. The Court of Appeals held that an appeal is not filed if it is presented to the clerk of courts electronically rather than manually with a paper copy unless authorized by local appellate rules.