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Case Law Update

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CASE LAW UPDATE – 2018

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MISCELLANEOUS

In Re: Guardianship of Bakhtiar, 9th Dist., Case No. 16CA011029, 2017-Ohio-8617 (Nov. 2017)

Facts: Mehdi Saghafi and his wife, Fourough Bakhtiar, were in their 80s and married for more than 55 years when Husband filed an application in the Lorain County Probate Court for appointment as guardian for his Wife's person based on allegations of her incompetence due to dementia. On the same day, one of their sons, Dariush Saghafi, filed an application for appointment as guardian for her estate. Another son, Kourosh Saghafi, a doctor, executed the statement of expert evaluation appended to both his brother's and father's applications.

One month later, Wife filed a complaint for divorce against her Husband in the Cuyahoga County Domestic Relations Court. Several days after that the couple's only daughter, Jaleh Presutto, filed an application in the Lorain County Probate Court for appointment as guardian of her mother's person and estate. After hearing the Probate Court found Wife incompetent to care for herself and her estate and appointed Jaleh as interim guardian of her mother's person and accountant Steven Sartschev as interim guardian of the mother's estate. The Probate Court prohibited the parties from proceeding with the pending Cuyahoga County divorce case.
There was much discord within the family and this spilled over into the court system During the proceedings the trial court appointed 2 interim guardians for Wife and she also had her own Attorney, Steven Wolf.

Eventually the Court appointed Attorney Zachary Simonoff as guardian then ordered the guardian to proceed with the divorce. The divorce concluded in October, 2014.

In June, 2016 Husband filed a motion in Probate Court requesting permission to have visitation with his ex-wife. The guardian filed in opposition. The Probate Court set a hearing date on the motion and summarily denied Husband's motion before the hearing. Husband appealed. Reversed.

Decision: On appeal the Court first looked into whether the denial of visitation was a final appealable order. Determining that Husband had a fundamental right to associate with another consenting adult, it determined that the order affected that fundamental right and therefore was a final appealable order. On the merits of the appeal the Court

recognized that Probate Courts have authority to address matters of visitation of wards in a guardianship. The Appellate Court here was unable to determine whether the trial court abused its discretion since it summarily dismissed the motion without explanation or hearing.

In Re: Guardianship of Bakhtiar, 9th Dist., Case No. 16CA011036, 2018-Ohio-1764 (May 2018)

Facts: In May, 2016 the Lorain County Grand Jury indicted Jaleh Presutto on several non-violent felony charges unrelated to the guardianship of her mother. Her mother was moved from Jaleh's home to a nursing home. Her brother, Dariush Saghafi, filed a number of motions in May and June, 2016. In September, 2016 the Probate Court found that Dariush was not a licensed attorney in the state of Ohio and that his motions were being filed on behalf of someone other than himself. Consequently the Court determined that he had violated R.C.4705.01 and struck his motions. The trial court then found that his filings constituted frivolous conduct and awarded attorney fees to his sister and his mother's guardian. Brother appealed. Reversed.

Decision: Under Civ.R. 11 the Court found "the trial court employs a subjective bad-faith approach in determining whether sanctions are warranted under Civ.R. 11." The Supreme Court has described the bad-faith requirement of Civ.R. 11 as "not simply bad judgement*** (but) a conscious doing of wrong*** with actual intent to mislead. If the trial court finds the violation was willful it may impose an appropriate sanction."

R.C.2323.51 is broader in scope than Civ.R. 11, because it provides the Court with the discretion to levy sanctions against a party, the party's counsel of record or both. Quoting R.C. 2323.51(B) the Court stated that the trial court may award court costs, reasonable attorney fees and other reasonable expenses to any party adversely affected by frivolous conduct incurred with a civil action. It further stated, "the analysis of a claim pursuant to R.C. 2323.51(A)(2) boils down to the determination of (1) whether an action taken by the party to be sanctioned constitutes frivolous conduct, and (2) what amount, if any, are reasonable fees necessitated by the frivolous conduct is to be awarded to the aggrieved party."

In looking at the Probate Court's review of the facts before it, the Appellate Court found that Dariush had filed three applications for guardianship, motions to remove the guardian, and numerous other motions and filings which were founded upon assertions by Dariush which were "merely a rehash of previously unproven allegations."

In determining appropriate attorney fees, the Probate Court failed to state after its review of the records its basis for determining that the fees were reasonable. The case was remanded for that hearing.

Concerning the unauthorized practice of law the Court of Appeals reversed stating that Dariush, as the ward's son, had sufficient interest in the proceedings to have standing to petition the Court for removal of his mother's guardian and other relief.

Presutto v. Hull, 9th Dist., Case No. 17CA011218, 2018-Ohio-3103 (Aug 2018)

Facts: First, look at *in re Bakhtiar Cases 1 and 2*. This case deals with prosecution of Ms. Bakhtiar's daughter, Jaleh Presutto. Ms. Presutto alleged the Defendants, who included the Lorain County Prosecuting Attorney and Assistant Prosecuting Attorney, Attorneys for her various family members, an investigator in the Prosecutor's Office, the Brecksville Police Department and others. Ms. Presutto was indicted and arrested on charges of kidnapping, abduction, aggravated theft and telecommunications fraud. The charges against her were eventually dismissed and this suit for malicious prosecution resulted. Shortly after the suit was filed the Prosecuting Attorney and Assistant Prosecuting Attorney filed a motion to dismiss on the basis of immunity and Ms. Presutto filed a brief in opposition. The Court denied the motion and the Prosecutor appealed. Reversed.

Decision: Reversed and remanded. Prosecutors enjoy absolute immunity from suit from acts committed in their roles as judicial officers. The decision to initiate, maintain or dismiss criminal charges is at the core of the prosecutorial function and therefore Courts have held that immunity of prosecutors extends through allegations of malicious prosecution.

Lingenfelter v. Lingenfelter, 9th Dist., Case No. 15AP000622, 2017-Ohio-235 (Jan. 2017)

Facts: The parties were married in April, 2000. Husband filed for divorce in June, 2012. The case was set for trial before a trial Magistrate on July 30 and October 10, 2013. At the conclusion of the first trial day the Magistrate excused the parties and had counsel remain in the courtroom where he inquired about the status of settlement negotiations. The Magistrate disclosed to counsel, without the parties present, that he knew the Husband's parents for 35 years and that his former secretary was a member of Husband's family. The Magistrate offered his opinion that he was not looking favorably on the Wife's positions on the issues, even though she had not yet presented her case. Following the second day of trial the Magistrate issued his decision and judgment was entered. Wife filed objections to the decision and filed a motion to disqualify the Magistrate. Without hearing, the trial court overruled Wife's objections and denied her motion to disqualify. Wife appealed, and the Appellate Court remanded the matter on the issue of disqualification. A disqualification hearing was held and the trial court again denied the motion. Wife again appealed. Reversed.

Decision: The Appellate Court said even though it cannot review allegations of judicial misconduct, it can review properly-raised challenges to a magistrate's impartiality and stated that the civil rules allow a party to file a motion to disqualify a magistrate "for bias or other cause." By analogy the Court stated that a Judge should be removed if a reasonable and objective observer would harbor serious doubts about the Judge's impartiality. The Court found that at no point on the record were the parties informed of the Magistrate's relationship with Husband's family. The Appellate Court also noted that at the time of that disclosure, the Magistrate made a number of negative references towards Wife at which time he had not heard Wife's evidence. It went on to say an appearance of bias can be just as damaging to public confidence as actual bias, and

that a reasonable person could conclude that there was at least an appearance of impropriety on the part of the Magistrate.

Thomasson v. Thomasson, ____ Ohio St.3d ____, 2018-Ohio-2417 (Jun 2018)

Facts: The parties were married in 1985. In January, 2015 Husband filed for divorce in Cuyahoga County. In June, 2016 the Court issued an order *sua sponte* appointing a GAL on behalf of Wife pursuant to Civ.R. 75(B)(2) and requiring each party to file a deposit for the GAL fees. Wife appealed and argued that Civ.R. 75(B)(2) does not provide authority to a trial court to appoint a GAL for an adult and that the appointment of a GAL to act on behalf of an adult is proper only after a hearing and finding that the adult is incompetent. Husband filed a brief in support of Wife's brief. The 8th District Court of Appeals dismissed the appeal concluding that it was not a final appealable order under R.C. 2505.02(B). Wife filed a jurisdictional appeal which was accepted. Reversed.

Decision: In reversing the decision of the trial court, the Supreme Court noted that the trial court relied on Civ.R. 75(B)(2) as its authority. But Civ.R. 75(B)(2) does not apply to adults. Instead it applies to children only. The trial court did not submit any other rule that permits the appointment of a GAL. Nevertheless the Supreme Court recognizes Civ.R. 17(B) which provides when a minor or incompetent person is not otherwise represented in an action the Court shall appoint a guardian *ad litem* or shall make such other order as it deems proper for the protection of such minor or incompetent person. Because Wife is not a minor child the only reasonable interpretation of the trial court's order is that it appointed a GAL for her because she is an incompetent person who does not otherwise have an appropriate representative. In order for Wife to appeal that order she must show that it meets the special proceeding exception which affected a substantial right. Wife asserted that the appointment of a GAL without notice or hearing was not proper, and violated her due process rights.

The Supreme Court found that by not accepting the appeal there was the real possibility that a GAL could use tactics to gain information that cannot be clawed back in the same way that the revelation of confidential information cannot be undone. The Court concluded that Civ.R. 75(B)(2) does not provide the trial court with the authority to appoint a GAL to represent Wife and Civ.R. 17(B) does permit the trial court to appoint a GAL to represent an adult only when the Court has adjudicated the adult to be incompetent. It is improper and a violation of Wife's due process right for the trial court to appoint a GAL to represent her without an incompetency adjudication made subsequent to providing that adult proper notice and an opportunity to be heard on the issue. The judgment of the Court of Appeals was reversed and the matter was remanded to the trial court.

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

Facts: In June 2016 the Parties reached an agreement 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 does not abate a 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.

OBJECTIONS and APPEALS

Weber v. Devanney, 9th Dist., Case No. 28876, 28938, 2018-Ohio-4012 (Oct. 2018)

Facts: The parties were married in 2003 and had one child born in 2009. In 2008 Husband relocated from Ohio to Maryland expecting that Wife would join him. She did not. Husband continued to live in Maryland although he made frequent trips back to Ohio. In May, 2010, while Husband was still residing in Maryland he filed a complaint for divorce in Ohio alleging that he had been a resident of Ohio for at least six months immediately preceding the filing of his complaint. Wife filed her answer and counterclaim and admitted Husband's allegations about his residency.

The trial was held before a magistrate between March, 2012 and June, 2014. The magistrate issued a decision granting the divorce Both parties objected. In 2017 the trial court held a hearing on the issues concerning the child due to the passage of time since the original trial. In ruling on the other objections, the trial court referred to the "magistrate's discretion" and that the magistrate's actions were "not unreasonable." Wife appealed. Reversed.

Decision: On appeal, Wife filed a motion to dismiss claiming that Husband was not a resident of the state of Ohio for six months immediately preceding the filing of his complaint. The Appellate Court stated that a trial court cannot confer jurisdiction by mutual consent where none would otherwise exist. Here, however, facts were alleged and admitted indicating Husband was a resident of Ohio, and no evidence to the contrary was before it. Therefore, the trial court did not err in deciding it had jurisdiction.

Wife also appealed the decision based upon the incorrect review standard being used by the trial court when it ruled on the objections. The Court cited the Montgomery County case *Guick v. Kwiatkowski, 2nd Dist. No. 18620, (Aug. 2001)*. The trial court errs when it employs an appellate standard of review when ruling on objections to the decisions of its own Magistrate, because the appellate court will then be prevented from conducting an appropriate review of the discretionary choice the trial court made when it adopted its Magistrate's decision.

B.F. v. C.F., 9th Dist., Case No. 28671, 2017-Ohio-8982 (Dec. 2017)

Facts: The divorce case is tried before a Magistrate. Magistrate granted the divorce, calculated child support, divided marital assets and allocated parental rights and responsibilities in a decision issued April 3, 2017 and adopted by the trial court that day. Father then filed objections to the decision on April 18, 2017 one day late. The trial court overruled Father's objections on May 30, 2017 and this appeal followed. Father appealed. Dismissed.

Decision: As a preliminary matter the Appellate Court noted that Father's objections were filed fifteen days after the Magistrate's decision. In siting *Zaryki v. Breen,* 2016-Ohio-7086) the Appellate Court stated "this Court has specifically held … that a trial court lacks jurisdiction to rule on untimely objections to a Magistrate's decision when (1) the Court has rendered judgment upon the Magistrate's decision, and (2) the time for taking an appeal from the Court's judgment has expired." It explained "otherwise a trial

court would be able to reset the time to appeal the original decision well after the time for the appeal had run, a result we do not believe was intended by the rule as it would permit the trial court to retroactively alter the Appellate Court's jurisdiction." Here the Father filed his objections out of rule and then the trial court ruled upon the objections on May 30, 2017 which was after the time for taking an appeal from the Court's judgment had expired. The trial court did not therefore have jurisdiction to consider the untimely objections.

Lorson v. Lorson, 9th Dist., Case No. 28601, 2017-Ohio-8562 (Nov 2017)

Facts: Husband and Wife were married in 2012 and divorced in 2017. In the divorce decree the trial court required Husband to pay spousal support for 13 months. Husband appealed. Affirmed.

Decision: Husband argued that the Court did not take into account the 11 months of spousal support already paid. The decree indicated that the parties testified about their employment income and concerning spousal support that the Court had considered the evidence, testimony and entire record of the case. At the time of filing of the notice of appeal the Husband filed a transcript but failed to get the Court Reporter's signature on the transcript and no transcript was ever delivered to the Appellate Court. Therefore the Appellate Court concluded "without a copy of the trial transcript, this Court is unable to review whether the trial court exercised improper discretion when it ordered Husband to pay 13 months of spousal support. We have no choice but to presume regularity in the proceedings."

Morrison v. Morrison, 9th Dist., Case No. 28514, 2018-Ohio-2282 (Jun 2018)

Facts: Wife filed for divorce in November, 2011 and in March, 2013 the Magistrate issued a decree of divorce. Wife filed objections which were overruled by the trial court and she appealed that order. In May, 2014 the Appellate Court issued a decision reversing the trial court in part and remanded the matter. In June, 2014 Wife filed several post-decree motions including a motion for modification of spousal support. These were heard in October, 2014 and the Magistrate issued a decision in December, 2014. Wife timely filed her objections and two years later in January, 2017 the Court overruled her objections, finding it appropriate to modify parental rights and child support obligations retroactively. Wife appealed. Reversed.

Decision: In the trial court's January, 2017 entry overruling the objections, the trial court referenced the objections to the decree issued December 26, 2014. The Court denied the objections filed January 9, 2015. But the Court made no reference to the Magistrate's decision dated December 17, 2014 or to Husband's pending objections to that decision. Therefore in reversing and remanding the trial court stated "the issue before us does not merely implication the presumption that a trial court conducted an independent analysis in reviewing a Magistrate's decision; rather, this Court cannot conclude that *any* review or consideration was given to the September, 2014 Magistrate's decision and Husband's objections thereto."

O'Hara v. Ephraim*,* 9th Dist., Case No. 28467, 2018-Ohio-567 (Feb 2018)

Facts: The parties were married in 2008 and had two children. Wife filed for divorce in August, 2013. The children were determined to be *Castle* children based upon certain cognitive and health conditions they had. The trial Magistrate also set spousal support. Husband objected briefly and generally indicating that he would supplement his objections following the filing of the transcript. Several months later Wife moved to dismiss Husband's objections because he had not supplemented them and no transcript had been filed. The trial court issued an entry overruling the objections of the Husband. Husband appealed. Dismissed.

Decision: In denying the appeal the Appellate Court first stated that an objection to a factual finding whether or not specifically designated as a finding of fact shall be supported by a transcript of all of the evidence submitted to the Magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Husband did not submit a transcript and has not demonstrated that there was plain error. Therefore Husband forfeited the issue raised on appeal concerning the determination that the children were *Castle* children.

Makruski v. Makruski, 9th Dist., Case No. 17CA011088, 2018-Ohio-1102 (Mar 2018)

Facts: Mother and Father divorced in 2014. Mother was designated as the residential parent of the two minor children. In 2016 Father filed a motion to modify his parenting time requesting to increase his visitation with the parties' youngest child prior to his pending military deployment. An expedited hearing was held and the Magistrate issued a temporary order modifying parenting time prior to Father's deployment, and setting further parenting time when Father had leave. Mother filed objections stating that Father's deployment could not be considered a change in circumstances. The objections were overruled. Mother appealed. Dismissed.

Decision: The Appellate Court dismissed the appeal as *moot* defining a *moot* appeal as one if an event occurs which renders it impossible for the Appellate Court, should it decide the case in favor of the Appellant, to grant her any effectual relief whatsoever. In this case the increase in Father's visitation time ceased in January, 2017 when his deployment began. Even if relief were appropriate the Appellate Court could offer no effectual relief to Mother.

PROCEDURE

Peak-Sims v. Sims*,* 9th Dist., Case No. 28703, 2018-Ohio-2002 (May 2018)

Facts: Husband filed a complaint for divorce without children in December, 2016. In June, 2017 the trial court dismissed the case without prejudice finding that it would be "in the best interest of both parties to give the parties time to address their mental health issues before proceeding." Husband appealed. Affirmed.

Decision: The Appellate Court raised the issue of whether this was a final appealable order that a dismissal without prejudice is not a final appealable order because it usually constitutes a dismissal other than on the merits. Article IV, Section 3(B)(2), of the Ohio Constitution only grants the Appellate Court authority to hear appeals from final judgments. Part of the definition of a final appealable order is "an order that affects a substantial right made in a special proceeding**." "A substantial right is a right that the United States Constitution, the Ohio Constitution, Statute, the Common Law or a Rule of Procedure entitles a person to enforce or protect." R.C.2502.02(A)(1). "An order which affects a substantial right has been perceived to be one which, if not immediately appealable, would foreclose appropriate relief in the future." *Bell v. Mt. Sinai Med Ctr*, 67 Ohio St.3d 60, 63 (1993). Here the Appellate Court recognized that there were no children, there were no orders in place for spousal or child support and therefore no substantial right was affected.

In dissent, Judge Carr pointed out that the joint requirement that the parties seek mental health counseling may preclude one party from coming back and refiling if the other party has not complied. Consequently it affects a substantial right and she would treat it as a final appealable order.

Schmitt v. Ward*,* 9th Dist., Case No. 28694, 28700, 2018-Ohio-1043 (Mar 2018)

Facts: Wife filed for divorce in 2007 and a decree of divorce was issued in 2012. In post-decree matters that ended in 2017 the Court signed an agreed entry on June 7th dealing with the parenting time schedule for that summer, and on June 20, 2017 approved an order concerning rental income on certain properties. Husband appealed. Affirmed.

Decision: The Appellate Court noted these were the 13th and 14th appeals filed in this case. Both entries filed with the Court in June, 2017 were agreed entries. In affirming the decision of the trial court the Appellate Court stated "from early in this state's history, we have held that a party participating in a consent judgment will not be allowed to appeal errors from that judgment." *(Sanitary Commercial Serv., Inc. v. Shank* 57 Ohio St. 3d 178 (1991)), citing *Wells v. Warrick Martin & Co.,* 1 Ohio St.386 (1853). The Court said that in the absence of an argument based in fraud, incapacity or lack of valid consent, an agreed-upon judgment entry must stand.

Bohannon v. Bohannon, 9th Dist., Case No. 28906 (Jul 2018)

Facts: Parties divorced in 2010 and Mother was named residential parent for the 3 minor children. Multiple post-decree motions were filed along with objections to each of the CSEA administrative orders. Hearing dates were set and continued. The court's hearing notices, including the final hearing date, gave the start time but gave no notice of the length of time allotted for the entire hearing. Both parties filed witness and exhibit lists. Father stated he intended to use 18 exhibits and call four witnesses, Mother intended to use 9 exhibits and call 6 witnesses. At the hearing the magistrate indicated the parties had one hour to present their cases. When Father requested more time the magistrate said he should have asked for additional time in advance. The one hour was allocated one-half to each party. Consequently only the parties testified, and no time was available for the guardian ad litem or other witnesses. Father's objections were overruled. Father appealed. Reversed.

Decision: The appellate court distinguished this case from *Smith v. McLaughlin,* 9th Dist. No. 24890, 2010-Ohio-2739. In *Smith* the hearing notice gave the amount of time (3 hours) and the parties had seven months to request additional time. Here the trial court's notice did not provide any indication of the amount of time allotted. The trial court abused its discretion by setting four motions for hearing in a one hour period.

Seabolt v. Seabolt, 9th Dist., Case No. 28669, 2018-Ohio-20 (Jan 2018)

Facts: The parties married in 1986. In 2015 Husband filed for divorce listing the marital home as Wife's last known address. The Court granted an uncontested divorce to Husband at a hearing Wife did not attend. Six months later Wife moved for relief from judgment alleging she did not receive notice of the final hearing. The court found that Husband had provided an address for Wife that was not reasonably calculated to notify her of the Court's orders, the Husband did not properly serve Wife, and that Husband took additional measures to conceal the proceedings from Wife. Husband appealed. Dismissed

Decision: In looking at the jurisdiction to hear the appeal, the Appellate Court notes that it may only hear appeals from judgments and final orders (Ohio Constitution, Article IV, Sect. 3(B)(2); Civ.R. 2501.02.) In the absence of a final appealable judgment or order, this Court must dismiss the appeal.

Husband argued that it is a final order because it contains language that "there is no just reason for delay" under R. 54(B). In dismissing the appeal the Court stated that it does not have jurisdiction over an appeal unless both the requirements of R.C. 2502.02 and Civ.R. 54(B), if applicable, are met. An order that does not meet the requirements of R.C. 2502.02 is not a final order regardless of its Civ. R. 54(B) language.

Kenney v. Carroll, 9th Dist., Case No. 17CA0042-M, 2018-Ohio-1882 (May 2018)

Facts: In the divorce decree Father was ordered to pay child support of $1,268 per month effective November, 2010. After both parties filed post-decree motions, a decision came on October 22, 2013 setting a parenting time schedule increasing Father's support to $1,531 per month effective January 1, 2012 by capping the support at the $150,000 gross combined income level. Mother filed objections which were overruled and then appealed. While the appeal was pending Father requested the Appellate Court remand the matter for the trial court to rule upon the objections. The Court issued a remand and on November 5, 2015 the trial court overruled Mother's objections except as to the parenting time schedule. The trial court sustained Father's objection to the support obligation and recalculated his obligation for the years 2012 and 2013 and set Father's support at $1,003 per month. Mother appealed the November 5, 2015 order and the Appellate Court consolidated the 2013 and 2015 appeals. The Appellate Court affirmed one cited error, and the case was remanded for the trial court to not use a $150,000 income limit in the calculation of support.

The trial court subsequently issued a *nunc pro tunc* judgment entry to which Wife appealed. In the *nunc pro tunc* entry the trial court again set Father's support obligation at $1,003 per month as it had in 2015. It added additional support worksheets and analysis to support its decision. Mother appealed. Reversed.

Decision: On appeal Mother argued that the trial court erred in issuing a *nunc pro tunc* judgment entry. In agreeing the Appellate Court said *nunc pro tunc* means now for then. It stated that Courts have inherent authority to issue *nunc pro tunc* entries so that the record speaks the truth, but that authority is limited to reflecting to what the Court actually decided not what the Court might or should have decided or what the Court had intended to decide. A *nunc pro tunc* order is not for the purpose of correcting or modifying existing judgement but is for the purpose of making the record conform to that which has already occurred. A *nunc pro tunc* entry is inappropriate when it reflects a substantive change in the judgment.

Here the trial court explicitly stated that it was making substantive changes in response to the Appellate Court's prior remand. Therefore it did not simply correct a clerical error but considered additional matters and conducted a new analysis. Contrary to what Father contended, it was not a labeling error but a substantive change.

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 pursuant to 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 files a motion to dismiss the appeal on the grounds that 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 give rise to 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 fact that the protected information once released 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 pursuant to an order has effectively determined the action with respect to the provisional remedy and requires the disclosure of allegedly confidential information.

RETIREMENT

Cook v. Cook, 9th Dist., Case No. 28575, 2017-Ohio-8848 (Dec. 2017)

Facts: The parties were divorced in 2004. In 2006, in follow-up to their divorce, the parties jointly submitted a division of property order dividing Husband's PERS account. In 2016 Husband filed a Motion to terminate the division of property order asserting that Wife had by then received at least one-half of the marital value of his PERS account. trial court found that Husband's request was to modify the division of property in the divorce and denied his motion. Husband appealed. Affirmed.

Decision: Husband argued that the language in the divorce decree provided a fixed-value distribution of the marital portion of his PERS. He argued that this was an ascertainable amount and once Wife received that amount she should receive no further payments, either in lump sum or by monthly benefit. The trial court found that there was no cap on the amount Husband was to pay Wife from his PERS benefit. In affirming, the Court of Appeals stated "there is simply no support in the record, or in the law, for Husband's claim that Wife's payments are to be capped when a specific sum has been paid to her."

Archer v. Dunton, 9th Dist., Case No. 28519, 2017-Ohio-8846 (Dec. 2017)

Facts: The parties were divorced in 1993. In the decree there is a reservation of jurisdiction granting the Court "the right to modify such orders as is appropriate in the future." At the time of the divorce, Husband had a pension through the police and fire pension fund. In 2003 the Court entered a division of property order approved by Wife's attorney (and indicating that it had been sent to Husband's attorney but not returned). In 2016 Husband filed a motion for relief from judgment requesting that the Court vacate the division of property order and permit the filing of an amended order.

In vacating the 2003 division of property order the trial court found that the DOPO inappropriately modified the provisions of the divorce decree and that the motion was timely filed because he had just recently discovered that the DOPO was in place. Husband argued that the trial court is without jurisdiction to modify a marital property decree and that a contrary or conflicting DOPO is rendered void if it modifies the decree. Wife appealed. Reversed in part.

Decision: On appeal the Court reversed the trial court's granting of the 60(B) motion, and commented that in the 13 years since the DOPO was entered the Husband did not produce evidence of how he was precluded in any way from discovering these issues earlier. The Court further found that Husband did not raise sufficient grounds under any part of Rule 60(B).

CHILD SUPPORT

Roberts v. Roberts*,* 9th Dist., Case No. 28509, 2017-Ohio-8473 (Nov 2017)

Facts: The parties were divorced in January, 2017 on a complaint filed in April, 2014. The trial was set and continued on at least 11 occasions. Four days before the final trial date, in October, 2016, Wife filed a motion to continue the trial alleging that discovery hadn't been completed and income information had not been exchanged. The Court denied her motion and the trial went forward. Wife appealed. Affirmed.

Decision: The Appellate Court stated that it will not reverse a trial court's decision concerning a regulation of its discovery proceedings absent an abuse of discretion. The Court found that prior to the issuance of protective orders at close of discovery, Wife had ample time to both conduct discovery and to file any necessary motions to compel discovery. The trial court's decision was not unreasonable, arbitrary or unconscionable.

Horak v. Decker*,* 9th Dist., Case No. 28731, 2018-Ohio-3659 (Sep. 2018)

Facts: The parties were married in 2006 and divorced in 2012. They had two children together. At the time of the final divorce they reached an agreement concerning custody but not support. Husband had worked at a body shop and was skilled in that trade. He voluntarily left that employment to start his own body shop business and consequently his income dropped from $75,000 a year to under $6,000 per year. Husband argued that there were better opportunities in the future if he started his own business. The magistrate found that Husband was voluntarily underemployed and imputed income to him of $75,000 per year. Husband objected and his objections were overruled. Husband appealed. Affirmed (reversed in part on other grounds)..

Decision: The Court, citing *Hann v. Hann (2012-Ohio-2001)* indicated that the subjective motivations for being voluntarily unemployed or underemployed play no part in determining whether potential income is to be imputed to a parent. A parent's intentional resignation from employment which results from either no employment or substantially less income would be an example of a situation where a parent is voluntarily unemployed or underemployed

Suppan v. Suppan, 9th Dist., Case No. 17AP0015, 2018-Ohio-2569 (Jun 2018)

Facts: Husband is a doctor who, at the time of the divorce, owned Commerce Parkway Associates, Wooster Ambulatory Surgery Center, and Suppan Foot and Ankle Clinic. In calculating Dr. Suppan's income the trial court failed to include distributions from the Suppan Foot and Ankle Clinic in its calculation. Wife appealed. Reversed.

Decision: The Appellate Court found that although the decision whether to average Dr. Suppan's income over a period of years was within the sound discretion of the trial

court, it is not within a trial court's discretion to arbitrarily disregard a source of income, in this case the distributions Dr. Suppan received from the Suppan Foot and Ankle Clinic.

J.M. v. L.M., 9th Dist., Case No. 17CA011126, 2018-Ohio-3417 (Aug 2018)

Facts: Husband and Wife were married in 1995 and had two children during their marriage. They divorced in 2011. Wife is a part-time secretary and earns about $12,000 per year. Husband is now the retired Chairman of the Board of Bendix Commercial Vehicle Systems LLC where he earned an annual post-divorce income in excess of $1,000,000. There was no dispute that even with this exceptionally high income the parties enjoyed a relatively modest standard of living during their marriage. In their separation of property settlement at the time of the divorce, the Husband was ordered to pay wife child support of $1,913.00 per month, spousal support of $12,500 per month for 48 months, an additional spousal support payment of $61,000 annually for four years, and a one-time lump sum property payment upon the signing of the separation agreement of $87,250. Father was also to assume all of the expenses for the children's parochial school education, extracurricular activities and medical needs after spousal support ended.

In July, 2014 Wife moved to modify child support based on the fact that her spousal support was ending. Wife testified she was seeking $8,000 in child support because that was the amount necessary to maintain the marital home and needs and lifestyle of the children. The Magistrate agreed and ordered Husband to pay approximately $8,000 per month in child support for both children and following the emancipation of the older child, approximately $6,000 per month. The Magistrate also ordered Husband to pay Wife's attorney fees which were in excess of $30,000. The Magistrate found that instead of using the substantial income to fund the protracted litigation, Husband could have used that money to settle the matter. Husband objected. The trial court adopted the Magistrate's award of $8,000 in child support but upon the emancipation of the older child the Husband would pay $4,000 per month, and reduced the attorney fees by approximately one-half. Husband appealed. Reversed in part and remanded.

Decision: In reversing the trial court the Appellate Court stated "whether an Obligor can afford to make higher child-support payments, however, is not the standard for purposes of determining whether an increase in child-support payments is warranted. See *R.C. 3119.04(B)*. Because the trial court based its decision on Husband's increase in income without any determination that the children's needs and standard of living were not being met under the original order, and because such an analysis is statutorily required, we hold that the trial court abused its discretion when it modified the child-support order."

As to Wife's argument that she should be entitled to legal fees based on Husband's conduct in protracting the litigation, the Appellate Court stated "to the extent that Wife argues that Husband protracted the litigation because he did not settle the matter despite having the financial ability to do so, we reject that argument outright because a litigant cannot be forced to settle a case simply because he can afford to do so." Therefore the Court did not err by reducing the award of attorney fees. On Husband's cross appeal the Court rejected his argument that the Wife could afford her own attorney fees. The Appellate Court stated "even though Wife can afford to pay her own attorney's fees, we cannot say that – given the disparity in income – the trial court abused its

discretion when it ordered Husband to pay approximately one-half of Wife's attorney's fees."

Salmons v. Eubanks, 9th Dist., Case No. 28327, 2017-Ohio-8985 (December 2017)

Facts: The parties were married in 2001 and divorced in 2012. They agreed that neither would pay child support to the other. In 2013 Mother moved to modify the child support order claiming Father earned substantially more than she. Magistrate agreed and modified the support obligating the Father to pay less than the $1,021 the guidelines say he should pay and ordered him to pay $750 per month. Father objected and the trial court kept support at zero. In so doing the trial court stated that Mother than to show more than a 10% change to establish that there had been a substantial change in circumstances; and that she had to show that there had been a change in circumstances not contemplated when they agreed to the prior deviation. They found that although Father's financial situation had improved since the decree, Mother's had as well. Mother appealed. Affirmed.

Decision: Mother argued that Father's income is $20,000 more than it was at the time of the divorce and that was not contemplated when they divorced. But, the record showed that the party did not agree to deviate to zero child support because of the amount of the respective incomes but to the percentage of each party's income to the combined income of the parties. Mother did not allege that there had been any change with respect to that ration let alone establish that there had been a substantial change.

Loewen v. Newsome, 9th Dist., Case No. 28107, 2018-Ohio-73 (Jan 2018)

Facts: Mother and Father had one child, born in 2004. They were never married. At the time of their son's birth, Father was a German citizen and a professional soccer player in the United States. Ultimately Father became a US citizen and established residence in Florida. In 2009 the Court designated Father as the residential parent and legal custodian of the parties' child. Mother appealed and the Appellate Court reversed and remanded the matter due to the trial court's unfair trial-time allocation and restrictions. (2012-Ohio-566) On remand a guardian *ad litem* was appointed and a second custody hearing was held; Father was again designated the residential parent and legal custodian of the son. Mother appealed and the matter was again remanded. This time the trial court failed to order the parties to deposit a specific sum for the GAL. On the second remand the trial court appointed a new guardian, reasserted the orders for psychological evaluations, and set a final hearing date allowing both parties additional time to present witnesses and evidence. In January, 2016 the Court again issued an order designating the Father as the residential parent and legal custodian of the son and ordered Mother to pay $50 per month in child support, but did not provide a rational for the child support nor did it attach a child support worksheet. Mother appealed. Reversed.

Decision: In considering whether the trial court erred in allocating parenting rights and responsibilities to Father the Appellate Court said this is not the exceptional case where the trial court had lost its way or abused its discretion in awarding custody to the Father.

In regard to the award of the statutory minimum support of $50 per month Mother argued that the trial court erred by not having evidence supporting such an award and in failing to attach a child support worksheet. The Appellate Court agreed and wrote that even though the Mother was to pay the statutory minimum amount, "it is well-settled that in an order for child support, a child support worksheet must be completed and made part of the record." The Appellate Court remanded the matter for a third time to recalculate child support and attach a child support guideline calculation.

Vanest v. Vanest, 9th Dist., Case No. 28498, 2017-Ohio-9302 (Dec 2017)

Facts: The parties were divorced in July, 2011 and the court approved a shared parenting plan for the couple's three children. In July, 2016 the court issued an entry maintaining the shared parenting plan naming the Mother as residential parent for school purposes for two of the three children and naming Father as residential parent for school purposes for one of the children. In July, 2016 the Magistrate set child support to be paid by Father in the amount of $43.67 per month. The Magistrate attached a child support worksheet to that decision. Mother objected. Mother's objections were overruled and she appealed. Reversed.

Decision: Mother argued that the trial court abused its discretion when it used a split-custody worksheet to calculate child support of children under a shared parenting plan. The Appellate Court agreed. In so doing it stated "regardless of whether the trial court determines that a shared parenting plan or a split parental-rights arrangement is adopted, it must use the worksheet which corresponds with the parenting plan that it orders, i.e. a shared parenting plan requires use of the shared parenting worksheet, a split parenting plan requires the use of the split parenting worksheet." The Court noted that this does not preclude the trial court from deviating from the shared parenting guideline support amount.

Trombley v. Trombley, 9th Dist., Case No. 17CA0012-M, 2018-Ohio1880 (May 2018)

Facts: Mother and Father married in 1997 and divorced in 2007. They had two children. At the time of their divorce they entered into a separation agreement where they agreed the Father would pay Mother $3,000 in child support per month. At that time Father was living in England and Mother was living in Ohio. Father's annual income was $170,000 and Mother's was $12,000 in spousal support.

In 2015 Father filed a motion for modification of support. The Magistrate found that a substantial change in circumstances existed, warranting a modification of support but found a number of factors justified an upward deviation from the amount calculated on the guideline support amount. Ultimately the Magistrate determined the Father's child support should be $2,400 per month. Mother objected and her objections were overruled. Mother appealed. Affirmed.

Decision: Mother claimed that it was error for the trial court not to use an average of Father's income. The Appellate Court looked to the Magistrate's determination that Father's current base pay plus his most recent bonus was the most accurate measure of his income and that using a three-year average salary calculation was not appropriate because in the prior two years Father received a severance package, earned a higher rate of pay, and subsequently received a signing and relocation bonuses from his current employer.

Clark v. Weekly, 9th Dist., Case No. 17CA0090-M, 2018-Ohio-2546 (Jun 2018)

Facts: Appellant is the Father of a child born in 2007. In 2008 the Medina County CSEA entered an administrative order for child support. In 2009 the child's maternal grandmother filed a complaint in Juvenile Court seeking custody of the child and to redirect Father's support payments to her. In 2012 the CSEA provided notice to the Domestic Relations Court of its administrative orders and the Court entered a judgment entry enforcing the orders. In 2017 Father moved to vacate the judgment entry arguing the Domestic Relations Court lacked subject matter jurisdiction to issue it.

Decision: In its first assignment of error, Father stated that the Domestic Relations Court did not have jurisdiction to issue a judgment entry on child support because the Juvenile Court had already acquired exclusive jurisdiction over the matter and therefore the Domestic Court's order was void *ab initio*.

The Appellate Court distinguished between a 60(B) motion to vacate, and a common law motion to vacate a judgment that is void. A motion filed under Civ.R. 60(B) must be brought within a reasonable time, generally within one year. A common law motion to vacate is for judgments that are void ab initio and may be brought anytime.

Here the Appellate Court determined that the Domestic Relations Court had jurisdiction and properly exercised the subject-matter jurisdiction in this case. In a case where the trial court lacks jurisdiction over a particular case, the judgment is voidable. But where the court lacks subject-matter jurisdiction the judgment is void ab initio. Here the court had subject matter jurisdiction – child support is among the subjects a domestic relations court has authority to determine. Therefore even if it did not have jurisdiction over the case its judgment is voidable. Because the judgment entry was not void *ab initio* and at best could only be voidable, Father could not use a common law motion to vacate to challenge it.

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

Facts: Parties are divorced in California and Husband per the divorce decree is ordered to pay to the Wife the sum of $ 589.00 per month as and 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 current 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 files a motion seeking to reduce his child support arrearages for the period of 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 the granting of 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 at trial 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 assuming that 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. In support of its decision the Court referred to the case of *Johnson v McConnell* from the 2nd District. In that case the Court of Appeals agreed that although the source of funds to pay day care may be considered by the trial court, the fact 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 (Mar 2018)

Facts: Pursuant to the terms of the Parties decree of divorce the Father was to provide health insurance for the benefit of 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 date of filing. Husband appealed. Affirmed.

Decision: Court of Appeals affirmed decision of the Court which found that although the Father was contributing to the cost of health insurance by paying cash medical the amount of 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 (Mar 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. Thus when the trial court included commissions in the determination of gross income during the calendar year in question, 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 the determination of gross income the trial court had the authority to average the father's income for purposes of calculating gross income under R.C 3119.05(H). Because the Father's income was somewhat inconsistent over 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 did recognize 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*)

CONTEMPT

Petersheim v. Petersheim*,* 9th Dist., Case No. 16AP0043, 2017-Ohio-8782 (Dec 2017)

Facts: The parties were divorced in February, 2014. Their separation agreement indicated that Wife would keep her automobile which was titled in Husband's name and that she would be responsible for the indebtedness secured by this vehicle, also in Husband's name, and she would timely pay the debt and would hold Husband harmless.

On June 25, 2015 Husband filed a motion in contempt against Wife for failure to make the payments on the debt related to this vehicle. At the commencement of the hearing Wife asked if the proceedings were civil or criminal contempt proceedings. Husband said it was civil contempt. Wife then testified that she was current on the payments on the date the motion was filed, and prior to the hearing had traded in that vehicle which extinguished the debt. Husband acknowledged that the debt had been extinguished and argued that Wife should be held in indirect civil contempt. Magistrate found Wife in civil contempt, determining that while the loan was not delinquent at the time that motion was filed, Husband was acting reasonably in assuming Wife's pattern of late payments would continue into the future. The Court sentenced Wife to three days in jail and ordered her to pay a fine of $250, but suspended the jail sentence and fine on the condition that Wife pay Husband's attorney fees of $1,350 and Court costs. The trial court issued an order independently adopting the Magistrate's decision on the same day. Wife's objections were overruled. Wife appealed. Reversed.

Decision: Wife's central claim is that the trial court violated her due process rights when it imposed criminal sanctions during a civil contempt proceeding. Citing *Cincinnati v. Cincinnati Dist. Council 5135 Ohio State 2nd 197(1973)*. The Appellate Court determined "What constitutes due process in a contempt proceeding depends to a large extent whether the contempt is direct or indirect and whether it is civil or criminal ,,,regardless of whether or not a particular contempt is direct or indirect, the sanctions imposed based upon that contempt may be either criminal or civil. While both types of contempt contain an element of punishment, Courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment *(Brown v. Executive 200, Inc.* 64 Ohio St. 2d 250 (1980)). If the primary purpose of the sanction is to punish the Defendant for a complete violation of a Court's order, it is a criminal sanction. If the primary purpose of the sanction is to benefit the Plaintiff, it is a civil sanction *(Forrer v. Buckeye Speedway, Inc.,* 9th Dist, 2008-Ohio-4770*)*." "If sanctions are primarily designed to benefit the Plaintiff through remedial or coercive means then the contempt proceeding is civil. Remedial civil contempt serve to compensate Plaintiff for damages suffered because of the Dependent's disobedience of a Court order. The Plaintiff must prove his or her loss as he or she would in any legal action for damages. Coercive civil sanctions are imposed when the Defendant is engaged in an on-going violation of a Court's order. Their purpose…is to induce the Defendant to stop the on-going contemptuous behavior. Defendants in prison under a coercive civil sanction are said to carry the keys to their prison in their own pocket…. Criminal contempt, on the other hand, is usually characterized by the unconditional prison sentence or fine. Its sanctions are punitive in nature, designed to vindicate the authority of the Court."

Knott v. Knott, 9th Dist., Case No. 28895, 2018-Ohio-4198 (Oct 2018)

Facts: Husband filed for divorce in April, 2015 and a decree was entered in December, 2015. Wife was designated the residential parent and legal custodian of the parties' two minor children and stated that Husband was entitled to claim the two children as dependents for the 2015 tax year and beginning with the 2016 tax year each parent was to claim one of the children. In 2015 Wife moved herself and the children in with her grandfather who provided for their support while she was unemployed. The grandfather claimed both children as dependents for the 2015 tax year; Husband also claimed both children as dependents on his 2015 taxes. The IRS requested proof of support from each of the parties and after providing proof of support the IRS granted the dependent exemption to the grandfather. Then, for the 2016 tax year, Husband again claimed both children as dependents for tax purposes. Both parties filed contempt against one another. The Magistrate determined that Wife was in contempt and Husband was not in contempt. Wife's objections were overruled Wife appealed. Reversed.

Decision: The Appellate Court reiterated the standard on contempt stating "to establish contempt, the moving party must establish a valid Court order, knowledge of the order by the Defendant, and a violation of the order. Civil contempt requires proof by clear and convincing evidence. Clear and convincing evidence is that measure or degree of proof which is more certain than a mere preponderance of the evidence but not to the extent of such certainty as required beyond a reasonable doubt in criminal cases and which will produce in the mind of the trier a firm belief or conviction as to the facts sought to be established."

The Appellate Court noted that at trial the Magistrate tried to ascertain how the grandfather had acquired the children's Social Security numbers. It was determined that he had filed in previous years claiming the children and already had that information. The fact that he acted to claim the children he claimed the dependency was supporting did not rise to the level of clear and convincing evidence that his granddaughter had supplied him with information or had otherwise acted in violation of the court's order. The decision to hold Wife in contempt was reversed.

The change of the dependent and exemptions for 2016 amounted to an impermissible retroactive change of the exemption. In finding that the trial court made no findings of a substantial change in circumstances and no indication that the trial court contemplated the best interest of the children in making this change, the Appellate Court sustained Wife's assignment of error.

Wife also assigned as error that the trial court failed to undertake an independent review to ascertain that the Magistrate properly determined the factual issues and appropriately applied the law. In that she notes that the trial court made no reference as to the transcript or exhibits. In response the Appellate Court stated "the mere fact that the trial court did not cite any specific portion of a transcript or exhibit does not demonstrate the Court failed to conduct an independent review of the objected matters as required by Civ.R. 53(D)(4)(d). While citing such material would tend to demonstrate that the trial court conducted the requisite independent review, there is no requirement in Civ.R. 53(D)(4)(d) that the trial court to do so. Likewise, we cannot conclude that the trial court did not conduct an independent review simply because it did not discuss every conceivable characterization of the evidence."

In this case, at the outset of the hearing, Wife's attorney sought clarification regarding the nature of the proceeding, given that Husband seemed to be asking for criminal sanctions. The Appellate Court found that the contempt sanctions levied against Wife were not coercive sanctions intended to bring her into compliance with the separation agreement, nor were they tailored to serve a remedial purpose by making Husband whole for the damage done to his credit score. Instead the contempt sanctions were intended solely to punish Wife for completed violations of the separation agreement. As such the fine and jail sentence were criminal contempt sanctions.

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

Facts: Father files a contempt of court action against Mother for not allowing Father to have visitation 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. Pursuant to a court order the GAL reports were kept confidential. Father files a motion to allow his expert to review the GAL reports so as to give the expert a "better understanding" of the underlying issues in the case. 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 relevant 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 are entitled to read the GAL report. The Rule does not address making the GAL report available 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

Choi v. Choi, 9th Dist., Case No. 28568, 2018-Ohio-725 (Feb. 2018)

Facts: Parties were married in 1978 and divorced in 2017. Husband was a dentist who because of age and health had retired. Wife was 62 years old and a nurse anesthetist. Just before Wife filed for divorce, her employer was purchased by another company. The new employer indicated to her that there would be cutbacks in either personnel or hours and based upon that she accepted a reduction in hours from 40 hours per week to 26 hours per week in order to maintain her employment. Husband claimed that Wife was voluntarily underemployed and in support cited the case of *Collins v. Collins, 9th Dist. Wayne No. 10CA0004, 2011-Ohio-2087*. The trial court ordered Wife to pay Husband $2,100 per month in spousal support, considering her current (reduced) wages. Husband appealed. Affirmed.

Decision: The Husband argued that Wife's reduction in income was financial misconduct, and that it was voluntary underemployment. Husband failed to present an argument on why this is financial misconduct. On the issue of voluntary underemployment the Appellate Court distinguished this case from *Collins*. In *Collins* the Husband resigned his position as a physician in order to open up a private medical practice, and thereby reduced his income from $200,000 per year to $29,000 per year. Here, the Wife did not voluntarily leave her lucrative full-time employment, but took an hourly reduction in order to save her job.

Kolar v. Kolar, 9th Dist., Case No. 28510, 2018-Ohio-2559 (Jun 2018)

Facts: Wife filed for divorce in 2012. A trial was held in August and October, 2016 and a decree of divorce was issued in January, 2017. The trial court ordered Husband to pay Wife's attorney fees in the amount of $90,000. Husband appealed. Reversed and remanded in part.

Decision: Husband argued that the trial court failed to determine the reasonableness of the award and failed to provide him the opportunity to cross examine opposing counsel as to the attorney fees affidavit. The Appellate Court concluded that its decision in *Miller v. Miller, 9th Dist., 2010-Ohio-1251* coupled with Loc.R. 25.04(B) required the trial court to make a finding as to the reasonableness of the award of attorney fees by determining the reasonableness of the time spent on the matter and the reasonableness of the hourly rate.

Lorson v. Lorson, 9th Dist., Case No. 28601, 2017-Ohio-8562 (Nov 2017)

Facts: Husband and Wife were married in 2012 and divorced in 2017. In the divorce decree the trial court required Husband to pay spousal support for 13 months. Husband appealed. Affirmed.

Decision: Husband argued that the Court did not take into account the 11 months of spousal support already paid. The decree indicated that the parties testified about their employment income and concerning spousal support that the Court had considered the evidence, testimony and entire record of the case. At the time of filing of the notice of appeal the Husband filed a transcript but failed to get the Court Reporter's signature on the transcript and no transcript was ever delivered to the Appellate Court. Therefore the Appellate Court concluded "without a copy of the trial transcript, this Court is unable to review whether the trial court exercised improper discretion when it ordered Husband to pay 13 months of spousal support. We have no choice but to presume regularity in the proceedings."

R.O. v. P.O., 9th Dist., Case No. 28929, 2018-Ohio-2587 (Jun 2018)

Facts: In the divorce decree the Court ordered Husband to pay Wife spousal support of $13,525 per month, and 50% of any gross bonus he receives from his employment, and 33% of any income or gain realized by Husband from any executive stock incentive plan in which he participates. At the hearing the Magistrate found that Husband had started a new job with an annual salary of $150,000 which was a significant decrease from his prior salary of $400,000 and reduced his monthly spousal support payment to $6,100 per month. Wife objected. The Judge concluded that despite the Husband's decrease in salary his total income was in line with his total income from previous years, and ordered him to continue to pay $13,525 per month in spousal support. Husband appealed. Reversed.

Decision: The Appellate Court found that the trial court had originally based its tier 1 spousal support award of $13,525 on Husband's base salary of $400,000. Then, after Husband moved to modify the award, the trial court used Husband's total income, not just his base salary of $150,000 to determine that Husband did not experience a substantial change in circumstances to justify a decrease in his spousal support. The Court noted that these figures were not compatible and it was error for the trial court to use Husband's total income as opposed to his base salary for purposes of determining whether he experienced a substantial change in circumstances.

Palazzo v. Palazzo, 9th Dist., Case No. 28536, 2018-Ohio-2710 (Jul 2018)

Facts: This is the third appeal to the divorce granted to the parties after 28 years of marriage. The original divorce decree was entered March 25, 2014. In the first appeal *(2015-Ohio-1254)* the case was remanded to consider evidence of Husband's member draws from a business account to determine how to treat those funds. On remand that trial court issued an order increasing the Wife's property division by just over $20,000. Both parties appealed that decision. In *Palazzo II (2016-Ohio-3041)* the Appellate Court remanded the matter to the trial court to address whether it would be inequitable to order

interest on the property division payments to Wife and to reconsider spousal support without counting the property division award payments as income to Wife. After the second remand the trial court explained its basis for not rewarding interest on the periodic property payments noting that Husband is required to pay income tax on the funds he uses to pay the property division award. On the re-evaluation of spousal support the Court increased the annual spousal support from $18,000 to $36,000 thereby doubling the monthly payment from $1,500 to $3,000. Both parties appealed. Affirmed.

Decision: Husband argued on appeal that the trial court failed to consider his ability to pay the property payments and the revised amount of spousal support. But he did not identify any factor enumerated in *R.C. 3105.18(C)(1)* bearing on his ability to pay or inability to pay. Husband also argued that the Court erred in making his spousal support retroactive to 2014, but did not develop any argument or cite any authority in his briefing. The Court stated that it declined to construct an argument on his behalf on this assignment of error.

Wife argued that there was a mathematical error and stated the correct value for the property division. But she did not cite the record as to where the error was made or how her calculation was arrived at. Wife then argued that the trial court used FinPlan to originally calculate spousal support and asserts that the trial court should have removed the property division payments and used the other figures which would result in her receiving $5,792 per month for spousal support. But Wife did not develop her argument beyond citing FinPlan and cited no legal authority to support her position.

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 did reserve 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 the issue of spousal support even when no support is ordered.

PARENTAL RIGHTS

In Re: T.K., D.W., C.W., 9th Dist., Case No. 28720, 2017-Ohio-9135 (Dec 2017)

Facts: This is a matter in Juvenile Court where Mother is the biological mother of T.K., D.W. and C.W. Father is the biological father of DW and CW and paternity was never established for T.K. Father became the legal custodian of all three children. In November, 2015 Father was incarcerated. At that time Father was remarried and his Wife, the step-mother of these three children, had initiated divorce proceedings against Father and contacted the CSB to inform them that she could no longer care for his three children. At that time Mother had not had contact with the children for over three years. At the temporary placement hearing and the permanent custody hearing Mother failed to appear. After the first permanent custody hearing she filed a motion for legal custody and for a six-month extension. On the second scheduled permanent custody hearing she again failed to appear. CSB took permanent placement of the children. Mother appealed. Affirmed.

Decision: Before a Juvenile Court may terminate parental rights and award permanent custody of a child it must find by clear and convincing evidence (1) that the child is abandoned; orphaned; has been in the temporary custody of the agency for at least twelve months of a consecutive 22-month period; the child or another child of the same parent has been adjudicated abused, neglected or dependent three times, or that the child cannot be placed with either parent based on an analysis under R.C. 2151.414(E); and (2) that the grant of permanent custody to the agency is in the best interest of the child. The trial court found that Mother demonstrated a lack of commitment towards the children and Mother failed to challenge that finding on appeal. The Appellate Court declined to construct an argument on Mother's behalf.

Okoye v. Okoye, 9th Dist., Case No. 28183, 2018-Ohio-74 (Jan 2018)

Facts: The parties were married in 2001 and adopted two Nigerian children in 2008. In 2013 Husband installed motion-sensing cameras around the house. In September of that year Wife filed for divorce and after Husband showed a video of Wife spanking one of the children with a wooden spoon, Husband was granted temporary custody and Wife was ordered to have supervised visitation. The supervised visits stopped when the children became unwilling to participate in the visits. In September, 2014 the parties were referred to Minority Behavior Health Group for family counseling. After a trial in March and June, 2015, the Court issued a decree of divorce, in March, 2016, which allocated sole parental rights and responsibilities of the minor children to Wife, and granted supervised visitation to Husband. Husband appealed. Affirmed.

Decision: The Appellate Court first noted that absent an argument the trial court reached an incorrect factual determination on one or more of the best interest prongs the Court would review the Court's best-interest analysis under an abuse of discretion review, focusing on those prongs where a party indicates there was not sufficient evidence. If an incorrect factual determination issue is raised the standard of review is raised from an abuse of discretion to a manifest weight of the evidence standard. Here the trial court found that Husband "is almost pathologically committed to sabotaging the children's relationship with their Mother." The Appellate Court concluded that the trial

court did not clearly lose its way or create a manifest miscarriage of justice in its factual determinations. It also noted that Wife had taken numerous steps to improve her parenting ability, but Husband had not.

Husband contends that because the wishes of the children conflicted with the recommendation of the guardian *ad litem*, the Court should have appointed counsel for the children. But Husband did not provide any authority to support that claim

Cutlip v. Gizzo, 9th Dist., Case No. 28535, 2018-Ohio-647 (Feb 2018)

Facts: The parties were married in 2001, had a child in 2002 and divorced in 2006. Their divorce decree included a shared parenting plan. Over the next nine years the parties filed numerous motions culminating in an agreed judgment entry in June, 2015. Three months later the child, then 13, got into a physical altercation with Mother. Mother called the police and the child was arrested and held in the Juvenile Detention Center. While in detention the child made abuse allegations against Mother. The Court appointed a guardian *ad litem* for the child and subsequently, after the GAL's investigation and recommendation, the child was released from detention and returned to Mother's home. Father filed a motion to modify custody/parenting plan and/or visitation and motion to modify child support. During the pendency of the motions the Court ordered family counseling which Father did not attend. Consequently the trial court ordered certain modifications to the 2015 agreed entry. Father appealed. Affirmed

Decision: On appeal Husband did not discuss a change in circumstances unknown to the Court prior to the time the Court ruled on allocation of parental rights, but said there is a long history of animosity between the parties. He then lists 17 statements which he believed supported a change in custody, but did not cite them to the record or support them the with legal authority. The Appellate Court affirmed the trial court's decision.

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

Facts: Husband files complaint pursuant to 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 pursuant to 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 (Jun 2017)

Facts: Parties have a shared parenting plan. At the time of the execution of the shared parenting plan 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 amount of child support would be unjust or inappropriate for the children, either of the parents 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 is not automatically entitled to 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.

Myers v Brewer, 2nd Dist. Case No. 2016-CA-10, 20187-Ohio-4324 (Jun 2017)

Facts: Parties had shared parenting for their 3 children. 2 of the children were on a week to week schedule. The third child resided with the Father and visited with the mother on alternate weekends. Father is the named as the school placement parent. Father is ordered to pay child support. Father appealed. Affirmed.

Decision: The Court of Appeals rejected the Husband's argument that because he was the school placement parent that he shouldn't be ordered to pay child support. The Court of Appeals also held that it wasn't an abuse of the Court's discretion when the Court follows the child support guidelines and designates the parent with the higher income as the obligor for the payment of child support.

Court of Appeals also rejected the husband's argument that he was entitled to a deviation solely because the parents have equal parenting time. The fact that the parties equally share in parenting time does not by itself justify a deviation in child support. It is simply one of the factors to be considered by the trial court when it considers a request for a deviation of child support.

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

Facts: Wife files a motion to modify parenting time. trial court orders each party to deposit $750.00 to pay for an attorney advocate for the children. Wife is unable to 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 pursuant to 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 that it would dismiss if the deposit was not made and the Court of Appeals found that the Plaintiff made no effort to deposit any amount towards the children's legal fees.

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

Facts: Parties had a shared parenting plan wherein the children lived with the Father and visited with the Mother on weekends and holidays. Subsequent to 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 the date of the filing of 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 (Apr 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. At trial the evidence was that the parties did not communicate very 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 that 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 despite the fact that 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. At trial 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 provide a definition of the phrase “change of circumstances” Ohio Courts have held that the phrase “change of circumstance” is intended to denote an event, occurrence or situation which has 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 that there be a change of circumstance is to prevent a constant re-litigation of issues that have already been determined by the Court. For there to be a change of circumstance the change doesn’t have to be quantitatively large but must have a material effect on the child(ren).

ATTORNEY'S FEES

J.M. v. L.M., 9th Dist., Case No. 17CA011126, 2018-Ohio-3417 (Aug 2018)

Facts: Husband and Wife were married in 1995 and had two children during their marriage. They divorced in 2011. Wife is a part-time secretary and earns about $12,000 per year. Husband is now the retired Chairman of the Board of Bendix Commercial Vehicle Systems LLC where he earned an annual post-divorce income in excess of $1,000,000. There was no dispute that even with this exceptionally high income the parties enjoyed a relatively modest standard of living during their marriage. In their separation of property settlement at the time of the divorce, the Husband was ordered to pay wife child support of $1,913.00 per month, spousal support of $12,500 per month for 48 months, an additional spousal support payment of $61,000 annually for four years, and a one-time lump sum property payment upon the signing of the separation agreement of $87,250. Father was also to assume all of the expenses for the children's parochial school education, extracurricular activities and medical needs after spousal support ended.

In July, 2014 Wife moved to modify child support based on the fact that her spousal support was ending. Wife testified she was seeking $8,000 in child support because that was the amount necessary to maintain the marital home and needs and lifestyle of the children. The Magistrate agreed and ordered Husband to pay approximately $8,000 per month in child support for both children and following the emancipation of the older child, approximately $6,000 per month. The Magistrate also ordered Husband to pay Wife's attorney fees which were in excess of $30,000. The Magistrate found that instead of using the substantial income to fund the protracted litigation, Husband could have used that money to settle the matter. Husband objected. The trial court adopted the Magistrate's award of $8,000 in child support but upon the emancipation of the older child the Husband would pay $4,000 per month, and reduced the attorney fees by approximately one-half. Husband appealed. Reversed in part and remanded.

Decision: In reversing the trial court the Appellate Court stated "whether an Obligor can afford to make higher child-support payments, however, is not the standard for purposes of determining whether an increase in child-support payments is warranted. See *R.C. 3119.04(B)*. Because the trial court based its decision on Husband's increase in income without any determination that the children's needs and standard of living were not being met under the original order, and because such an analysis is statutorily required, we hold that the trial court abused its discretion when it modified the child-support order."

As to Wife's argument that she should be entitled to legal fees based on Husband's conduct in protracting the litigation, the Appellate Court stated "to the extent that Wife argues that Husband protracted the litigation because he did not settle the matter despite having the financial ability to do so, we reject that argument outright because a litigant cannot be forced to settle a case simply because he can afford to do so." Therefore the Court did not err by reducing the award of attorney fees. On Husband's cross appeal the Court rejected his argument that the Wife could afford her own attorney fees. The Appellate Court stated "even though Wife can afford to pay her own attorney's fees, we cannot say that – given the disparity in income – the trial court abused its discretion when it ordered Husband to pay approximately one-half of Wife's attorney's fees."

Eichenberger v Clark, 10th Dist., Case No. 14AP-813, 2015-Ohio-2718 (Jul 2015)

Facts: Attorney sues the client in common pleas court for fees which the Attorney alleged were owed by the client for defense of a foreclosure action. In response to the complaint for fees, the Client files a motion for a stay and requests that the Attorney submit to "fee arbitration pursuant to the rules of the Columbus Bar Association. Trial court grants the stay and refers the matter to the Columbus Bar Association for fee arbitration. Attorney appeals. Reversed.

Decision: Gov. Bar Rule V(9)(G) requires an attorney to assist in an investigation of alleged attorney misconduct and to testify in a hearing pursuant to the rule. This rule does not require an attorney to arbitrate his or her fee dispute claims against a client if the client so requests. While Gov. Bar Rule V generally authorizes a certified grievance committee of a bar association to adopt and use alternative dispute resolution procedure to handle client dissatisfaction issues such as fee disputes, the rule does not contain language which would demonstrate the Supreme Court's intent to authorize a certified grievance committee of a bar association to require an attorney to arbitrate a fee dispute with a client at the client's request. While the Supreme Court requires arbitration of fee disputes between lawyers of different firms (Prof.Cond.R.1.5(f)) the Supreme Court has not promulgated any rule requiring a lawyer to arbitrate a fee dispute with a client when the client so requests.

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. Sometime 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 to the extent that Mother argued that the trial court's paternity determination was not supported by sufficient evidence, they note that 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 in this case 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 all of the decisions in her case.

AGREEMENTS

T.M. v. W.B., 9th Dist., Case No. 16CA011025, 2017-Ohio-8622 (Nov 2017)

Facts: Parties were divorced in 2013. They had two biological children who were minors and their divorce decree included a shared parenting plan. Subsequently Mother filed a motion to modify the shared parenting plan. In April, 2016 the parties reached an in-court agreement but could not reach an agreement with respect to a school-year-possession schedule for the children and agreed that they would defer to the trial court and would accept the schedule it set forth. After that, Father filed a summary of the agreement; Mother moved the trial court to adopt the in-court agreement. Thereafter Father sent a proposed judgment entry to the trial court, the guardian and Mother's counsel and sent them an amended judgment entry, which they did not approve. The trial court adopted the amended proposed judgment entry in full. The adopted judgment entry submitted by Father changed material provisions in the agreement the parties reached in Court. Mother appealed. Reversed.

Decision: In reversing the trial court the Appellate Court held that the trial court erred by adopting the proposed judgment entry which did not accurately reflect the parties' in-court agreement.

Batcher v. Pierce, 9th Dist., Case No. 28797, 2018-Ohio-3766 (Sep 2018)

Facts: The parties were divorced in 2008 when they entered into a separation agreement and shared parenting plan. In August, 2015 Father filed a motion to reduce child support. At the hearing on his motion the parties orally entered an agreement on the record which was retroactive to the date of the motion. The agreement was read on the record and Mother and Father accepted the terms. No exhibits, testimony or stipulations concerning income or expenses were admitted at the hearing. In addition to the terms agreed by the parties the Court modified the percentage each would pay towards out-of-pocket medical expenses. Mother objected and her objections were overruled. Mother appealed. Reversed.

Decision: The Appellate Court noted that the transcript contains no agreement by the parties to alter the apportionment of the uninsured or unreimbursed health care costs. The Court of Appeals noted that as previously held a trial court can *sua sponte* alter the terms of a shared parenting plan if the Court determines the modifications are in the best interest of the children. However there is no evidence the parties' income or expenses are stipulations and that information is vital to the determination of whether the modification was in the children's best interest.

Frost v Frost, 10th Dist., Case No 14 AP-1044, 2015-Ohio-3596 (Sep 2015)

Facts: Parties enter into an agreement at the time of the final hearing to resolve all issues. At the hearing to acknowledge the agreement the Wife testifies as to her understanding of the terms. Trial court directs Counsel for the Wife to prepare the divorce decree. Husband files to set aside the agreement. Trial court denies the motion and grants the divorce and the proposed decree of divorce as prepared by Counsel for the wife. Husband appealed. Affirmed.

Decision: Settlement agreements are favored in the law and when the parties enter into a settlement agreement in the presence of the court, such an agreement constitutes a binding contract. A settlement agreement "may be either written or oral and may be entered into prior to or at the time of the divorce hearing. Neither a change of heart nor poor legal advice is grounds to set aside a separation agreement. A party may not unilaterally repudiate a binding settlement. So long as the court is satisfied that agreement was not procured by fraud, duress, overreaching or undue influence, the court has the discretion to accept it without finding it to be fair and equitable. An Oral settlement agreement in a divorce action "can be enforced by the court in those circumstances where the terms of the agreement can be established by clear and convincing evidence.

CIVIL PROTECTION ORDERS

Akron v. Sage, 9th Dist., Case No. 28834, 2018-Ohio-3662 (Sep 2018)

Facts: During the pendency of their divorce Wife filed a petition for a domestic violence civil protection order against her Husband. An *ex parte* civil protection order was issued that would expire in one year, which was August 26, 2017, unless earlier modified or dismissed by order of the Court. The process server was to personally serve the *ex parte* order on Husband but the order was instead served on Husband's divorce attorney.

On July 1, 2017 Husband was arrested for violating the *ex parte* order because he was at a restaurant that was within 500 feet of Wife's residence. A jury trial ensued and Husband was convicted. Husband appealed. Reversed.

Decision: In his first assignment of error, the Husband said the trial court failed to instruct the jury regarding the element of personal service and the trial court's error denied him his due process and fair trial right. He claimed that even though he did not argue this failure to so instruct the jury, this is a plain error. The Court found that it was a plain error and that initial service of an *ex parte* civil protection order must be made in accordance with the provisions for personal service and required personal service on Husband himself.

Since the City failed to present uncontroverted evidence that Husband had been properly served with the *ex parte* civil protection order the error was sustained and the judgment was reversed.

Cyran v. Cyran, 152 Ohio St.3d 484 (Jan 2018)

Facts: The parties' marriage was dissolved in 2013. In 2015 Wife filed a petition for a domestic violence civil protection order against Husband. The order was to remain in effect until June, 2016. Husband objected and the objections were overruled. Husband appealed.

The Appellate Court issued a show cause order asking the parties to explain why the case should not be dismissed as *moot* because the protection order had expired. Husband argued that he faced the possibility of collateral consequences with respect to his concealed firearm permit and his credit report as well as his ability to obtain housing, drive certain vehicles, and obtain future employment. The Appellate Court dismissed the appeal as *moot*. Husband appealed to the Ohio Supreme Court with two propositions of law: (1) the collateral consequences exception to the *moot doctrine* applies to an appeal to an expired protection order when the Appellant faces possible collateral consequences that may not be ascertainable at the time of the appeal, and (2) there is a rebuttable presumption that an appeal from an expired protection order is not *moot*. The Court granted the discretionary appeal (and also found a conflict with an 8th District case). Affirmed.

Decision: The Supreme Court rejected both of Husband's propositions of law and the certified question. They found that in the absence of demonstrated legal collateral

consequences the collateral consequences' exception to the *mootness* doctrine does not apply to an expired domestic violence civil protection order.

In the dissent Justice Kennedy said "proof of the existence of collateral consequences beyond a reasonable doubt is not required. Collateral consequences are measured by probability or certainty. As an example he notes that a Court is mandated by R.C. 3109.04(F)(2)(c) to consider a history of, or potential for…spousal abuse (or) other domestic violence in determining whether shared parenting is in the best interest of a child when deciding whether to modify or terminate a decree of shared parenting and shared parenting plan. Therefore when a respondent subject to a finding of domestic violence and CPO is also a party to a shared parenting plan the legal collateral consequences of the CPO are probable and certain in parties' appeal and the CPO is not *moot*."

ADOPTION

In Re: Adoption of M.G.B.-E., ____ Ohio St.3d ____, 2018-Ohio-1787 (May 2018)

Facts: Father and Mother were married for about five years and their marriage ended in a divorce in 2004. They had two children, a son and a daughter. In the course of their very contentious divorce proceedings Mother accused Father and his brothers of sexually abusing the children. Mother impeded Father's parenting time from the outset; in a two-year period Father filed more than 25 police reports when Mother refused to deliver one or both children for parenting time. In May, 2005 Father moved for temporary and permanent custody of the children alleging Mother had repeatedly denied his parenting time. In 2005 and 2006 he filed at least five motions to hold Mother in contempt. Mother then made additional allegations of sexual abuse of the children by Father in two different counties. Children Services reported no indication of anything improper, neglectful or abusive occurring during the visits with Father or his family. In June, 2006 Mother unilaterally cut off parenting time between Father with the children again alleging sexual abuse. An examination revealed no physical signs and based on the 2006 allegations Mother obtained an *ex parte* civil protection order from the trial court prohibiting Father from having contact with Mother or the children. Also the parties agreed to reduce their motions to a ruling on the most recent contempt and Mother's request for supervised visits. Before the Court could rule Mother went to a neighboring county and changed the children's last names to her maiden name, alleging that she did not know Father's address and his address was not ascertainable with reasonable diligence. After that the Domestic Relations Court ordered Father's parenting time limited pending therapy and that it expected Father to begin therapy with the children within six months. Father had not commenced that therapy six months later at a review hearing but agreed to contact the therapist. He did not do so.

For the next six years, until 2014, the children did not receive any voicemail, telephone call, text message, e-mail, card, letter or gift from Father. Father testified in his defense that from 2010 until August, 2014 he had no way of contacting the children because he did not know where they were living and because he did not have a working telephone number for Mother. Mother changed addresses and telephone numbers multiply times without informing the Domestic Relations Court or Father as required by the final divorce decree. In 2014 Father learned of the high school his children were attending and made attempts to see his children, one who was a football player and wrestler and one who was a cheerleader, at events. Mother notified the local police department to intervene and ask Father to leave. Mother stopped sending the children to their scheduled activities and on at least one occasion she herself showed up with her relatives and without the child present.

In May, 2015 Father filed a motion in the Domestic Relations Court to reestablish parenting time. Four days later the step-father of the children filed a motion for adoption. He alleged that Father failed without justifiable cause to provide more than *de minimus* contact with the children. The Probate Court found that Father's consent was not necessary and that the decision was affirmed by the 12th Dist. Court of Appeals. Father appealed to the Ohio Supreme Court. Reversed.

Decision: The Supreme Court started its analysis by looking at its decision *In re Adoption of Pushcar* 110 Ohio State 3rd 332 (2006). Father took *Pushcar* to mean the

Probate Court may not proceed with an adoption petition if there is any parenting matter pending in another Court. The Supreme Court clarified that in *Pushcar* the use of the word 'parenting' was not what was intended. Instead the *Pushcar* court should have used the word "parentage." Therefore the syllabus in *Pushcar* should effectively read "when an issue concerning parentage of a minor child is pending in the Juvenile Court, a Probate Court must refrain from proceeding with the adoption of that child." Here it was a parenting order, not a parentage order.

The Supreme Court then looked to R.C. 3107.07(A) which deals with consent to adoption. Here that means it was error for the Probate Court <u>not</u> to take into account Father's efforts to reestablish parental rights and responsibilities through the Domestic Relations Court during the year proceeding the filing of the adoption petition as well as Mother's efforts to impede Father's contact with the children. In fact the Probate Court did not consider Father's pending motion and did not even mention Father's pending motion in Domestic Relations Court, and the Supreme Court concluded the Father's efforts to enforce his parental rights prior to the filing of step-father's adoption petition is irrelevant. It was further error for the Probate Court to refuse to admit evidence about the Domestic Relations Court's proceedings or other oral orders despite Father's proffered testimony and exhibits demonstrating that the Domestic Relations Court has granted Father limited visitation with the children. The Court concluded by stating "when a parent has filed a parenting motion in a Juvenile or Domestic Relations Court having continuing jurisdiction over a child prior to the filing of a petition to adopt that child, the Probate Court must consider the parent's legal action as part of its consideration whether the parent failed without justifiable cause to have more than *deminimus* contact with the child during the year immediately preceding the filing of the adoption petition under R.C. 3107.07(A).

ATTORNEY DISCIPLINE

Disciplinary Counsel v. Skolnick, Slip Opinion, 2018-Ohio 2990 (Aug 2018)

Facts: Attorney berates his Paralegal as to her physical appearance and dress and calling her a "ho", dirtbag and other obscenities, and insults and belittles her in front of clients. Paralegal records more than 30 episodes of Attorney's bad behavior. The Attorney's explanation for his behavior was that he learned the lingo from rappers and hip hop artists he represents as an entertainment lawyer and that he thought that he was being funny.

Decision: Supreme Court suspends Attorney for 1 year with 6 months stayed. The suspension was necessary to not only protect the public and the dignity of the legal system but also to deter future misconduct of this nature by the Attorney Skolnick and other attorneys licensed to practice law.

Disciplinary Counsel v. Bellew, 152 Ohio St.3d 430, (Dec 2017)

Facts: Attorney was subject to several suspensions of his law license. Nine days after his first license suspension he filed a divorce complaint for a client, then did not appear at the initial hearing.. Upon discovering this she requested a refund of the $300 she paid him Counsel wrote her a check from an account he had closed 5 years earlier. Five months later the suspension he again took a retainer to represent a woman in a post-decree matter, and again did not appear at the hearing. In total, five separate disciplinary actions were brought against Attorney Bellew, and he did not cooperate in any of them.

Decision: Supreme Court permanently disbars counsel.

Disciplinary Counsel v. Rutherford, Slip Opinion, 2018-Ohio 2680 (Jul 2018)

Facts: Attorney suspended 4 times:

- Non-payment of child support
- Failure to timely register
- Neglect of three client matters
- Failure to answer a disciplinary complaint

This matter was the fifth, and was brought for his neglecting four separate client matters, and collecting retainers and not performing services.

Decision: Supreme Court permanently disbars counsel.

PROPERTY DIVISION

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 that grandson (husband) can build a home on the gifted land. Husband takes out loan of $ 38,000 for construction of 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 some 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 the following 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 has to 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 of the properties. 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 that 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 rather 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).

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

Facts: Per the divorce decree the Husband was ordered to pay the 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, which are suspended on the condition that Husband pays $20,000.00 and then $ 1,000.00 per month for 60 months. Husband appealed. 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. In support of that position the Husband cited the Sizemore case out of the 12th District. In Sizemore the 12th District Court of Appeals held that to using contempt to imprisons 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 State 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.

Smith v Smith, 12th Dist., Case No CA2016-08-059, 2018-Ohio-7463 (Sep 2017)

Facts: Parties owned and operated a pallet building company. Husband lets the building insurance lapse. He was in the process of switching company when a fire destroys the entire building. Husband obtains a loan and rebuilds the building which had been 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 in order to find a party guilty of Financial Misconduct under 3105. 171 (e) there must be a) some type of wrongdoing and b) there must be an intent to interfere with the other spouse's property rights. In this case there was no evidence that 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. In this case the transaction which gave rise to 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.