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QDRO Best Practices: Addressing Critical Issues Prior to Final Hearing

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I. Understanding QDROs and other Retirement Plans by Ensuring All Issues Addressed in Separation Agreement

Numerous issues may arise if the Separation Agreement does not properly address QDRO-related issues**.**

This presentation address some of those issues and then further explores how to prevent them.

II. Potential Issues With a Faulty Separation Agreement

A few of the many potential issues:

Discrepancies between language (or lack thereof) in separation agreement and QDRO lead to disagreement between counsel.

Additional cost for parties to reopen/relitigate

Basics could have been addressed if time taken prior to finalization

If Participant dies prior to approving QDRO, a properly drafted separation agreement that is comprehensive enough to be deemed a QDRO may (potentially) be honored by plan administrator.

No requirement that a QDRO be a separate order – a decree could be deemed a QDRO

III. Examples of Faulty Language

Plaintiff shall receive 50% of Defendant's 401k Plan.

Plaintiff shall transfer $10,000 of his Retirement Savings Plan to Defendant.

Defendant shall receive 50% of Plaintiff's pension through his employer.

Defendant shall transfer 50% of the marital portion of his pension commencing immediately.

<<<<<Unfortunately, this language is oftentimes all that is provided in a separation agreement.

IV. Important Components of Separation Agreement – traditional defined benefit and defined contribution

Simultaneous to drafting, or even before, attempt to have the QDRO prepared.

All issues addressed at the time of execution, not months (or, sadly, years) later

QDRO incorporated by reference into separation agreement

Saves time and prevents discrepancies

If this isn't accomplished, language may be included in the QDRO that wasn't negotiated and agreed upon (unless clearly specified in the Separation Agreement)

Oftentimes, however, unable to prepare in time due to the nature of negotiations

V. Important Components of Separation Agreement – defined contribution

a. Defined Contribution Plans (401(k), savings plan, etc.) – What to include:

Specific percentage or dollar amount payable to alternate payee

Effective date of assignment

A statement regarding the "pro rata" allocation of benefits among the various accounts

Investment gains/losses subsequent to effective date

Loans

DC fees

b. Specific percentage or dollar amount payable to alternate payee

Percentage Example: Alternate Payee shall be assigned ___% of the Participant's Total Account Balance accumulated under the Plan as of ____.

Fixed Dollar Example: Alternate Payee shall be assigned a portion of Participant's Total Account Balance under the Plan in an amount equal to $____, effective as of _____.

"Total Account Balance" important.

> Under a DC plan, participant's benefits generally contained in more than one account (pre-tax, after-tax, rollover accounts, cash accounts, etc.).

c. Effective date of assignment

The percentage or fixed amount "as of when"

Utilizing retroactive dates becoming more of an issue

> Plan administrators changing recordkeepers frequently and may not be able to calculate
>
> The longer you wait to submit the QDRO, more chance of running into problems.
>
> QDRO rejected and left with determining the gains/losses as of the effective date in separation agreement until the earliest date per the plan.

d. "Pro rata" allocation of benefits among the various accounts

> The share of the benefits shall be allocated on a "pro rata" basis among all of the Participant's accounts under the Plan.
>
> This goes to the "Total Account Balance" detailed above.
>
> Attorney for alternate payee could be fooled into agreeing to having the funds be transferred from a pre-tax account, leaving participant with already taxed funds.

e. Investment gains/losses subsequent to effective date

Is it the intent to have the alternate payee's assigned share of the benefits include interest and investment earnings or losses for periods subsequent to the effective date until date of segregation?

Many separation agreements fail to include such a statement.

f. Impact of the loan

First, uncover whether the participant has taken a loan (no hardship required).

Be careful about what is the total account balance.

A participant may have a plan with $100,000 and a $20,000 loan.

Some plan administrators will tell you the total account balance is $100,000, others may say $80,000.

Loan language is misleading

"Share of benefits should "include/exclude" the loan balance"; "The share of benefits should "take into account/not take into account" the loan balance"

By "including" the loan, does the plan subtract the loan amount first because they are including the effect of the loan, or do they include the loan balance as part of the total balance, which would increase award to alternate payee?

Clearest loan language (which contains a hypothetical):

The alternate payee's assigned percentage shall be calculate "AFTER" the loan amount is subtracted from the participant's total account balance.

For illustration purposes only, if the total account balance is $10,000, and $2,000 of that represents an outstanding loan, the alternate payee's share of the benefits shall be 50% x ($10,000 - $2,000), or $4,000.)

This example assumes the loan should be calculated "after" and the amount of assignment is 50%. Oftentimes in cases where the loan was used for a marital purpose.

g. Administrative Fees

Plan administrators may charge a fee for the review and processing of a defined contribution QDRO (not defined benefit)

Some plans require the fee to be taken from the Participant's account.

Negotiation strategy: contact plan administrator to determine (1) whether there is a fee, (2) whether it must be taken from the participant's account, or (3) whether it may be allocated by agreement.

Negotiate this fee; oftentimes as high as over $1,000

6. **Defined Benefit Plans (pension plans)**– What to include:

Formula or dollar amount of accrued benefit to be payable to alternate payee (e.g., coverture formula if not in pay status, and either coverture or fixed if in pay status)

Separate Interest vs. Shared Payment (i.e., whose life expectancy the benefits are to be payable over)

Preretirement survivorship protection

Postretirement survivorship protection (if using the Shared Payment approach)

Early retirement subsidy for the alternate payee / Postretirement COLA adjustments

*Cash balance plans rising in popularity

a. Formula or dollar amount of accrued benefit to be payable to alternate payee

Coverture Formula

AP is entitled to 50% of the marital portion of the P's accrued benefit as of the P's date of retirement. Once P's final benefit is calculated at retirement, the marital portion is then determined by multiplying the accrued benefit by a coverture fraction.

The numerator of which is equal to P's years of credited service under the plan that were earned during the marriage, and the denominator of which is equal to P's total credited service under the plan as of his/her date of retirement or AP's benefit commencement date, if earlier.

Using this approach is the only way to provide AP with inflationary protection on his/her ownership share of the pension.

As the denominator grows by one each year while the numerator remains constant, the fractional ownership interest of AP's share of the pension is actually decreasing each year.

But this ever-decreasing fraction is applied to a larger pension. In essence, AP is earning a smaller and smaller percentage of a larger pie; this is how AP receiver his/her growth protection under a pension plan.

Accepted approach by Ohio courts. See *Hoyt v. Hoyt* (53 Ohio St. 3d 177).

DO NOT MAKE THE MISTAKE OF:

Defining the numerator as the duration of the marriage without considering the possibility that the participant was not covered under the plan during the entire marriage.

Defining the accrued benefit and denominator as *the date of divorce* (i.e., "frozen" approach).

On its face, may appear to be coverture language

b. Separate Interest vs. Shared Payment

The sole distinction is whose life expectancy the benefits are to be payable over

Separate Interest: AP's share of the benefits is *actuarially adjusted* to his/her own life expectancy.

Shared Payment: AP's benefits are not actuarially adjusted; AP shares in a portion of P's pension when it becomes payable to P.

Under shared payment, AP will receive benefits if, as, and when P retires and receives benefits.

These two approaches define the duration of benefit payments, not amount.

If benefits are in pay status, must use shared payment (plan will not adjust when benefits are in pay status)

c. Separate Interest vs. Shared Payment

Benefits of Separate Interest:

AP may elect to receive benefits even if P not yet retired. Such a commencement date must be on/after P's *earliest retirement age* as defined by ERISA.

AP may choose among available benefit options offered under the plan (P may also is also free to choose any form of available benefit option).

P could elect survivor coverage for new spouse if remarried upon date of retirement.

d. Preretirement Survivorship

Qualified Preretirement Survivor Annuity (QPSA) coverage necessary for AP under <u>both</u> approaches.

Necessary to secure AP's rights to benefits in the event of P's death before AP commences benefits

e. Postretirement Survivorship

Qualified Joint and Survivor Annuity (QJSA)

Only necessary under the shared payment approach

AP's share of the benefits are contingent upon survival of the participant (unlike separate interest); therefore, unless P elects QJSA at retirement for benefit of AP, AP's share of benefits will cease upon P's death.

f. Early retirement subsidy and COLA adjustments

Is AP entitled to adjustments?

Early retirement subsidy: payment of full, or slightly reduced, pension commencing before P's normal retirement age. It is equal to the value of the early retirement pension actually received by P less the value of the of the pension P would have received with a full, actuarial reduction imposed.

The company "kicks in" an extra amount

g. CASH BALANCE PLANS

A Cash Balance Plan (also referred to as a hybrid plan) is a unique type of IRS-qualified retirement plan that has many of the characteristics typically found in a defined contribution plan (such as a 401(k) profit sharing plan), while providing the higher contribution and benefit limitations of a defined benefit plan. In a Cash Balance Plan, the amount of benefit each participating employee receives is stated as an account balance that can be converted to an annuity or lump sum at retirement.

h. CASH BALANCE PLANS – HOW DO THEY WORK?

In a Cash Balance Plan, each participant has a hypothetical account that grows annually in two ways:

1) *Employer contribution (pay credit)*. The pay credit is a percentage of pay or flat dollar amount that is specified in the plan document.

2) *Interest credit*. The interest credit is a guaranteed rate of return specified in the plan document, and typically tied to federal long-term rates or set at a fixed percentage, i.e. 5%.

When participants terminate employment, they are eligible to receive the vested portion of their hypothetical account balance.

i. CASH BALANCE PLANS - QDROs

Many plans require that the QDRO have the amount of assignment as follows.

*The Alternate Payee is awarded a lump sum amount equal to ($____ or **____%** of the Participant's vested accrued cash balance benefit balance under the Plan as of _____ ("Designated Benefit"), based on month end valuation. Such amount shall be transferred into a separate account for the benefit of the Alternate Payee. The Alternate Payee will also be entitled to any interest credits that are attributable thereon from the date specified above to the date of distribution.*

Looks like language found in a DC QDRO

Obtain information and documentation in discovery

Summary Plan Description/QDRO Procedures/When AP may commence

j. Regardless of DB or DC plan, include the following:

Continued jurisdiction

Repayment language if inadvertent payment

Who is going to prepare/initiate preparation? Who is going to pay?

Language regarding Participant's death prior to QDRO approval – Separation Agreement shall be deemed a QDRO

Addressing the proper plan name

k. Other important QDRO-related issues

Pre-approval

Following up with Plan administrator (checklist)

VI. Government Plans – Federal Employee Retirement Systems (FERS)

Divided by way of a Court Order Acceptable for Processing (COAP)

Shared Payment Approach (if, as, and when)

COAPS may provide the following:

Employee Annuity division;

Refund of Employee Contributions division; and

Former Spouse Survivor Annuity coverage.

Remarriage before Age 55 by former spouse terminate FSSA

COLAs: If annuity is awarded on percentage or formula, and otherwise silent on COLA, it will be automatically incorporated. If

award is a specific dollar amount, COLA is prevented *unless the court order expressly requires their inclusion*.

If Former Spouse predeceases Employee, benefits may go to FS's estate or revert to Employee.

VII. **State Plans** – e.g. Public Employees Retirement System, State Teachers Retirement System

In Ohio as many other states, a statutory form is necessary (i.e., Division of Property Order ("DOPO"))

Shared Payment approach (if, as, and when)

Decree should require participant to elect former spouse as beneficiary under a joint and survivor annuity option at retirement (post-retirement survivorship)

Must be stated as a whole percentage (e.g., __% of Participant's benefit under the joint survivor annuity plan of payment)

Copy of Decree sent to pension fund to ensure compliance.

Term life insurance to secure pre-retirement death of Participant.

Assignment of Benefits: Typical coverture fraction.

In a DOPO, when no boxes for "Method of Payment" are checked, former spouse will receive marital share of the first benefit received by Participant (age/service benefit, refund of employee contributions).

DROP: Deferred Retirement Option Plans. Allows participant to retire and begin receiving pension in tax-deferred account and accumulates interest. Coverture fails because Employee continues to contribute to DROP post divorce.

VIII. Military Retired Pay

<u>10/10 Rule</u>: Parties must be married for at least 10 years during which the member performed at least 10 years of service.

Generally eligible after 20 years of service

Shared Payment approach. Coverture fraction accepted.

When member is ACTIVE, must include actual number of months of creditable service earned during the marriage (DFAS will not calculate numerator). Reserves uses a "points" system.

NEW LAW REQUIRES FROZEN ASSIGNMENT, negatively impacting former spouse. If you represent former spouse, use caution. See handout.

Survivor Benefit Plan coverage. Ensure that decree includes this post-retirement survivorship protection; otherwise the Military Qualifying Court

Order may not be sufficient. Election (application) must be within one year after divorce.

Remarriage before Age 55 by former spouse terminate

What to submit: (1) Application of Former Spouse (Form 2293): (2) SBP Election Statement (Form 2656-1); and (3) certified Decree

Common QDRO Mistakes and Measures to Avoid Them

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Qualified Domestic Relations Orders, Division of Property Orders, and other orders that divide retirement benefits (collectively "QDROs") are frequently not given the attention and consideration necessary at the conclusion – and during the pendency – of a divorce proceeding. All too frequently, attorneys are quick to finalize a divorce case and either (1) hurriedly execute a QDRO without fully comprehending its terms, or (2) fail to timely prepare and process the QDRO per the terms of the decree of divorce. In order not to fall into such traps, these and other common QDRO mistakes are detailed below.

Failing to discover all employee benefit plans

Determining all employee benefit plans in which the other party may be participating is necessary and should be a fundamental component of discovery in every case, big or small. No matter how you identify the plan information – be it through an affidavit, discovery requests, subpoenas, depositions, or other mechanism – it is then important to obtain the key documentation necessary in order to determine what benefits are available from each plan, how the benefit may be paid, and all options concerning the form and timing of payments. Each ERISA-governed plan maintains three key documents, which details this information: The Summary Plan Description; The Annual Benefits Statement; and The Plan's Written QDRO Procedures.

Undertaking discovery and a review of the plan's documents may uncover more than one plan that the employer sponsors; oftentimes, the employee will participate in more than one plan, which may even be a surprise to the employee. Furthermore, having these important documents accessible early in the case will expedite the QDRO-drafting process as the attorney or the expert that is hired to prepare the QDRO will have the requisite information needed to draft the order.

Failure to prepare the QDRO by the time of final hearing

Understandably, the last thing an attorney may be thinking about when a trial is fast approaching is preparing a QDRO, especially when the chance of settlement appears slim. However, in a dissolution, uncontested divorce, or in a case where it is obvious that a division of a retirement asset is going to be necessary, there is no reason that the QDRO should not be prepared in advance and ready for signatures on the day of the final hearing.

Taking it a step further, having the QDRO prepared simultaneous to the drafting of the settlement agreement and incorporating it by reference into your divorce decree will prevent discrepancies, conflicting positions, and the eventual delay of having the QDRO ultimately approved. By incorporating the QDRO by reference, two important matters are accomplished: (1) the requisite language will be integrated into the settlement agreement, which will address frequently overlooked critical issues (see more on this in the following section); and (2) because the QDRO will be executed at the final hearing, a certified copy can be sent immediately to the plan administrator for review, eliminating several post-decree steps.

Not addressing QDRO-related issues in the decree of divorce

If the decree of divorce does not incorporate the QDRO by reference, several considerations must be addressed in the decree so that issues do not later arise. For starters, it is important to determine the type of plan.

Defined benefit plans require essential features that must be addressed in your settlement agreement, some of which will depend on whether the participant is in pay status. Some of these features include detailing :(1) when the alternate payee may commence his/her benefits (shared payment versus separate interest approach); (2) the proper calculation method, such as the coverture" method; (3) pre- and post-retirement survivorship (Qualified Preretirement Survivor Annuity and Qualified Joint and Survivor Annuity, the latter of which is unnecessary in a separate interest QDRO); (4) cost-of-living adjustments, and to what extent; and (5) the early retirement subsidy.

Defined contribution plans also necessitate careful consideration. Failing to address interest, dividends, gains, and losses could cause litigation down the road if the balance fluctuated greatly from the date of assignment. Also important is determining whether the participant has a loan balance and if that loan balance will be included or excluded from the assigned percentage.

Finally, regarding Ohio public pension funds, it's important to address pre-retirement protection for the former spouse in the form of a term life insurance policy. Also, if it is the parties' intent to have the member cover the former spouse under a joint and survivor annuity, the decree of divorce must specify the same and the amount of the annuity must be indicated as a whole percentage only; otherwise the pension fund will instruct the parties to obtain a new court order.

Failing to follow through

Malpractice arises when counsel for the alternate payee neglects to ensure that the plan administrator has actually approved the QDRO and deemed it qualified. Sometimes this problem arises because the QDRO is an afterthought after a long, contentious case; other times, it occurs when the QDRO is first rejected by the plan administrator – as is common – and counsel does not remit a

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corrected QDRO.

Sometimes this problem arises because the QDRO is an afterthought after a long, contentious case; other times, it occurs when the QDRO is first rejected by the plan administrator – as is common – and counsel does not remit a corrected QDRO.

The best way to ensure the task completed is to have standard office procedures and checklists in place. For instance, one measure is to designate a shelf or area in the office to cases with pending QDRO issues. Each case file on this shelf would have a one-page checklist indicating that status of the QDRO, such as the date when

the QDRO was filed, the date sent to plan administrator, the date qualified by plan administrator, and the date the qualification letter (and the termination letter) was sent to the client. Once the plan administrator has deemed the QDRO qualified and they have interpreted the order per the intent of the parties, the file may officially be removed from the shelf.

Conclusion

The issues raised above only scratch the surface on the issues and complexities surrounding QDROs. This article is intended to encourage attorneys to uncover all necessary information about the participant's plans and begin to address all facets of division at the outset.

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- Complaints of headaches or dizziness
- Vision changes
- Sensitivity to light or sound
- Balance issues- including stumbling or tripping
- Speech and Language difficulties
- Communication difficulties- including repetitive, slurred, too fast or too slow speech
- Attention deficits
- Fatigue and Tiredness
- Increased impulsiveness
- Irritability- wide emotional swings
- Low frustration threshold
- Temper outbursts and changes in mood
- Learning and memory problems- sometimes only short-term, and sometimes just the ability to learn new information
- Inflexibility
- Lack of initiative
- Disassociation between thought and action- such as between what is safe and what is dangerous
- Socially inappropriate behaviors
- Self-centeredness and lack of insight
- Poor self-awareness
- Personality changes
- Delayed reaction times
- Difficulty sleeping, hyperactivity
- Excessive daytime drowsiness

Although some of these lines of inquiry may seem repetitive, it is surprising how different questions and discussions may cause a particular witness to recall a specific incident.

In addition to the obvious issue which is our duty to fully represent out clients' injuries and to work to obtain fair compensation for those injuries, the importance of asking these questions from the outset of all of any and all individuals with whom your client interacts is that the greatest chance of recovery occurs based upon the amount of therapy received in the first 5 months post-injury. Furthermore, the sooner the therapy begins, the reduced likelihood that the brain injured clients will develop the complications that are clinically known to result. As has been shown in statistically significant results, TBI begins a chronic disease process that affects the person's morbidity and can result in the risk of epilepsy, sleep disorders, including sleep apnea, Alzheimer's disease, chronic traumatic encephalopathy (CTE), Parkinson' disease, neuroendocrine disorders and psychiatric disease.

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Advanced Issues in Spousal Support

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SPECIFIC ISSUES INVOLVING SPOUSAL SUPPORT

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General Information

These materials are being offered to help highlight some of the more practical issues involving spousal support. Rather than offer a general outline of the basic spousal support considerations, these materials will cover specific topics and considerations for the domestic relations practitioner when dealing with complex divorce cases involving considerations of spousal support.

The Basics

Spousal Support is controlled and defined by a myriad of statutes. The starting point for any spousal support consideration is Ohio Revised Code §3105.18. I am not including the entire statute; however, the statute generally provides:

> In divorce and legal separation proceedings, upon the request of either party and after the court determines the division or disbursement of property under section 3105.171 of the Revised Code, the court of common pleas may award reasonable spousal support to either party. During the pendency of any divorce, or legal separation proceeding, the court may award reasonable temporary spousal support to either party.
>
> An award of spousal support may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, from future income or otherwise, as the court considers equitable.
>
> Any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise.
>
> R.C. §31056.18(B)

Three main components in the first part of the statute are: (1) support must be requested so always plead it in your Complaint/Counterclaim; (2) support may be awarded as property, in installments, from future income of the parties, in the form of attorney fees, or by way of lump sums of money; and (3) there are statutory reasons for support to terminate. The statute does not preclude the inclusion of other reasons for termination which will be discussed later.

When fashioning spousal support, the Court is guided by the factors contained within section (C) of the statute which sets forth that the Court can consider any factor it deems relevant but must consider what would be reasonable and appropriate considering:

(a) the income of the parties

(b) their earning potential;

(c) the ages and the physical, mental, and emotional conditions of the parties;

(d) the retirement benefits of the parties;

(e) the duration of the marriage;

(f) the extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

(g) the standard of living of the parties established during the marriage;

(h) the relative extent of education of the parties;

(i) the relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

(l) The tax consequences, for each party, of an award of spousal support;

(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

It is important to remember the statute provides a presumption that each spouse contributed equally to the parties' total incomes during the marriage. §3105.18(C)(2). If you represent the obligor in a case, it is important to impress on him or her, if requested, the lower earning spouse will be entitled to a reasonable and appropriate share of the total after tax, net income of the parties. There are hundreds of cases that cover the statutory factors and each case should be decided on a factual investigation & case-by-case examination.

R.C. §3105.18 also provides statutory requirements that must be met in order for the Court to modify a pre-existing spousal support obligation. The parties (or court) must have retained jurisdiction to modify the order, there must have a substantial change in the parties' circumstances warranting a modification, and the change of circumstances

must not have been foreseen at the time of the original order. The main idea here is that the order, in light of the facts that exist at the time of the requested modification, make the previous order unreasonable or inappropriate. Assuming these requirement can be met, a court may consider "any purpose expressed in the initial order or award and enforce any voluntary agreement of the parties." The spousal support statute current in effect was amended and became effective in March, 2013.

I. FORESEEABILITY AND DRAFTING ISSUES

One issue that has been in constant flux in Ohio is the issue surrounding foreseeability. Specifically, what practitioners can/should and cannot/should not put into separation agreements regarding the termination of spousal support.

The traditional approach to building in spousal support termination language (otherwise known as setting a "triggering event" for a termination or modification of support) would be to simply state that spousal support would terminate upon the expiration of a certain duration (i.e., expiration of 72 months), remarriage, death of either party, or cohabitation with an unrelated adult of the opposite sex. Parties, however, have become more sophisticated and are attempting to use more complex language or "triggering events" that set forth specific events in the future in an effort to meet jurisdictional requirements. The problem is that if parties' include too specific of language regarding potential future events, Courts may find that the specific events set forth in an agreement were "contemplated" and therefore, foreseeable, barring the Court from having the jurisdiction to modify or terminate support.

This has created a new problem for courts to decide what is and what is not "foreseeable" with the common law test of foreseeability and termination of spousal support. Stated another way, prior to statutory amendments, courts routinely found that in order for a spousal support order to be terminated there must have been an unforeseen substantial change in the circumstances of the parties in order for the court to have jurisdiction to determine what is and is not a reasonable amount of spousal support.

In 1991 the Ohio legislature amended R.C. §3105.18 but still did not include a statutory requirement that there be a substantial and unforeseen change the parties circumstances that occurred since the last order. As a result, the courts were still faced with the common law precedent of foreseeability and substantial changes in circumstances. This common law requirement is highlighted by an infamous case called *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, 95 N.E.2d 172 (2009). While the *Mandelbaum* case dealt primarily with the issue of whether or not the changes in circumstances that had occurred in the case were "substantial", the court also recognized there was a common law requirement of foreseeability. *Supra*, at ¶32.

A. *Burkhart v. Burkhart*, 191 Ohio App.3d 169, 2010-Ohio-5363.

Shortly after the Ohio Supreme Court dealt with the issue in *Mandelbaum*, the court re-visited the issue more in-depth in a case called *Burkhart v. Burkhart*, 191 Ohio App.3d 169, 2010-Ohio-5363. In that case, the Tenth District Court of Appeals expressly

recognized that the movant of a motion for modification of spousal support must show not only that there was a change in circumstances, however, that the change must be "substantial" and must not have been foreseen at the time of the original order. In *Burkhart*, the movant, Mr. James Burkhart, filed a motion to modify spousal support approximately 10 months after the original order was entered arguing that his business had declined as a result of the reduction in the overall economy, and, as a result, his spousal support obligation should be modified.

The Trial Court and ultimately the Tenth District Court of Appeals found the Trial Court ***did not*** have jurisdiction to modify the previous spousal support award as Mr. Burkhhart failed to demonstrate that decline in his business was unforeseen at the time of trial. The court specifically noted in its decision that the record failed to establish that Mr. Burkhart was "unaware" his income would decrease and, to the contrary, Mr. Burkhart testified that he had believed there was going to be a downturn in the landscape architectural industry. As a result, the court specifically found that Mr. Burkhart foresaw a downturn in the economy which would lead to a decline in his own business and that he had raised that issue before a decree of divorce was finalized with the court. *Burkhart*, ¶20.

B. *Piliero v. Piliero*, 10th Dist. No. 1142, 2011 Ohio 4364.

In a highly-criticized decision, the 10th District Court of Appeals readdressed the issue of foreseeability and jurisdiction in *Piliero v. Piliero*, 10th Dist. No. 1142, 2011 Ohio 4364. In this case, the parties, through counsel, had included specific triggering language in the Decree as part of the spousal support award in an attempt to limit the court's jurisdiction as to the modifiability of spousal support. The specific language the parties included in the decree of divorce ultimately resulted in acting as a roadblock preventing the Husband's ability to modify the court's agreed-upon spousal support award.

Specifically, the parties included the following language in the divorce decree:

> The parties expressly provide that spousal support is MODIFIABLE as to amount only as set forth herein, and as to duration only as set forth above, and the Court shall retain jurisdiction for such purposes only.
>
> "* * * *The parties agree that the amount of spousal support shall be MODIFIED, from time to time, so that the parties have equal after-tax annual income from earnings* (earned income, passive income, imputed income, and retirement income) and from child support, but specifically excluding all income from capital gains, lottery winnings, gifts and the like.
>
> 1. Defendant has a reduction or cancellation of her retirement benefits from UAL, Inc[.]; *child support payments made by plaintiff to defendant are terminated.* In those events,

> spousal support shall increase by that sum which equalizes after tax income between plaintiff and defendant.
>
> 2. Upon the commencement by defendant of her social security benefits; upon the commencement by defendant of her retirement benefits from plaintiff's Federal Civil Service Retirement Plan ("CSRS"). In those events, spousal support shall decrease by that sum which equalizes after tax income between plaintiff and defendant."
>
> *Piliero*, ¶2.

The Tenth District began its analysis recognizing, "First, pursuant to *Mandelbaum*, we must determine whether the parties' decree expressly reserved jurisdiction for the trial court to modify spousal support. Here, the decree states, in relevant part, that "[t]he parties *expressly provide that spousal support is MODIFIABLE* as to amount only as set forth herein, and as to duration only asset forth above, and the Court shall retain jurisdiction for such purposes only." *Piliero*, ¶14.

The court specifically found that there had been changes in circumstances, however, found that the trial court did not have jurisdiction to modify spousal support based upon the foreseeability requirements of the *Mandelbaum* case. Specifically, the 10th District Court of Appeals acknowledged the parties had to have recognized that the child would be emancipated at some point in time and, in addition, knew that the retirement benefits the defendant was receiving would be affected by cost-of-living adjustments and other factors. Therefore, these were factors the parties must have "contemplated" at the time of their agreement.

Specifically, the Tenth District found the foreseeability requirement was not met as the circumstances in which the parties built into their agreement demonstrated, in fact, the parties HAD contemplated the occurrence of the very events they wanted to use as triggering events for being able to modify the spousal support obligation:

> Finally, pursuant to *Mandelbaum*, we must determine whether the parties contemplated the change in circumstances at the time of the original decree. First, in addressing whether the parties contemplated the annual cost-of-living increases at the time of the original decree, appellant testified as follows:
>
> Q: Prior to your divorce, you were employed in the same position that you are now?
> A: Yes.
> Q: Did you receive cost-of-living increases during the time that you were employed during your marriage?
> A: Yes.
> Q: And those continued after your marriage?

A: Yes.
(Tr. 112.).

Further, the parties' decree states, in relevant part, that, "[t]he parties agree that the amount of spousal support shall be MODIFIED, *from time to time*, so that the parties have *equal after-tax annual income from earnings* (earned income, passive income, imputed income, and retirement income) *and from child support*, but specifically excluding all income from capital gains, lottery winnings, gifts and the like." (Emphasis added.) (See Agreed Judgment Entry and Decree of Divorce at 4.).

The plain language of the decree suggests that the parties contemplated, at the time of the divorce, that, "from time to time," there would be a need to modify spousal support in order to equalize their after-tax annual incomes, which could reasonably include cost-of-living increases that appellant was receiving both during the marriage and at the time of the parties' divorce. In addition, the record indicates that appellee failed to present any evidence that the parties did *not* contemplate the annual cost-of-living increases at the time of the divorce.

Second, in addressing whether the parties contemplated the termination of child support at the time of the original decree, appellant testified as follows:

Q: [Appellant], when you got divorced, you knew, did you not, that eventually child support for [youngest daughter] was going to stop?
A: Yes.
(Tr. 112.)

Further, the decree clearly states that the termination of child-support payments, made by appellant to appellee, is one of the triggering events for a modification of spousal support. In addition, the record indicates that appellee failed to present any evidence that the parties did not contemplate the termination of child support at the time of the divorce. Therefore, appellee did not satisfy the third jurisdictional prerequisite.

Piliero, ¶16-18

Ultimately, the 10th District Court of Appeals reversed its own decision upon a motion for reconsideration and supporting arguments made by the American Academy of Matrimonial Lawyers. In its brief written by Attorney Gary J. Gottfried, the AAML argued that the Tenth District's decision "stand[s] for the proposition that circumstances agreed to by the parties in final orders as 'trigger' events calling for the modification of spousal support are self-defeating and precluded under a strict interpretation of *Mandelbaum v. Mandelbaum*." The AAML argues that such a literal application of *Mandelbaum* is not supported by Ohio Law or public policy." *Piliero* II, 2012-Ohio-1153, ¶8.

The 10th district relied on cases from other districts including the Seventh, Eighth, and Second District and decided:

> We believe "contemplated" means more than just "thought of" or "discussed." In our view, "contemplated" means, in part, that the parties or court already took some fact or circumstances into account in resolving an issue.
>
> For example, if a wife agrees to accept less in spousal support because the husband's financial situation is deteriorating, the husband cannot subsequently seek a downward modification of his support obligation based upon that same consideration because the parties already "contemplated," or took into account, this circumstance in arriving at their agreement. The parties' mere discussion of the husband's deteriorating financial situation without taking it into account in some respect would not be a bar to later modification. To be sure, if the husband's financial situation deteriorated more than what the parties had "contemplated," or took into account, a motion for modification may be in order, but mere discussion is not sufficient to constitute "contemplation."
>
> *Piliero v. Piliero*, 10Th Dist. No. 1142, 2012-Ohio-1153, at ¶14.

After this decision was rendered, the Ohio legislature again amended the Ohio spousal support statute, however, did not (once again) codify the foreseeability issue in the sense that the statue still fails to fully define "contemplated" for the purposes of foreseeability. As a result, there is still no absolute clear answer to the question what a messed relations practitioner should or should not put in a separation agreement, divorce decree or into evidence at the time a trial as it relates to preserving a party's ability to modify spousal support award into the future

This author argues the most effective way to preserve your client's ability to modify a spousal support order in the future is to avoid specifying what it is the parties are basing their award of spousal support on, exactly. Setting forth the parties incomes and other facts would be permissible, however, setting forth specific potential future events may still lead to a problem in that the opposing party will argue those events, because listed as

potential future events, were contemplated at the time of the parties' agreement. An example of some language practitioners are currently using would be:

> The parties are agreeing for the payment of spousal support from spouse 1 to spouse 2 in the amount of $X dollars for a period not to exceed 72 months. The parties further agree that spouse 1's spousal support obligation shall terminate upon the death of either party, spouse 2's remarriage, or spouse 2's cohabitation with an unrelated adult of the opposite sex. The parties agree the court shall retain jurisdiction to modify the current spousal support award as to both amount and duration upon the occurrence of an unforeseen substantial change in either party's circumstances. The parties reached this agreement without making any contemplations regarding any specific future changes in the parties' circumstances as the parties agree it is impossible for them or the trial court to appropriately or specifically predict the timing or nature of any potential future occurrence.

While this language does not specify any potential future occurrences therefore limiting a court's ability to reject a request for modification on jurisdictional requirements, it does not assist a practitioner while in the midst of a trial as to what evidence to put forth regarding potential future decreases in income.

Specifically, this does not help a practitioner determine whether or not to have a potential obligor testify as to what he or she believes to be a reasonable and appropriate amount of spousal support would be due to a potential future event such as a downturn in the obligor's specific industry or the economy in general. The only guidance practitioners currently have regarding whether or not something was contemplated at the time a trial or at the time an agreement of spousal support was reached is still basically the definition contained in the *Piliero* II decision.

I suggest that the correct interpretation of "contemplated" was demonstrated by the 2nd District in *Taylor v. Taylor*, 2015-Ohio-2481 and the 11th District in *Patti v. Patti*, 2014-Ohio-1156. See also, *Dean v. Dean*, 8th Dist. No. 95615, 2011-Ohio-2401, and *Ballas v. Ballas*, 7th Dist. No. 08 MA 166, 2009-Ohio-4965

II. WHAT IS INCOME FOR SPOUSAL SUPPORT PURPOSES?

Many practitioners fail to realize that, unlike child support, spousal support technically does not have a statutory definition of "income." Specifically, nowhere in R.C. §3105.18 is income defined by the statute. Courts typically will look to the definition of income contained within R.C. §3119.01 (i.e., the child support statute) when attempting to ascertain the gross income of the parties in order to fashion spousal support award.

The basic definition of income for child support purposes is defined in R.C. §3119.01(c)(5) and (7). Essentially, for child support purposes, gross income is defined to

include income "from all sources whether earned or unearned during a calendar year irrespective of whether or not that income is taxable." The child support statute goes further and also defines what "gross income" *does not* include. For instance, the statute expressly excludes income from means-tested government administrative programs, veteran's benefits, supplemental security income, and the like.

Interestingly, Ohio courts have made a specific distinction between what is to be considered income for child support purposes versus what would be income for spousal support purposes. It is important for the practitioner to understand that while courts use the definition of child support contained within the child support statute as a guide in order to determine a party's income for spousal support purposes, that definition is not the final authority on the issue. Stated another way, essentially, the definition of income for spousal support purposes is broader than the definition of income for child support purposes.

Specifically, the definition of income for child support purposes expressly excludes non-reoccurring income such as gifts from friends or family, one time bonuses, unsustainable income or cash flow, and ordinary and necessary business expenses in generating gross receipts.

For the purposes of spousal support, however, there is no rule forbidding a trial court from looking to income from any and all sources including non-reoccurring income, property previously divided as part of a court's property division unsustainable income or cash flows and income from any other source. The 12th District Court of Appeals has expressly found

> We agree with the reasoning of other Ohio courts cited previously that have found that income for child support and spousal support differ as reflected in the respective statutes. The legislature chose to address income differently for the spousal and child support obligations and we are obliged to follow that mandate.
>
> *Brandner v. Brandner*, 12th Dist. No. CA2011-07-136, 2012-Ohio-3043

Citing to a Summit County Case, the 8th District stated it this way:

> R.C. 3105.18(C) does not limit the sources from which income may be derived or the characteristics of income that may be considered for purposes of determining an appropriate award of spousal support. In contrast, R.C. 3119.01(C)(7)(e) specifically excludes '[n]onrecurring or unsustainable income or cash flow' from gross income for purposes of child support. 'A nonrecurring or unsustainable income or cash flow item is, an income or cash flow item the parent receives in any year or for any number of years not to

> exceed three years that the parent does not expect to continue to receive on a regular basis.' This exclusion is not found in R.C. 3105.18, nor does R.C. 3105.18 incorporate this limitation by reference.
>
> *Feldman v. Feldman*, 8th Dist. No. 92015, 2009-Ohio-4202, ¶41

This may not seem like a complicated issue or "advanced" issue for spousal support, however, it is extremely important when advising a client as to that client's vulnerability or exposure at trial depending on their investments, their income (passive or active, realized or unrealized), their status of employment, and numerous other factors. If it was a modification of child support the definition of income would be more limited, however, a client's exposure dramatically increases when faced with trying to negotiate a spousal support obligation or preparing for and presenting evidence at trial on the issue of spousal support.

III. SELF-EMPLOYMENT AND SPOUSAL SUPPORT

The definition of income issue could be no more prevalent than in the area of dealing with self-employed litigants. As you probably are already aware, whenever dealing with spousal support when you have a self-employed party on either side, the issue of the definition of income becomes extremely important.

A. Business Expenses

The first obvious aspect of dealing with spousal support and self-employed litigants is the issue of business expenses. As many already know, closely held, small corporations can potentially manipulate their company's balance sheet and other financial documents. As a result, it is absolutely necessary to obtain all of the appropriate discovery relative to a litigant's business expenses and other financial documents in order to make a determination as to whether or not a company's business expenses and other deductions are "ordinarily reasonable and necessary." This would, essentially, require a litigant to retain the services of a forensic accountant and/or business valuation specialist to offer an expert opinion as to whether the expenses being claimed by a litigant are reasonable and appropriate under normal accounting procedure and practice. It would be difficult (if not impossible) for any practitioner to advise an obligee as to the reasonableness of a spousal support proposal without an opinion from an expert as to whether or not the obligor's claimed business expenses were necessary and reasonable.

It should also be noted that a litigant should review a period of at least five years' worth of business expenses, tax returns, deduction schedules, and other self-employment records in order to identify any trends in increases of expenses or decreases of net income for the purposes of determining income for spousal support. The point being, if a self-employed obligor starts to believe his or her marriage is failing, they may began driving up expenses resulting in a reduction in net income over a period of years to make a reduction of net income less obvious. A review of too few years of documents would make it difficult to identify a trend of reduction of net income.

B. "Phantom Income"

Courts have also recognized the theory of "phantom income" when determining a party's income. The 9th District Court of Appeals was faced with a rather difficult decision dealing with manipulation of income and "phantom income" in *Freeman v. Freeman*, 9th Dist. No. 07CA0036, 2007-Ohio-6400.

In this case, the court was examining income for the purposes of child support, however, it is a good example of when a court will consider "phantom income" and "paper losses" as part of a party's gross income for support purposes. Specifically, in that case, the trial court found that the husband's minimum income was $94,417 per year as per the husband's tax return. The court, however, added back in $78,592 which was a carryover loss on the husband's tax return. The logic was that this was a loss on "paper only" and the husband did not actually lose that cash. The 9th District recognized,

> The magistrate feels that figure should be added back to arrive at his income for purposes of child support calculation. Because both parties are able to make adjustments on their incomes in the way of write offs in setoffs, the magistrate feels that no one would be able to pinpoint what the parties' incomes truly are the court must give great weight to the tax returns." Id. at ¶7.

Adding these figures together, the magistrate determined the husband's income to be $173,000.

The 9th District also affirmed the trial court's calculation of the wife's income noting that the wife also had the ability to manipulate her income for tax reporting and, as a result, added back in trust fund income she actually received but which was not taxable for the purposes of her individual tax return. Id. at ¶12.

Even though the case was ultimately reversed on other grounds, the 9th District specifically stated, "Based on the foregoing and our review of the record, it is clear that the Magistrate considered the sources from which Wife receives income as well as any income deferrals. Husband has not persuaded this Court that the trial court abused its discretion in determining Wife's gross income for child support purposes to be $500,000.00." Id. at ¶16.

The 12th District Court of Appeals also dealt with a similar issue in *Marron v. Marron*, 12th Dist. No. CA2-13-11-109 and CA2013-11-113, 2014-Ohio-2121. In that case, the 12th District Court of Appeals recognized that self-generated income includes gross receipts received by a party from a closely held corporation less necessary expenses in the incurring of the gross receipts. Id. at ¶12. The 12th district also recognize that Ohio appellate courts have included retained K-1 earnings in the calculation of a spouse's income for spousal and child support purposes. Id.

Parties have argued that retained earnings on a schedule K-1 should be considered "phantom income" and excluded from gross income because the party reporting the retained earnings or "phantom income" on their tax return does not actually receive the income itself. The 9th District Court of Appeals rejected this argument stating that, "claims such as appellants require courts to make sure that the support obligor is not merely attempting to manipulate his income and wrongfully shelter a portion of it from his support obligations. See, *Poitinger v. Poitinger*, 9th Dist. No. 22240, 2005-Ohio-2680. The 12th district went further and explained that "courts must carefully examine corporate expenses and deductions as related to possible personal income when a corporate proprietorship is involved in a support case. *Marron*, supra, at ¶14, citing. Hayman v. Hayman, 12th Dist. No. CA2001-10-250, 2003-Ohio-76.

The point of these cases is clear, trial courts have wide discretion in in determining the parties' incomes without regard to whether or not that income is actually listed on a party's tax return. That is why it is essential to perform the correct type and amount of discovery to truly determine what income is available to each party.

Generally speaking, most domestic relations practitioners would consider certain deductions and/or expenses to be "ad backs" to a party's income when dealing with closely held corporations. I cannot over emphasize the necessity of reviewing all circumstances and appropriate financial documents when dealing with a self-employed party to determine whether or not that person has taken deductions or concealed other line item values from the corporate filings and personal tax returns for the purposes of shielding income for spousal support. Of course, it depends on the amount of income of each case and whether or not the specific facts of the case warrant the spending of legal fees on expert witnesses.

For an interesting look at the unique issue regarding actual income being listed as a business expense, See *Southers v. Southers*, 10Th Dist. No. 113, 2011-Ohio-6233.

C. Book of Business & Generation of Income

A recent issue that has now started to plague courts in Ohio involves the issue of "books of business" and property distributions coupled with spousal support awards. There is currently a case pending in the 10th District Court of Appeals *Dodge v. Dodge*, 10th Dist. No. 16AP166. In this case, the husband is a financial broker for Merrill Lynch and, over a period, built up a relationship with various clients from which he generates income managing their investments.

The wife argued in that case that the book of business or "client relationships" should be treated as an asset for the purposes of the court's property distribution and spousal support award. Conversely, the husband argued that he was a W-2 employee, was subject to a restrictive covenant in his employment, and had no legal right to take those clients with him if he chose to leave Merrill Lynch, and, as a result, those client relationships should not be considered property subject to division under the property division statute nor considered for spousal support purposes.

This issue is still pending before the 10th District Court of Appeals and the parties are waiting a decision. Interestingly, the Franklin County Court of Common Pleas, Domestic Relations Division, dealt with a similar issue in a wholly different case and determined that, under similar circumstances, the "book of business" did constitute a marital asset subject to division and subject to consideration when fashioning spousal support award. It should be noted, however, in that case the parties did not dispute such a finding.

The 8tjh District Court of Appeals addressed this issue in *Wojanowski v. Wojanowski*, 8th Dist. No. 99751, 2014-Ohio-697. The Court found that the Husband's Merriyl Lynch client relationships were a "book of business" that could be valued for purposes of future spousal support.

> Here, the "asset" in the form of the "book of business" was undisputedly amassed during the course of the parties' long marriage. The trial court considered it as marital property and divided the marital portion of any future income Husband may receive based on the "book of business" he developed during the marriage. As such, we do not find an abuse of discretion.
>
> Wojanowski v. Wojanowski, 2014-Ohio-697, ¶ 39 (8th Dist. Cuyahoga)

In Dodge, supra, the Husband argued that *Wojanowski* was distinguishable because In *Wojanowski*, the Husband was close to retirement, was elgible for a "client transition program" (Which Dodge was not), and, the asset was clearly marital whereas Dodge's clients were amassed prior to the marriage. Of course, even assuming the clients were pre-marital, if found to be an actual income generating asset, the Court could look to it for the purposes of income.

IV EFFECTS & CONSIDERATIONS WITH DOUBLE DIPPING.

A. Introduction and Background

Double dipping has become increasingly prevalent in domestic relations law since the Tenth District's opinion in *Heller v. Heller*, 10th Dist. No. 07AP-871, 2008-Ohio-3296. The issue of double dipping is not unique to Ohio and is currently being reviewed by courts throughout the United States. Double dipping is commonly defined as:

> "Double Dipping" is the concept that the same income stream associated with one party is being counted twice. Usually, the first time as part of a property distribution and the second as income for the purposes of fashioning a spousal support award.

Another Definition:

> "The theory is that when a business is valued using a capitalization of earnings approach, it is double dipping to both distribute the business and then base spousal support on the income the business produces."
>
> Morgan, "Double Dipping": A good Theory Gone Bad, 25 J. Am. Acad. Matrim. Law 133, 142 (2012).

The issue of double dipping occurs when the Court uses the cash flow to value a business (or other asset), divides that asset after the value has been determined, and then bases its spousal support award on the very same cash flow used to determine the value of the business (or other asset) in the first place. The most common example of double dipping occurs when a party's pension is divided and then the income stream received by an obligor is again used as income for spousal support. This is not the only example. As stated above, it also occurs in the division of business interests.

In *Heller*, the Husband was a minority shareholder in a closely held corporation. The Court awarded ½ of the value of the Husband's interest in the business to the Wife and then awarded her an additional 20% of any future earnings that were distributed to Husband above his normalized salary.

The Husband appealed arguing the Trial Court distributed those earnings twice, once because those future earnings were used to determine the overall value of Husband's interest in the business (with ½ of that value being awarded to the wife as part of the property distribution) and then used again as income for spousal support.

The Tenth District agreed this was an "impermissible" double dip and reversed the Trial Court because it had "dipped from the same well twice."

Many were critical of the Tenth District's decision for one obvious reason, i.e., R.C. §3109.18 which reads:

> A Court may consider the income of the parties, from all sources, including, but not limited to, <u>income derived from property divided</u>, disbursed, or distributed under section 3105.171 of the Revised Code;
>
> R.C. 3105(C)(1)(a.)

The Trial Court did what many believed the Trial Court <u>was required to do</u>, i.e., determined the business interest/property was marital, assigned it a value, and then divided that value. Once divided, the Trial Court was then required to look to the divided property (business interest) for the purposes of determining whether spousal support was appropriate and, if so, what amount would be reasonable.

The Husband did not agree as the future profits of the business were used to value the property while the Wife agreed because the spousal support statute allows a double dip. The Tenth District had never squarely addressed this issue before the *Heller* decision.

B. Pre-*Heller* v. *Heller*

There is an entire line of "pension" cases that go against what many believe is the spirit of the *Heller* decision. Most DR practitioners are familiar with these cases and they are relatively easy to understand:

> Husband and Wife get divorced, Husband has a pension, Husband's pension gets valued and divided. Upon entering retirement and pay-out status, the Husband starts drawing on his pension and files for a modification of his spousal support.
>
> Husband argues, "She got half of my pension, why should she get more in the form of spousal support payments?"
>
> The answer: R.C. §3109.18 says so.
>
> *Guidubaldi v. Guidubaldi*, 11th Dist. No. 96P-0022 (1997); *Lawrence v. Lawrence* (2001), 144 Ohio App.3d 454.

Stated another way, when the husband (or wife as the case may be) enters retirement, the asset (i.e., the pension) that was distributed as part of the property division becomes an "income stream" that §3109.18 allows to be used as a basis for paying spousal support.

The pension cases are alive and well. No one can doubt a Court has statutory authority to divide a pension and then look to the income derived from that pension for the purposes of awarding spousal support. Herein lies the problem, "How do we reconcile the pension line of cases from the cases where Courts have found double dipping to be impermissible?" While there is no clear cut answer, *Heller* and subsequent decisions tend to suggest that the answer turns on two things: (1) whether or not a future stream of revenue from a business was used to value a business, and (2) a Court must look to the equities of each individual case. But, *Heller* has only been around since 2008.

Before *Heller*, the Fifth District court of Appeals somewhat addressed the double dipping theory in *Bagnola v. Bagnola,* 5th Dist. No. 2003-CA-00120, 2003-Ohio-5916. The Court did not squarely accept or reject the double dipping theory except to acknowledge that the income the Appellant derived from his business interests was "inextricably" tied to the valuations performed for each of his business interests. Stated another way, the Court did not find a double dip had occurred or that it was "impermissible double dipping," rather, the Court merely acknowledged that the income stream or revenue that was derived from the Husband's business interest was used to value the business interest itself. The Court went no further on the subject.

The Second District Court of Appeals in *Ulliman v. Ulliman,* 2nd Dist. No. 22560, 2008-Ohio-3876 upheld a Trial Court's decision where the Court refused to count

retained earnings as income to the spousal support obligor for the purposes of fashioning his spousal support obligation. The Trial Court concluded that an impermissible double counting *would* [may] occur ***had*** the Trial Court considered the retained earnings as income to the Husband. The Second District Court of Appeals refused to reverse the decision without passing judgment on the validity of the double dipping concept stating the issue had not been properly presented as part of the case before the Trial Court.[1]

So, until *Heller* there had been no cases that squarely dealt with the issue of double dipping.

C. *Heller V. Heller* & Double Dipping

The Tenth District poked the hornet's nest in *Heller v. Heller*, 10th Dist. No. 07AP-871, 2008-Ohio-3296 setting off a flurry of cases in the Tenth District and all over the State of Ohio. In *Heller*, the Tenth District defined the double dipping concept as follows:

> "The 'double-dip' refers to the double counting of a marital asset, once in the property division and again in the [spousal support] award. More specifically, where a court uses a business owner's 'excess earnings' to value the interest in the business and also fixes support on that spouse's total income (inclusive of the 'excess earnings' used to value the business), a 'double-dip' occurs." Vuotto, *Double Trouble* (2004), found at http://www.vuotto.com/new-jersey-divorce-articles/double-trouble.htm (last visited June 25, 2008). "[U]tilizing the same stream of income that forms the basis of valuing a business when calculating [spousal support] provides the non-owning spouse with the benefit from the same stream of income twice."
>
> *Heller v. Heller*, 10th Dist. Franklin No. 07AP-871, 2008-Ohio-3296, ¶ 20, overruled (in part by) *Gallo v. Gallo*, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶ 20

The Appellant argued that an impermissible double dip had occurred in the division of the Appellant's interest by using future income to value the business and then, again, in the fashioning of spousal support. The Tenth District Agreed:

> Trial courts may treat a spouse's future business profits either as a marital asset subject to division, or as a stream of income for spousal support purposes, but not both. When the trial court in this case treated

[1] An important aspect of this case was that the Appellate Court noted a trial court should necessarily inquire as to the level of control a person has over the company when determining whether or not retained earnings is part of a party's income for spousal support purposes.

> defendant's share of H & S's expected future profits as both an asset and as income for spousal support purposes, this constituted an abuse of discretion.
>
> *Heller v. Heller*, 10th Dist. Franklin No. 07AP-871, 2008-Ohio-3296, ¶ 23.

Upon remand, the Trial Court (essentially) rendered the same decision, but included a lengthy discussion explaining why it believed its ruling was equitable and why a prohibition against double dipping was inequitable. The Tenth District upheld its previous decision, however, softened its approach explaining:

> In the first appeal, there was no language in our decision to suggest that this court intended to promulgate a flat prohibition against double dipping applicable to every income-producing asset; rather, this court addressed the "double dip" issue only as it applies to the facts of this case.
>
> *Heller v. Heller*, 10th Dist. Franklin No. 10AP-312, 2010-Ohio-6124, ¶ 8

Heller II demonstrated that, while there was no explicit rule against double dipping, a Court must, nevertheless, review its property division where there is a danger of a double dip occurring. The question at this point becomes, "When does a double dip occur, how do we spot it, and when is double dipping impermissible?"

D. Post *Heller* Cases

- In *Kline v. Kline*, 8th Dist. Cuyahoga No. 96734, 2012-Ohio-479 the Court refused to follow *Heller* finding that, in *Heller* (essentially) the Husband's future Spousal Support obligation was being satisfied by the fact that the future profits that were ordered to be paid to the Wife (as part of the overall spousal support award) were actually already paid as part of the division of the business value since the business value was based on the future profits.

- In *Eddington v. Eddington*, 10th Dist. Franklin No. 14AP-572, 2015-Ohio-1233, the Trial Court recognized the principle set forth in *Heller* I. While it did not expressly disagree with the double dipping theory, the Court refused to apply it finding that not all the future values of the Defendant's business were used and therefore no double dipping occurred.

- In *Bohme v. Bohme*, 2nd Dist. Montgomery No. 26021, 2015-Ohio-339, ¶ 25, the Court held that the double-counting analytical framework "works well for fixed assets that produce an income stream" such as a

pension or annuity. However, it is not as easily applied towards a closely-held business, particularly, a wholly-owned professional practice. Ultimately the Court did not follow *Heller* I as the valuation methodology used involved an asset approach and a market approach.

- In *Kellam v. Bakewell*, 6th Dist. Erie No. E-13-032, 2014-Ohio-4635 "We find *Heller* to be distinguishable. In that case, the same asset was both counted in the marital division and required to be paid as part of the spousal support award. Here, in contrast, the value of the law firm was determined in the marital division, but the spousal support award was based on appellant's income in general."

- In *Organ v. Organ*, 9th Dist. No. 26904, 2014-Ohio-3474 *"Heller* is distinguishable because, in this case, the Trial Court found that Husband's stock in the California company was his separate property and did not include it as part of its division of marital property. We also conclude that, just because Husband acquired the stock with his share of the marital assets does not mean the court could not consider it when it determined Husband's spousal support obligation."

- *Corwin v. Corwin*, 12th Dist. Warren No. CA2013-01-005, 2013-Ohio-3996 "When the trial court treated Husband's share of BCN's expected future profits as both a marital asset subject to division and as income for spousal support purposes, the trial court abused its discretion. *See Heller* at ¶ 23. Consequently, we reverse the spousal support award of the trial court and remand this matter to the court for further proceedings.

As one can see, Courts work hard to find different ways around applying the *Heller* standard.

E. The Tenth District Squarely Addresses Its *Heller* Holding:

The Tenth District recently re-visited the concept of double dipping in *Gallo v. Gallo,* 10th Dist. No. 14AP-179, 20156-Ohio-982. It was very obvious in the *Gallo* decision the Tenth District wanted to re-define what it meant by double dipping.

The parties were married in May of 1998. They had two children. Before trial, the parties stipulated to shared parenting, agreed upon a parenting schedule and other issues. The parties also stipulated to a property distribution. For the purposes of this article, the parties' major remaining issue involved determining the calculation of the Husband's income for the purposes of child and spousal support.

The Husband was an ocular plastic surgeon and was the sole owner of "*Gallo* Eye and Facial Plastic Surgery." He was also a sole owner in one medical center (Perimeter Surgical Center) and a 1/40th owner in another, "Ohio Valley Medical Center." The parties entered into a stipulation as to the value of his primary medical practice (*Gallo* Eye) and

Perimeter utilizing an ***asset*** based valuation method. Neither of these two valuations were challenged nor was there disagreement that the income from these two interests could be used for spousal support purposes.

Ohio Valley Medical Center ("OVMC") presented a different problem. The Ohio Valley Medical Center was valued utilizing a share price to determine the "fair market value." The share price, in turn, was calculated using a preset formula contained in the OVMC's operating agreement, which, was a multiple of earnings before interest, taxes, and amortization. (EBITA)

The issue of double dipping was raised and presented to the Trial Court as part of the trial. The Husband argued that the earnings he received from Ohio Valley should not have been counted as part of his normalized income for support purposes because, as his expert testified, those earnings were included as part of the valuation method when determining the value of his 1/40th interest. The Appellee argued that *Heller* was distinguishable because in *Heller* the experts used a "Capitalization of earnings method" to determine the fair market value whereas in *Gallo* no business valuation had technically been performed. The Husband countered arguing the method used to value the share price was commensurate with the method used in *Heller*. The Tenth District Agreed.

On Appeal, the Tenth District performed an in-depth analysis of *Heller* and whether or not the double dipping theory of *Heller* should apply. The Tenth District specifically set forth: *"In order to determine whether Heller applies to the case at bar, we must first determine whether the trial court engaged in a double dipping here." Gallo*, supra, at ¶16. It is in this part of the decision that the Tenth District began further "softening" the *Heller* decision. Specifically, the Tenth District expressly stated that the double dipping definition contained in *Heller* was misleading and, essentially, needed to be narrowed for two main reasons:

> **Reason No. 1**
> As we stated above, *Heller* generally defined a "double dip" as "the double counting of a marital asset, once in the property division and again in the [spousal support] award." *Id*. at ¶ 20. Double dipping, however, does not entail the double counting of a *marital asset*. Rather, a double dip occurs when a court twice counts a *future income stream*—once in valuing the marital asset and once in deciding the economically superior spouse's ability to pay spousal support. It is the future income stream, not the marital asset, that is the subject of the doubling in the double dip. Thus, if the marital asset is valued without specific reliance on a future income stream—say, through a market-based or asset-based approach—then no double dipping occurs.[2] *Haynes v. Haynes,* 8th Dist. No. 92224, 2009–Ohio–5360, ¶ 48 (no double dipping occurred because the business valuation adopted by the trial court was an asset-based valuation method).

Gallo v. Gallo, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶ 18, appeal not allowed, 144 Ohio St.3d 1426, 2015-Ohio-5225, 42 N.E.3d 763, ¶ 18 (2015)

Reason No. 2
The second part of *Heller's* definition of a "double dip" is too constrained because it only encompasses businesses valued based on excess earnings. Numerous types of assets may be valued based on future income streams, including pensions, business and professional goodwill, and dividend-yielding stock. Blumberg, Section 41.07[3]. Moreover, business valuations may be premised on future income streams, even if a calculation of excess earnings is not a step in the valuation method. Occurrences of double dipping, therefore, are not limited to situations where excess earnings factor into the valuation of a business.

Gallo v. Gallo, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶ 20, appeal not allowed, 144 Ohio St.3d 1426, 2015-Ohio-5225, 42 N.E.3d 763, ¶ 20 (2015)

There was some debate about whether the methodology used to value Ohio Valley was similar enough to the method used in the *Heller* case to even compare the two. Ultimately, however, the Tenth District believed the methods were similar enough because they both used a cash-flow based method to determine the value.

The valuation method used in this case is **similar, but not identical**, to the method used in *Heller*.

H & S, the business at issue in *Heller*, was valued pursuant to the discounted cash flow method, while Ohio Valley was valued pursuant to the capitalization of earnings method. Both of these valuation methods are income-based approaches to valuing a business. *Adams v. Adams,* 459 Mass. 361, 381, 945 N.E.2d 844 (2010).

[T]he basic concept of the income approach is to project the future economic income associated with the investment and to discount this projected income stream to a present value at a discount rate appropriate for the expected risk of the prospective income stream.' " *Id.,* quoting Pratt & Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies,* 175 (5th Ed.2008).

Although both methods depend on a future income stream to determine value, they differ in how they arrive at that future

> income stream. The capitalization of earnings method merely uses a business's historical earnings as an augur of future earnings. Hood, Mylan, & O'Sullivan, *Valuation of Closely Held Business Interests,* 65 UMKC L.Rev. 399, 412 (1997).
>
> The discounted cash flow method, on the other hand, uses an equation to project future annual earnings over a chosen forecast period. *Id.* at 418, 945 N.E.2d 844; *accord Adams* at 382, 945 N.E.2d 844 ("Unlike the direct capitalization of income approach, which assumes a perpetual stream of income, the discounted cash flow method uses a more complex equation to reduce a finite period of future income * * * to present valuation."). *See also* Haas, *Valuation Strategies in Divorce,* Section 4.22 (5th Ed.2014) (comparing the discounted cash flow and capitalization of earnings methods).
>
> *For our purposes, the similarities between the two methods overshadow their differences. Both methods derive a business's value from its future income stream. That feature constitutes the hallmark necessary for the danger of double dipping to arise. Thus, the valuation method used in this case, like the valuation method in Heller, opens the door to possible double dipping*.
>
> *Gallo v. Gallo*, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶¶ 25-26, appeal not allowed, 144 Ohio St.3d 1426, 2015-Ohio-5225, 42 N.E.3d 763, ¶¶ 25-26 (2015)

After concluding the danger of an impermissible double dip was present, the Tenth District acknowledged the Trial Court awarded 100% of the value of Ohio Valley to the Husband and awarded the wife ½ of the value in the form of fixed assets. The Tenth District next acknowledged the Trial Court used the Husband's income from Ohio Valley to determine a reasonable and appropriate amount of spousal support and, therefore, "double dipping" had occurred. *Gallo*, supra, at ¶27.

The Tenth District passed on the issue of whether the double dip was impermissible citing to the pension line of cases and simply acknowledging that double dipping has occurred for some time in divorce cases and that a further analysis must be performed.

> Like businesses valued under an income-based approach, pensions are valued based on their expected future income streams. Consequently, the arguments against double dipping appear in divorce cases involving the division of a pension and the award of spousal support.

> *Gallo v. Gallo*, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶ 29, appeal not allowed, 144 Ohio St.3d 1426, 2015-Ohio-5225, 42 N.E.3d 763, ¶ 29 (2015)

The Tenth District ultimately determined that double dipping is permissible, however, it specifically acknowledged that a trial court **must** acknowledge if a double dip occurs and then consider the equities of a double dip in dividing an income producing asset. Because the Trial Court did not, the Tenth District Reversed the Trial Court's Decree of Divorce for further consideration.

> A trial court may ameliorate the inequity inherent in double dipping by splitting the income-producing asset at issue between the parties, thus ensuring that each spouse will share in advantages and disadvantages associated with that asset. Alternatively, a trial court may determine that some circumstances, such as the disparity in income between the parties, override the unfairness in double dipping. Ultimately, the trial court has discretion regarding if and how to remedy the double dip, and such decisions will turn upon the facts and circumstances of each particular case.
>
> Here, the trial court did not consider the double dip, so we must remand for that consideration to occur. Accordingly, we sustain Samuel's first assignment of error, but only to the extent that the trial court erred in not factoring the double dip into its analysis of this case. By sustaining the assignment of error, we do not suggest that the trial court must necessarily alter the current division of property or award of spousal support. We, instead, merely direct the trial court to expand its consideration of those issues to include the effect of the double dip.
>
> *Gallo v. Gallo*, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶¶ 34-35, appeal not allowed, 144 Ohio St.3d 1426, 2015-Ohio-5225, 42 N.E.3d 763, ¶¶ 34-35 (2015)

Upon remand, the Trial Court rendered a new decision that specified it considered the double dip, cited to the disparity in the parties' incomes, and other factors. Nonetheless, it found that double dipping (based on the facts of the case) was equitable.

The Husband filed a second appeal in *Gallo v. Gallo*, 10th Dist. No. 15AP000442 arguing that the Trial Court again abused its discretion in finding the double dip equitable based on the specific facts of the case. The matter has been briefed, argued, and was submitted to the Court for consideration on November 30, 2015.

Since *Gallo v. Gallo*, the Tenth District decided another case *Settele v. Settele* 10th Dist. No. 14AP-818, 2015-Ohio-3746. In *Settele*, the Appellant argued on appeal that an

impermissible double dip occurred as a result of the Trial Court's using the Appellant's business' cash accounts and accounts receivables to determine the value of the Appellant's dental business and then using those same funds again as income for support purposes. The Tenth District rejected this argument primarily finding that the valuation methodology used to value the business was based on the assets of the business and not a future income stream and therefore neither *Heller* nor *Gallo* applied.

The Tenth District explained that there was no clear testimony that the same accounts receivables and cash that were used to value the business were also included in the expert's averaging of the Husband's income for spousal support purposes. *Settele*, supra, at ¶32. The Court expressly pointed out that the "hallmark" indicator for a potential impermissible double dip would be where a "business valuation" is performed where it is "derived from its future income stream" Id. at ¶27. The Court further clarified that no one would "reasonably" contend that a double dip occurred where either the market or asset approach to valuing a business occurred. Id. The Tenth District chose to draw a distinction between the accounts receivable being a current income stream versus a future income stream and part of an asset based approach to valuing the business.

> Regarding accounts receivable as a future income stream, in a post-*Gallo* case considering a *Heller I* double-dipping issue set in the context of an asset-based valuation, the court in *Sieber* treated the accounts receivable included in that asset-based valuation as present, rather than future, income. *Id.* at ¶ 57
>
> ("The trial court did not consider the future benefits or potential future income stream from the ownership" when it adopted an asset-based business valuation that included the company's accounts receivable. "Rather, the court considered the present, fixed assets of the [company].").
>
> This result aligns with the "future income streams" envisioned as heralds of a double-dipping danger in *Gallo* and *Heller I*. *See Gallo* at ¶ 20–27; *Heller I* at ¶ 22; *Bohme* at ¶ 28–33.[4] *See also Skrabak v. Skrabak,* 108 Md.App. 633, 653, 673 A.2d 732 (1996)
>
> ("The accounts receivable held by the corporation at the time of the trial were fees that had already been earned and can be called 'future income' only in the sense that they will be collected in the future.").
>
> *Settele v. Settele*, 10th Dist. No. 14AP-818, 2015-Ohio-3746, 42 N.E.3d 243, 253, ¶ 37

F. Double Dipping Is Still Evolving

Many have now said (including Westlaw) that *Gallo* overruled the double dipping theory in *Heller*. To the contrary, the double dipping argument in *Heller* has not been overruled, rather, more refined. The *Gallo* case makes a few things very clear:

1. Where there is an income producing asset valued by using future cash flows and/or revenues, and that asset is to be divided, a trial court must look to determine if there is a potential double dipping situation.

2. If the Court determines there is a potential double dipping situation, it must then look to the individual facts of that case (case-by-case basis) to determine whether or not the double dipping itself is equitable or whether the unfairness of a double dip may be remedied in some other fashion.

3. If the Court believes it is equitable to double dip, then there has been no abuse of discretion so long as the underlying facts of the case support the Trial Court's decision.

4. Stated another way, "[w]ith an eye to avoiding unfairness, trial courts should carefully consider the division of income-producing and non-income-producing assets and the probable effects of that division on the availability of income and need for support." *Gallo v. Gallo*, ¶33 (Citations Omitted).

For a thorough discussion of the double dipping concept, see further, Rossi v. Rossi, 8th Dist. Nos. 100133, 100144, 2014-Ohio-1832. See also, "DOUBLE DIPPING": A GOOD THEORY GONE BAD, 25 J. Am. Acad. Matrim. Law. 133, 151

V. VOCATIONAL AND MEDICAL ISSUES IN SPOUSAL SUPPORT

Another issue that is becoming more prevalent with spousal support considerations is when one of the spouses is either unemployed, underemployed, disabled, and/or a combination of all three. Specifically, I have come across numerous cases where one of the spouses is not employed claiming to be disabled. The question becomes do you need a vocational expert, a medical expert, a legal expert as to disability, or all three.

First, the decision must be made as to whether or not the facts of the case and the financial aspects of the case warrant the expenditure of marital funds for the purposes of retaining expert witnesses. Specifically, if the parties have relatively low incomes and your client's exposure to spousal and/or child support is relatively low because of the incomes, it most likely makes more sense not to have significant expert witness fees. Conversely, if the parties' incomes are relatively high, it's a long-term marriage, and one of the spouses is claiming to be unemployed because of the physical disability, expert witnesses may be necessary.

The real question becomes what to do when you have a case where a party is unemployed claiming disability where they have not been found to be disabled. In that instance, it is almost certain (assuming the case facts warrant it) that you would need at a minimum a vocational and medical expert.

Example:

> Husband and wife are married for 17 years, have two minor children, husband is employed with an annual income of $80,000. For the first 10 years of marriage, the wife was employed outside the home earning approximately $35,000 with a limited college education, however, stopped work to take care the kids and is now claiming she suffers from medical conditions that prevent her from returning to work. There has been no actual finding of disability by any governmental agency.

In this example, if the parties are going to be unable to agree on a spousal support award requiring the parties to participate in a trial, the husband is most certainly going to need a vocational expert to give an opinion as to the wife's earning capacity. Any reputable vocational expert would make it clear that they are unable to offer an opinion of what the wife could earn based upon her alleged medical conditions, rather, the vocational expert would notify the parties in the court that the opinion as to the wife's vocational abilities would not take in account medical related issues and the like.

If the wife is going to go further and actually retain a medical expert to offer testimony regarding her medical conditions and her ability to work, obviously, the husband would then be forced to retain his own medical expert to review the wife's medical expert's opinion and offer a potential opinion to the contrary.

Some districts have allowed vocational testimony to be entered into evidence even knowing the vocational testimony was based, at least in part, on medical reports rendered regarding the litigant's health and ability to work. In *Brickner v. Brickner*, 12th Dist. N o. CA2008-03-081, the 12th District Court of Appeals affirmed a trial court's award of spousal support for duration five years to the husband where the husband appealed claiming the court had erred and abused its discretion in only awarding five years of support as a result of his disability. After reviewing the expert reports in the case, the 12th District Court of Appeals found

> The trial court heard testimony from both parties regarding appellant's illness and reviewed the vocational assessment reports which detailed appellant's illness as well as information from the Mayo Clinic. Despite all of this evidence, the trial court stated repeatedly that the appellant was not disabled. We cannot say that the trial court erred in this assessment as it is within the court's discretion to make.
>
> Id. at ¶24.

It appears in this case there may have been a missed objection or motion to exclude certain evidence as it is unclear how the vocational expert was able to offer an opinion on the Husband's employability given the fact the opinion was based on medical evidence.

That being said, the Tenth District made the following finding:

> Vocational expert's testimony and report opining that former wife could not work due to her health issues and physical limitations was admissible as based on evidence of record and relevant to issue of whether wife was entitled to spousal support incident to divorce; former husband claimed on appeal that expert's opinion was based on evidence not in record, but expert testified at trial that her opinion was based on physician's report, which had been admitted into evidence, and her own personal observations made as part of her vocational assessment. Evid.R. 703.
>
> *Havanec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966.

This 3rd District had a similar issue and decided:

> Mr. Milam contends that the opinion of the expert, Steven Rosenthal, was based upon the reports of two medical doctors that were not themselves received in evidence. Significantly, Rosenthal testified that the information contained in the reports of the two doctors that he considered was consistent with Ms. Milam's subjective complaints that she communicated to Rosenthal directly. From our review of the record, it appears that although Rosenthal may have considered those reports in arriving at a conclusion that Ms. Milam was suffering from Chronic Fatigue Syndrome, he did not rely upon those reports in forming his opinion that she was not employable, having relied instead upon Ms. Milam's subjective complaints, which were received in evidence in the form of her own testimony.
>
> *Milam v. Milam*, 3rd Dist. No. 94-CA-23, 1994 WL 579722, at ¶3.

Contrary to what I believe to be best practice, both Courts allowed the vocational expert to testify regarding certain medical conditions based on that experts review of medical records and the parties' testimony. This makes it somewhat unclear whether or

not two different experts are needed for testimony or perhaps just document review. I believe best practices require two different experts in high level cases.

What is clear, however, is that if a party is going to make a claim of disability they need to present evidence of an actual finding of disability by a governmental agency or through the use of expert medical testimony. The sixth District Court of Appeals made this abundantly clear in finding that the appellant/wife was unable to show an abuse of discretion where trial court failed to find her disabled as the only testimony or other evidentiary proof offered to show disability was that of her own. *Riley v. Riley*, 6th Dist. No. H-08-019, 2009-Ohio-2764.

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Family Law

Family Law Case and Legislative Update

Chris Trolinger, Esq.

Columbus, OH

FAMILY LAW CASE LAW UPDATE

OHIO SUPREME COURT

Morris v. Morris, 2016-Ohio-5002, 2014-0688

The conclusion of the Second District that relief under Civ.R. 60(B)(4) is unavailable is consistent with the Ohio Constitution, the mandates of the General Assembly, and our precedents. Accordingly, we hold that a trial court does not have jurisdiction under Civ.R. 60(B) to vacate or modify an award of spousal support in a decree of divorce or dissolution when the decree does not contain a reservation of jurisdiction to modify the award of spousal support pursuant to R.C. 3105.18(E). Moreover, based on our precedents, if the parties' separation agreement, incorporated into a decree of dissolution, reserves the jurisdiction of the court to modify, a party is limited to seeking relief from judgment under Civ.R. 60(B)(1), (2), or (3); a litigant may not seek relief from the decree under Civ.R. 60(B)(4) or (5). See Knapp v. Knapp, 24 Ohio St.3d 141, 493 N.E.2d 1353 (1986), paragraph two of the syllabus; In re Whitman, 81 Ohio St.3d 239, 245, 690 N.E.2d 535 (1998).

Trumbull County Bar Association v. Roland, 147 Ohio St.3d 274, 2016-Ohio-5579. (2016)

Divorce attorney permanently disbarred. For among other things, representing the wife in a divorce and assisting in the concealment of assets.

The facts deemed admitted are summarized as follows. Carradine paid Roland over $850,000 between 2006 and 2009. Those funds were not payments for legal services or advancements but were instead funds that Roland and Carradine had agreed to place in Roland's client trust account for the purpose of hiding marital assets from Martin. By April 9, 2009, Roland had transferred $814, 105.96 of those funds to an account at Maerki Baumann & Co. in Zurich, Switzerland, in which Carradine had a beneficial interest.

FIRST DISTRICT COURT OF APPEALS

Maddox v. Maddox, 2016-Ohio-2908, 65 N.E.3d 88 (App. 1 Dist. 2016)

Where father filed a motion to present additional evidence pursuant to Civ.R. 53(D)(4)(d) prior to the trial court's ruling on objections to a child-support order, and proffered evidence that he could not have with reasonable diligence produced evidence of his termination from employment to the magistrate because he had been terminated after the hearing before the magistrate, the trial court erred by denying his motion without a hearing. [See CONCURRENCE: The evidence didn't exist until after the magistrate's hearing, so, under the plain language of Civ.R. 53(D)(4), father could not have produced it with " reasonable diligence" for the magistrate's consideration.]

SECOND DISTRICT COURT OF APPEALS

Shannon v. Shannon, 2016-Ohio-3089, 26918

Husband's income will decrease by slightly more than 30% once the severance pay is exhausted. However, for 2015, his total income decreased by less than 10%. Thus, his change in income for 2015 is not sufficient to justify reducing Husband's 2015 spousal support by almost 39%.

Hattenbach v. Watson, 2016-Ohio-5648, 27071

The trial court did not abuse its discretion in determining that no downward deviation of child support was equitable despite both parents' splitting parenting time equally due to disparity of income where Mother was imputed to minium wage and Father earned $109,000.

Montei v. Montei, 2016-Ohio-8190, 2016-CA-12

The Court held that filing a civil action to recover for an alleged breach of confidentiality of medical records that occurred in prior litigation in which the patient was not a party does not function as a waiver of confidentiality allowing disclosure of those records in the prior litigation.

Here, subpoena was issued for medical records of the Father's girlfriend's child in a post decree domestic relations case. The Hospital provided the records to the Mother's counsel and such was provided to the guardian ad litem. The girlfriend, on behalf of the minor, filed a civil lawsuit against the Mother, her counsel, and the medical provider for a wrongful disclosure of protected medical records. The trial court, in the domestic case, ruled that the disclosed documents were no longer privileged due to the existence of the Civil Lawsuit (which was filed in response to the disclosure in the domestic case).

THIRD DISTRICT COURT OF APPEALS

In re L.S., 2016-Ohio-4999, 60 N.E.3d 9 (App. 3 Dist. 2016)

In an issue of first impression in Ohio, the Court concluded that, for a child to be found dependent under R.C. 2151.04(D), R.C. 2151.04(D)(1) plainly and unambiguously requires that a sibling of the child or any other child who resides in the household be adjudicated abused, neglected, or dependent before the complaint is filed. In these cases, there were no such adjudications before the complaints were filed, and the Agency concedes as much. Accordingly, the trial court abused its discretion by not dismissing the Agency's complaints against Father as to R.C. 2151.04(D).

FOURTH DISTRICT COURT OF APPEALS

Sinkovitz v. Sinkovitz, 2016-Ohio-2861, 64 N.E.3d 382 (App. 4 Dist. 2016)

Incarcerated party did not have absolute due process right to attend final divorce hearing. Here, the party was represented by counsel at the final divorce hearing, and appellant's deposition testimony was presented to the trial court per the trial court's suggestion. In light of the foregoing, the court found that the trial court did not abuse its discretion in denying appellant's motion to convey or in denying his motion to attend via telephone conference.

In re Adoption of B.B.S., 2016-Ohio-3515, 15CA35

When a parent does not provide financial support as there is no child support order in the juvenile custody proceeding and the adopting custodians do not ask for support, a non consenting parent in an adoption proceeding is justified in not providing support for the children. As to de minimus contact, a text message that states that further communication will not be accepted provides justification for failure to contact the child and disallows a finding of de minimus contact.

FIFTH DISTRICT COURT OF APPEALS

Leach v. Leach, 2016-Ohio-8569, 2016 CA 00013

Prenuptial agreement was enforceable despite the changes in assets after the marriage due to the wording of the prenuptial agreement. This case poses a warning to those who wish to enter a prenuptial agreement—"Be careful of what you wish for, you just might get it." The Court held despite the loss of much of the assets mentioned in the prenuptial agreement due to a bankruptcy, the prenuptial agreement was valid and the individual who was the wealthiest at the time of execution was bound by its terms.

SEVENTH DISTRICT COURT OF APPEALS

Smith v. Smith, 2016-Ohio-3223, 14 CA 0901

The trial court found that because marital funds and effort were utilized to improve the real estate purchases by Husband's premarital funds, the equity in the real estate became marital property.

EIGHTH DISTRICT COURT OF APPEALS

Bakhtiar v. Saghafi, 2016-Ohio-8052, 104204

An 81 year old plaintiff wife in a divorce could still pursue the divorce action over the objection of the spouse even when the plaintiff had been declared incompetent by probate court. The findings of the probate court can be given deference in the domestic relations court as to whether to proceed to trial on the divorce.

NINTH DISTRICT COURT OF APPEALS

In re Guardianship of Bakhtiar, 2016-Ohio-8199, C.A. 15CA010721

This case is an appeal of the order of the probate court allowing the guardian to proceed with the divorce in Cuyahoga County. The Ninth District found that the appeal was moot due to husband's appeal of the divorce decree issued in the Cuyahoga County case.

Alvarez v. Alvarez, 2016-Ohio-3432, C.A. 27821

Husband's brief period of unemployment did not constitute a change of circumstances for purposes of modifying his spousal support award when new employment was obtained a few months after his unemployment with same or similar salary.

TENTH DISTRICT COURT OF APPEALS

Keathley v. Keathley, 2016-Ohio-5296, 15AP-901

R.C. 3119.962(B) requires that a court make a finding of whether the alleged father knew he was not the biological father at the time of executing the APA in setting aside a paternity determination. Because the trial court made no such finding in the positive or negative, the case was remanded for further proceedings.

Hall v. Hall, 2017-Ohio-447, 16AP-480

An intervening party (alleged biological father) filed an appeal of the trial court's disestablishing Hall as the father of a child born prior to the parties subsequent marriage. The Court found that Mother could not disestablish Hall as the father of the child because Hall willingly assumed legal paternity of E.H., with knowledge that he was not the child's natural father, the trial court was precluded from disestablishing his paternity pursuant to R.C. 3119.962.

In re Adoption of N.T.R., 2016-Ohio-3427, 15AP-955

The magistrate factually found that appellant had a zero support order as part of the parties' divorce decree. That order provides justifiable cause for his failure to provide support for his child. Consent still required.

Pallone v. Pallone, 2016-Ohio-7066, 15AP-779

On the issue of whether a transcript is available or not due to indigency, the Court remanded this matter for the trial court to determine whether appellant's affidavit of indigency is credible. If the court finds the affidavit to be credible, it must determine whether alternative technology or other methods of reviewing the record may be considered. Additionally, if the trial court finds appellant's affidavit to be credible, it must allow appellant to file an affidavit of the relevant evidence. Finally, the trial court must review the partial transcripts submitted by appellant and determine whether the portions of the transcripts, in addition to any other material submitted by appellant, pursuant to Civ.R. 53(D)(3)(b)(iii), are sufficient for the court to resolve appellant's objections.

ELEVENTH DISTRICT COURT OF APPEALS

In re L.K.P., 2017-Ohio-500, 2014-T-0077

After the adoption, appellee (mother) refused appellant (paternal grandfather) visitation. Appellant, therefore, moved the trial court to find appellee in contempt of the visitation order. Appellee maintained, in response, that because Father's parental rights were terminated, appellant no longer has

a statutory right to visitation. The Court of appeals determined that the adoption terminated Paternal grandfather's visitation rights.

TWELFTH DISTRICT COURT OF APPEALS

Holden v. Holden, 2016-Ohio-5557, CA2015-07-016

The Court concluded that the magistrate's and judge's actions in modifying Father's shared parenting plan prior to adopting the plan did not divest the trial court of subject matter jurisdiction so that the judgment rendered is void ab initio. Rather, it consists of an error in the trial court's exercise of jurisdiction over this particular case.