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2016 Annual Convention

Family Law Session

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Electronic Eavesdropping in Domestic Relations Cases

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ELECTRONIC EAVESDROPPING

IN

DOMESTIC RELATIONS CASES

I. HISTORY

A. The Federal Communications Act of 1934: in response to international threats and organized crime.

B. The Omnibus Crime Control and Safe Streets Act of 1968: partially in response to domestic “threats.” Organized Crime, Industrial Espionage, Domestic Relations, privacy, terrorism.

C. 1986: the Electronic Communications Privacy Act (ECPA). Computer and “electronic” protection added! Updated again in 1996.

D. 2001: The Patriot Act (Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, in response to 9/11).

II. STATUTES

A. Federal

1. Federal Wire Tapping Act (FWA) 18 U.S.C. 2511 et. seq. 1968.

(1) Except as otherwise specifically provided in this chapter **ANY** person who -

(a) **intentionally intercepts, endeavors to intercept** or procures any other person to intercept or endeavor to intercept, **any wire, oral or electronic** communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other **device** to intercept any oral communication when –

(i) such device is **affixed** to, or otherwise **transmits** a signal through a wire, cable, or other connection used in wire communication; or

(ii) such device transmits communications by **radio**, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or another component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of a business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment (affecting interstate or foreign commerce).

(c) **intentionally discloses**, or endeavors to disclose, to any other person **the contents of any wire, oral or electronic communication**, knowing or having reason to know that the information was obtained through the interception of a wire, oral or **electronic** communication in violation of this subsection;

(d) **intentionally uses, or endeavors to use**, the contents of **any wire, oral or electronic communication**, knowing or having reason to know that the information was obtained through the interception of a wire, oral or **electronic communication** in violation of this subsection; "shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).e However,

(2)(d) It shall not be unlawful under this chapter for a person **NOT** acting under color of law to intercept a wire, oral or electronic communication where such person is a **PARTY to the communication** or where one of the parties to the communication has given **PRIOR CONSENT** to such interception unless such communication is intercepted for the purpose of committing any criminal or **TORTIOUS ACT** in violation of the Constitution or laws of the United States or of any **State**. (emphasis added).

(2) Exempt from the act: providers of “electronic communication service” for work necessarily incident to the rendition of the service; those protected by the Foreign Intelligence Surveillance Act; certification from the Attorney General of the U.S.; acting under court order; any communication that is “readily accessible to the general public.”

(3) “Service providers” are exempt. (AT&T, Verizon, gmail, Hotmail, AOL, etc. if activity in ordinary course of business)

(4)(a) Penalties: Whoever violates subsection (1) shall be **fined** under this title or **imprisoned not more than five years or both**.

(3) **Civil Violations** - (18 U.S.C. 2520)

(A) In General: **ANY** person whose wire, oral or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the **PERSON OR ENTITY** (other than the U.S. government) which engaged in that violation such relief as may be appropriate. (emphasis added)

(B) **Relief** - in an action under this section, appropriate relief includes -
(1) injunctive or declaratory relief as may be appropriate;
(2) **damages** under subsection (c) and **punitive damages**; and

(3) a reasonable **attorney's fee** and reasonable litigation **costs**.

(C) Computation of Damages

(2) The court may assess as damages whichever is the greater of -

(A) the sum of the actual damages suffered by the plaintiff . . . or

(B) "statutory damages...the **greater of \$100 a day for each day of violation or \$10,000.**"

(D) Defense - A good faith reliance on -

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization.

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that (broadcaster, service provider, "lawful consent of the originator or an addressee") or **person acting under color of law**.

These are complete defenses against any civil or criminal action brought under this chapter or any other law.

(Note: No defense or exception for spouses or agents of spouses!)

(e) Statute of Limitation - a **CIVIL** action under this section may not be commenced later than **two years** after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(5) **Prohibition of Use As Evidence of Intercepted Wire or Oral Communications.**

(18 U.S.C. **2515**). Adopted 6/19/68 and never changed!

Whenever any wire or oral communication has been intercepted, **NO** part of the contents of such communication and **NO EVIDENCE** derived therefrom

may be received in evidence in **ANY** trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a **STATE**, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. (emphasis added). (June, 1968).

(2) **Fed. Communications Storage Act (CSA), 18 U.S Code 2701:**

(a)(1) Whoever **intentionally accesses** without authorization **a facility** ¹ through which an electronic communication service is provided; **...and obtains...** a **wire or electronic communication** while it is in electronic **storage...** shall be punished as provided:

(b) Punishment: If the offense is committed for the purposes of **commercial advantage...** or private commercial gain or in furtherance of any criminal or tortious act in violation of the laws of ... the United States or any state (A) a fine... or imprisonment for not more than five years, or both, for a first offense and (B) a fine... or imprisonment for not more than ten years, or both, for any subsequent offense.

2. In any other case **(A) a fine...or imprisonment for not more than one year, or both, for a first offense** (B) A fine... or imprisonment for not more than five years, or both, in the case of an offense that occurs after a conviction of another offense under this section (there are Patriot Act exceptions)

Section 2707 Cause of Action – Civil Damages

(a) any...subscriber, or other person aggrieved by any violation of this chapter... may, in a **civil action**, recover from the person or entity, other than the United States,...

(b) relief (1) preliminary and other equitable or declaratory relief (2) **damages**

¹ "Facility" is not statutorily defined however, "cases have implied that computers, cell phones, and voicemail are facilities" AAML, Electronic Eavesdropping and Divorce, Vol. 21, 2008.

under subsection c; and (3) a reasonable attorney fee and other litigation costs reasonably incurred.

(c) Damages. The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff, any profits made by the violator as a result of the violation, but in no case shall a person entitled to recovery receive less than the sum of \$1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of successful action to enforce liability under the section, the court may assess the cost of the action, together with reasonable attorney's fees determined by the court.

(f) Limitation. A civil action... may not be commenced later than two years after the date which the claimant first discovered or had a reasonable opportunity to discover the violation.

B. State Statutes: Ohio Criminal Statutes

(1) Interception of Wire, Oral or Electronic Communications. (R.C. 2933.52). 6/11/12

(A) No person purposely shall do any of the following:

(1) Intercept, attempt to intercept, or procure any other person to intercept or attempt to intercept a WIRE, ORAL OR ELECTRONIC communication;

(2) Use, attempt to use, or procure another person to use or attempt to use an interception device [not defined] to intercept a wire, oral, or electronic communication, if either of the following apply:

(a) The intercept device is affixed to, or otherwise transmits a signal through, a wire, cable, satellite, microwave, or other similar method of connection used in wire communications.

(b) The interception device transmits communications by radio, or interferes with the transmission of communications by radio.

(3) Use, or attempt to use, of the contents of a wire, oral or electronic communication, knowing or having reason to know that the contents were obtained through the interception of a wire, oral or electronic communication in violation of sections

2933.51 to 2933.66 of the Revised Code.

(B) This section does **NOT** apply to any of the following: [those acting under color of law or acting in ordinary course of the communications business]

(1) The interception, disclosure, or use of the contents or any evidence derived from the contents of an oral, wire, or electronic communication that is obtained through the use of an interception **WARRANT** or that is obtained pursuant to an order or interception that is issued or made in accordance with section 802 of the "Omnibus Crime Control and Safe Streets Act of 1968", 18 U.S.C. 2510 to 2520 (1968).

(2) An operator of a switchboard, or an officer, employee or agent of a communications common carrier, whose facilities are used in the transmission of a wire communication...

(3) A law enforcement officer who intercepts a wire or oral communication, if the officer is a party to the communication or if one of the parties to the communication has given prior consent to the interception by the officer;

(4) A person who is not a law enforcement officer and who intercepts a wire or oral communication, if the person is a **PARTY** to the communication or if one of the parties to the communication has given the person **PRIOR CONSENT** to the interception, **AND** if the communication is not intercepted for the purpose of committing any criminal offence or **TORTIOUS ACT** in violation of the laws or Constitution of the United States or this state for the purpose of committing any other **INJURIOUS ACT**;

(C) Whoever violates this section is guilty of interception of wire, oral or electronic communications, a felony of the fourth degree (6 to 18 months, \$5,000 fine)

(2) Telecommunications harassment, O.R.C. 2917.21 (9/30/11)

(A) No person shall knowingly make or cause to make a telecommunication or knowingly permit a telecommunication to be made from a telecommunication device under the

person's control, to another, if the caller does any of the following:

(1) Fails to identify the caller...and makes a telecommunication with purpose to harass or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and the recipient.

(2) Describe, suggest, request or proposes that the caller engage in **sexual activity**

(3) Violates Section 2903.21 [menacing by stalking].

(4) **Knowingly states... that the caller intends to cause damage** to or destroy public or private property

(B) No person shall make or cause to make a telecommunication or permit a telecommunication to be made... **with purpose to abuse, threaten or harass** another person or permit a telecommunication to be made from a telecommunications device under the person's control and with purpose to abuse, threaten or harass another person.

(C) (1) Whoever is guilty of this section is guilty of a **telecommunication harassment.**

(2) ...a misdemeanor in the **first degree (up to 6 months in jail) on the first offense and a felony in the fifth degree** (6-12 months) on each subsequent offense.

(3) Ohio's **Menacing By Stalking**, 2903.211 (9/17/14)

(A) (1) No person by engaging in a **pattern of conduct** shall **knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.** In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's mental distress, the other person's belief or mental distress may **be based on words or conduct**

of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any electronic method of remotely transferring information, including but not limited to, any computer, computer network, computer program, or computer system, shall post a message with purpose to urge or incite another to commit a violation of division (A)(1) of this section.

(3) No person, with a sexual motivation, shall violate division (A)(1) or (2) of this section.

(B) Whoever violates this section is guilty of menacing by stalking.

(1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree. [Up to 6 months in jail].

(2) Menacing by stalking is a felony of the fourth degree [6-18 months] if any of the following applies:

(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of section 2911.211 of the Revised Code.

(b) In committing the offense under division (A)(1), (2), or (3) of this section, the offender made a threat of physical harm to or against the victim, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message made a threat of physical harm to or against the victim.

(c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school.

(d) The victim of the offense is a minor.

(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.

(f) While committing the offense under division (A)(1) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(1) of this section, the offender had a **deadly weapon** on or about the offender's person or under the offender's control. Division (B)(2)(f) of this section does not apply in determining the penalty for a violation of division (A)(2) of this section or a violation of division (A)(3) of this section based on conduct in violation of division (A)(2) of this section.

(g) At the time of the commission of the offense, the offender was the **subject of a protection order issued under section 2903.213 or 2903.214** (criminal protection orders) of the Revised Code, regardless of whether the person to be protected under the order is victim of the offense or another person.

(h) In committing the offense under division (A)(1), (2), or (3) of this section, the offender **caused serious physical harm to the premises at which the victim resides, to the real property on which that premises is located, or any personal property located on that premises**, or, as a result of an offense committed under division (A)(2) of this section or an offense committed under division (A)(3) of this section based on a violation of division (A)(2) of this section, a third person induced by the offender's posted message caused serious physical harm to that premises, that real property, or any personal property on that premises.

(4) Ohio Statutes: Civil Actions 2933.65

(A) A person whose wire, oral, or electronic communications are intercepted, disclosed, or intentionally used in violation of [sections 2933.51 to 2933.66 of the Revised Code](#) may bring a civil action to recover from the person or entity that engaged in the violation **any relief that may be appropriate and that includes, but is not limited to, the following:**

(1) The preliminary and other equitable or declaratory relief that is appropriate;

(2) **Whichever of the following is greater:**

(a) Liquidated damages computed at a rate of two hundred dollars per day for each day of violation or liquidated damages of ten thousand dollars, whichever is greater;

(b) The sum of actual damages suffered by the plaintiff and the profits, if any, made as a result of the violation by the person or entity that engaged in the violation.

(3) Punitive damages, if appropriate;

(4) Reasonable attorney's fees and other litigation expenses that are reasonably incurred in bringing the civil action.

(B) Good faith reliance on an interception warrant, extension of an interception warrant, other court order, a grant of an oral order for an interception, a grand jury subpoena, a legislative or statutory authorization, or a good faith determination that divisions (A) and (B) of [section 2933.521 of the Revised Code](#) permitted the conduct that is the subject of a complaint is a complete defense to a civil action or criminal action that is brought under the laws of this state and that arises out of the execution of the warrant or the oral order.

(C) A claimant who brings a civil action under division (A) of this section shall commence the civil action within two years after the date on which the claimant first has a reasonable opportunity to discover the violation.

(D) The remedies and sanctions described in [sections 2933.51 to 2933.66 of the Revised Code](#) with respect to the interception of wire, oral, or electronic communications are the only judicial remedies and sanctions for violations of those sections involving those types of communications that are not violations of the constitution of the United States or of this state.

III. Ohio Tort Law

A. Invasion of Privacy

To recover for *invasion of privacy*, the following elements must be shown:

- (1) A public disclosure,
- (2) of facts concerning the private life of an individual,

(3) the matter disclosed is highly offensive and objectionable to a reasonable person of ordinary sensibilities,

(4) the disclosure is intentional, and

(5) the matter publicized is not of legitimate concern to the public. "Public disclosure" means a disclosure to the public at large, or so many people that the matter must be regarded as substantially certain to become one of public knowledge. [Alexander v. Culp, 124 Ohio App. 3d 13](#)

B. Intentional Infliction of Emotional Distress

To establish a claim for *intentional infliction* of emotional distress, a plaintiff must prove the following **elements**:

(1) the defendant intended to cause, or knew or should have known that his actions would result in serious emotional distress;

(2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency and can be considered completely intolerable in a civilized community;

(3) the defendant's actions proximately caused psychological injury to the plaintiff;
and

(4) the plaintiff suffered serious mental anguish of a nature no reasonable person could be expected to endure. Only the most extreme wrongs, which do gross violence to the norms of a civilized society, will rise to the level of outrageous conduct. It is not enough that the defendant acted with intent to cause emotional distress. Liability will be found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. [Marconi v. Savage, 2013-Ohio-3805](#)

IV. Ethics:

A.. Ohio Supreme Court Board of Commissioners on Grievances and Discipline, Opinion 2012-1 p. 3 (attached). In ten states, surreptitious recording is both illegal and unethical for lawyers. In nine states surreptitious recording is unethical. In four states evaluation is done on a case by case basis.

B. Current law in Ohio: Opinion 2012-1, effective June 8, 2012. "In general, Ohio lawyers should not record conversations with clients or prospective client without their consent." While a "surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording takes place. The acts associated with the lawyer's surreptitious recording, however, may constitute misconduct." However, if the recording is conducted for an improper purpose in violation of 2933.52 that is a criminal or tortious purpose, it could be a per se violation. Despite a society where there is a diminished expectation of privacy due to advances in technology "as a basic rule, Ohio lawyers should not record conversations with clients without their consent." A similar duty exists in regard to prospective clients.

C. American Bar Association Formal Opinion 01-422 states that..."such conduct is, at the least, inadvisable." p.8

- V. **Case Review:** See highlighted cases below.

TABLE OF CASES

A. Non-Domestic Relations Cases

1. **Ralic v. The Ohio State Bar Assn.** #76-1650, Supreme Court of the United States, 5/30/78. Attorney surreptitiously tape records his potential clients, acting with gross disregard for their privacy and completely inconsistent with an attorney's fiduciary obligation.
2. **U.S. v. Wuliger**, 981 Fed. 2d 1497, 12/22/92. Attorney intentionally uses wiretapped conversations and is prosecuted.
3. **State v. Bidinost**, 71 Ohio St. 3d 449; 644 N. E. 2d 318; 1994 Ohio LEXIS 2946. Neighbor intercepts cordless phone conversations from a baby monitor, records the conversations per the instruction of both police and prosecutor. Evidence ruled in violation of ORC 2933.51-66 and therefore inadmissible.
4. **Konop v. Hawaiian Airlines**, 302 Fed. 3d 868, 8/23/02. Employer obtained the password of a pilot's private website. Employer engaged in union surveillance of organizing activities.
5. **McKinley v. City of Mansfield**, 404 Fed. 3d 418, Sixth Circuit Court of Appeals, 4/11/05. Mansfield city cops were using scanners to monitor cell phone calls, including calls of people they pulled over for traffic stops. Over 30 officers involved.
6. **Cardinal Health v. Adams**, 582 Fed. Sup. 2d. 967, 10/10/08. Both the FWA and SCA in

play. Ex-employee steals email communication from employer Cardinal Health and steals business from them.

7. **U.S. v. Szymuszkiewicz**, 7th Circuit, 11/29/10. Defendant monitored his supervisor's email by simply setting up a "rule" in the supervisor's Outlook program. The "rule" forwarded the supervisor's email for three years.
 8. **Shefts v. Petrakis** , District Court, Central District Illinois, 12/8/10. Defendant used "Spector Pro" monitoring software loaded onto employee's computer, including Plaintiff and logged texts sent from a Blackberry. TRO issued seizing and impounding the computers used by Plaintiffs and Defendants. "Interception" and "implied consent" case. Cites U.S. v. Haldeman
 9. **U.S. v. Barrington**, 648 Fed. 3d, 1178, 11th Circuit, 8/11/11. Conspiracy to commit wire fraud. Grade and address changes for profit. Key loggers. FWA violation.
 10. **Rene v. GF Fishers Inc.**, District Court, Southern District Indiana, 9/16/11. Key logger. Contemporaneous interception. No connection to interstate or foreign commerce. Key logger is not an interception of electronic communication, but a violation of the Stored Communications Act.
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B. Electronic Eavesdropping in **DR cases**:

11. Nations v. Nations, U.S. District Court, Western District Arkansas, #87-5102, 10/9/87. A 2520 COA recording device placed on the marital residence phone recording all incoming and outgoing without wife's knowledge or consent. Wife moved for an injunction prohibiting use of the tapes and the transcripts and for actual and punitive damages. Request for impoundment denied. Cites Simpson an exonerated husband, then cites U.S. v. Jones from our 6th Circuit. Court finds a title three prohibits all wiretapping activities unless specifically accepted. There is no express exception for instances of willful unconsented to electronic surveillance between spouses.

12. Nukum v. Ingle, 944 Fed. 2d 1534(1991), United States Court of Appeals, 10th District, 8/28/91. Mom and her dad (grandpa) intercepted and recorded conversations between minor son Brent in her own home without Brent's knowledge or consent. Mom had custody of Brent at the time. In one conversation mom recorded a conversation in which Brent's father, ex-husband Harold, instructed Brent and his brother to set fire to mom's home. The house did burn down. All charges were eventually dismissed against Brent upon reaching majority, Brent brought suit against his mom alleging a violation of 18 USC 2510-20. Court held not a Title 3 violation as it was an "extension phone" exception arguably permitted. "There is no persuasive reason why Congress would exempt a business extension and not one in the home." Court notes that the Circuits are split on extension phone exceptions.

13. Pollack v. Pollack, U.S. 6th Circuit Court of Appeals, 9/1/98. Title 3 when mom tape recorded conversations between ex-husband and minor daughter and husband's current wife. "Vicarious consent" defense. Daughter was 14 years old.

Good review of the competing circuits decisions. Attorneys involved as they did use and disclose the contents of conversations during their course of representation. Grandma

hid a tape recorder in the children's bedroom.

14. **White v. White**, Superior Court New Jersey, 344 N.J. Super .211, 5/31/01. Wife hires investigative research company who copied husband's hard drive, including files and emails sent between husband and his girlfriend. Inter-spousal immunity. Reasonable expectation of privacy. Rummaging through files on a computer hard drive the same as rummaging through files in an unlocked file cabinet.
15. **Babb v. Eagleton**, United States District Court, Northern District Oklahoma, 11/5/07. Parenting coordinator. Attorneys sued for using recordings in court.
16. **Bailey v. Bailey**, United States District Court of Eastern District of Michigan, Case #07-11672, 2/6/08. Key logger.
17. **Miller v. Meyers**, U.S. Court Western District of Arkansas, #0906103, 1/21/11. Key logger. Private and criminal violations of 18 USC 1030, 2701, 2511. Husband installed it on then wife's computer prior to the commencement of the divorce proceeding. He used the key logger results during the divorce proceedings and later custody proceedings. Now husband alleges that the divorce decree precludes her from bringing subsequent causes of action against him. Court held the agreement was meant to settle any and all claims related to the divorce proceeding, but did not function as a waiver of all claims, including her federal claims that could not have been litigated in a state divorce proceeding. Court rejected the FWA claims citing *Frazer v. Nationwide*, *Knop* and others because the SCA applies. Analogizes monitoring internet traffic on his own home network as analogous to listening in on an extension line. No evidence plaintiff recorded evidence during the course of the monitoring. No contemporaneous exception. Defendant found in violation of "computer trespass" under the Arkansas code because he intentionally accessed the My Space and Yahoo computer networks

without authorization [there is a Lisk like reference to genuine issues regarding an enforceable agreement between the parties as to non-disclosure of materials used in the divorce proceeding].

18. **State v. Terrion**, 9th Appellate District, Summit County, 8/3/11. Key logger. Husband confronts wife about an affair, shoots her in the head and kills.
19. **Klumb v. Goan**, 884 F.Sup.2d 644, United States District Court, Eastern District Tennessee 7/19/12. An all time classic!
20. **Young v. Young**, #1D11-6098, Florida Court of Appeals, 1st District, 9/11/12. Husband gave wife his computer password so she could install anti-virus software. Later, without his consent she used the password to read his email and then change the password so he could no longer gain access to his account. An allegation of cyberstalking also.
21. **Luis v. Zang**, United States District Court, Southern District of Ohio, Western Division, Case No. 1:12-CV-629, 6/20/14. Report and recommendation. Web watcher, remote spy. Great analysis. (Preceded by *Zang v. Zang*, 2012 U.S. Dist. LEXIS 123383).
22. **Branson v. Rodriguez-Linares**, #2D12-3827, 2nd Appellate District of Florida, 7/25/14. Cyberstalking including 300 emails in a month and a half, harassing phone calls, etc. Numerous text messages as well. She didn't prove that she was being cyber stalked.
23. **Leech v. Mayer**, U.S. 6th Circuit Court of Appeals, 10/22/14. Cell phone as "spy gadget." An allegation of intercepting cell phones. Husband was a cop.
24. **Horowitz v. Horowitz**, #2D13-3871, 2nd Appellate District of Florida, 4/1/15. Key logger program, cyberstalking.

VI. SUMMARY

- A. General Rules: what is a violation?
- B. Analysis of the situation: suggested check list - Who, what, where, when and why?
- C. What to do when a client shows up with the eavesdropping goods?
- D. What to do when your client tells you they've been victimized. Check list: client a party to the communication? Prior permission given? Vicarious consent?
- E. Tort Cause of action: Invasion of Privacy, Defamation
- F. Advice on what YOU should do. Ethical considerations.



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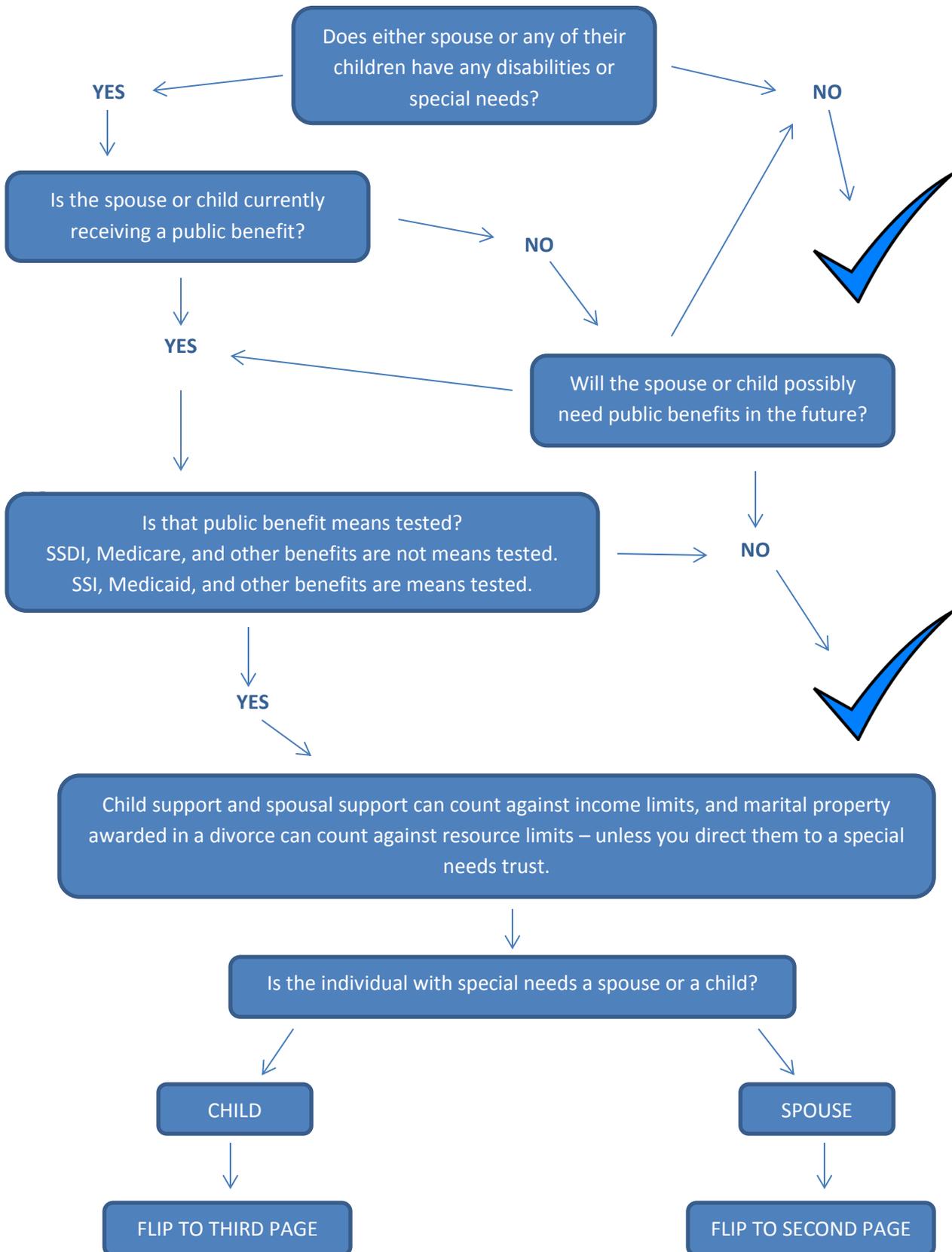
2016 Annual Convention

Family Law Session

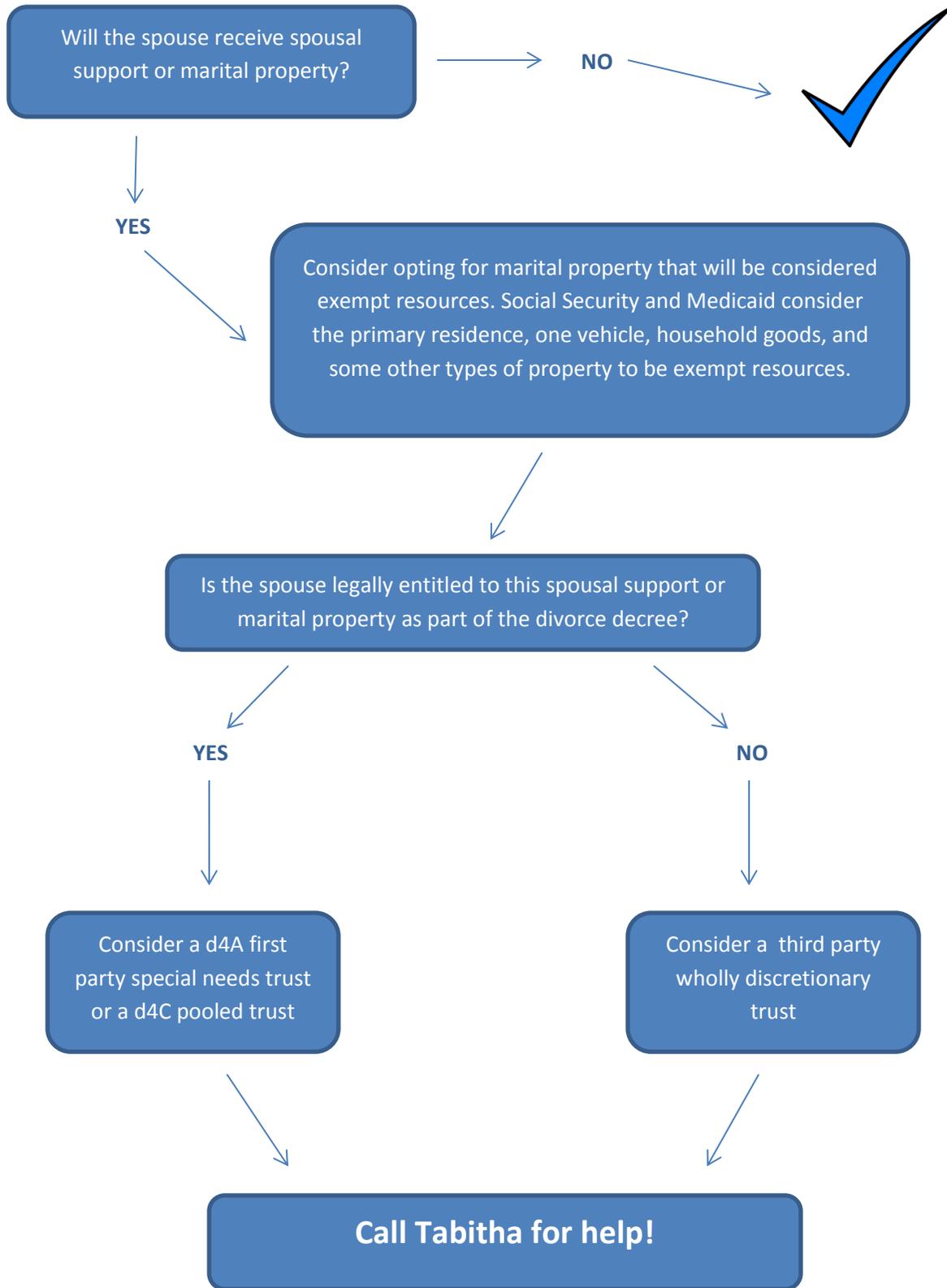
Custody and Divorces Involving Children or Parties with Special Needs

Tabitha Woodruff, Esq.
West Jefferson, OH

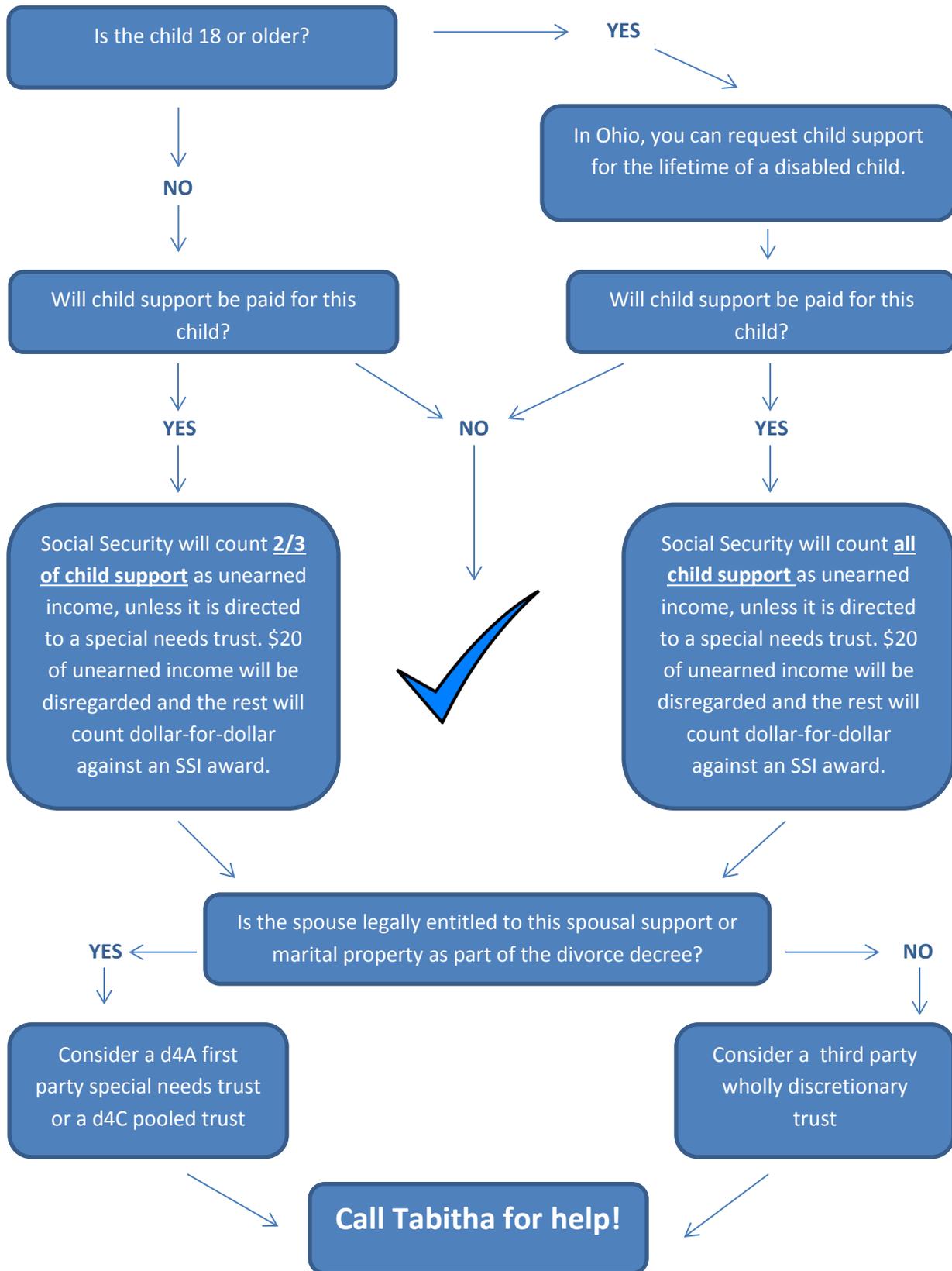
Issue Spotting Special Needs Complications in a Divorce or Child Support Case



Issue Spotting Special Needs Complications in a Divorce or Child Support Case



Issue Spotting Special Needs Complications in a Divorce or Child Support Case



When Special Needs Trusts are a Critical Tool for Family Law Attorneys

By Tabitha M. Woodruff, Esq.¹

Navigating public benefits eligibility for a person with disabilities is a challenge without the added complications that divorce can bring a family. Child support, spousal support, and divorce settlements can reduce or eliminate public benefits for a person with disabilities. It is critical that family law attorneys, judges, and magistrates understand how to avoid these potentially devastating consequences.

Public benefits fall into two major categories: means tested and non-means tested. Means tested public benefits have resource limits, income limits, or both, while non-means tested public benefits do not. Some types of support from the Social Security Administration (SSA) for individuals with disabilities are non-means tested, such as Social Security Disability Insurance (SSDI) and Childhood Disability Benefits (CDB). Recipients of these types of support are automatically eligible for Medicare, which is basic health insurance.² Supplemental Security Income (SSI) and Medicaid are means tested, and can be lost if child support, spousal support, or a divorce settlement are allocated improperly to a person with disabilities. Medicaid can go a step beyond health insurance for the disabled or elderly and cover long term care services, like physical therapy and skilled nursing. Through Medicaid Home Care Based Service (HCBS) waivers, these services can be provided in the home instead of in a nursing home or institution. In Ohio, SSI eligibility will be tied to Medicaid eligibility by the end of 2016, and so a loss of SSI can result in a loss of Medicaid as well.

SSI can provide up to \$733 per month to an adult or child with disabilities.³ In calculating the benefit amount for a child's SSI, the SSA will disregard one-third of child support payments, apply a general \$20 disregard to unearned income, and count the rest dollar-for-dollar against the SSI benefit amount.⁴ Thus, if \$1,200 per month is being paid in child support each month, \$400 of the child support will be disregarded, an additional \$20 will also be disregarded as unearned income, and then \$780 will count dollar-for-dollar against the SSI benefit amount. That will completely zero out an SSI benefit amount of \$733, and the child will lose SSI benefits. If child

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² [POMS HI 00801.146](#).

³ See [SSI Federal Payment Amounts for 2016](#), <https://www.ssa.gov/oact/cola/SSI.html>.

⁴ [POMS SI 00830.420](#).

support is being paid for an adult child with disabilities, there is no one-third child support disregard. The SSA will only disregard \$20 and will count the rest against the SSI benefit amount dollar-for-dollar.⁵ As a result, \$753 per month in child support would be enough to cause an adult child with disabilities to lose SSI benefits. In a similar vein, spousal support is also considered unearned income, and after the \$20 disregard, will be counted dollar-for-dollar against an SSI benefit amount for an ex-spouse with disabilities. SSI and Medicaid also have resource limits, and so a divorce settlement of property or cash may also cause ineligibility.⁶

These eligibility issues can be avoided entirely if child support, spousal support, or divorce settlements are directed to a special needs trust. A special needs trust holds funds and assets for the sole benefit of an individual with disabilities, and follows particular requirements that prevent anything in the trust from counting toward the financial limits imposed by means tested public benefits like SSI and Medicaid. There are three different types of special needs trusts that work for different circumstances.

If an individual is legally entitled to support or a settlement by court order, that funding can be directed to a first party “d4A” trust without jeopardizing SSI or Medicaid eligibility.⁷ A d4A trust must be established before the beneficiary is 65 years old. It must be established by a court, a parent, a guardian, or a grandparent and cannot be established by the individual himself. If it is being established by a parent who also happens to have a durable power of attorney for the beneficiary, the parent must establish the trust in their own capacity and not as attorney-in-fact for their child.⁸ If the d4A trust is being established by a court, it must be “ordered” by the court and not simply “approved” by the court.⁹ The trust agreement must include a Medicaid payback provision, allowing Medicaid to be reimbursed upon the beneficiary’s death for all Medicaid funding spent on that individual during their lifetime.

First party funds can also be directed to a pooled “d4C” trust without jeopardizing SSI or Medicaid eligibility.¹⁰ A pooled trust is managed by a nonprofit which serves as trustee and manages the trust property. These nonprofits often manage third party trusts as well. A pooled trust is a good option where a professional trustee is needed. Pooled trusts, however, are subject

⁵ [POMS SI 00810.420](#).

⁶ Some resources are excluded from being counted against the resource limit, such as the primary residence. [POMS SI 01130.050](#), [POMS SI 01130.100](#). Cash resources are considered income in the month of receipt and count toward the resource limit on the first day of the next month if they have not yet been spent. [POMS SI 01110.600](#). Currently in Ohio, the SSI resource limit is \$2000 and the Medicaid resource limit is \$1500. By the end of 2016 SSI eligibility will be tied to Medicaid eligibility and the resource limit for both programs will be \$2000. “[Simplify Eligibility Determination](#),” Ohio Governor’s Office of Health Transformation (April 15, 2015), <http://www.healthtransformation.ohio.gov/LinkClick.aspx?fileticket=hSAAEHhkLjA%3d&tabid=252>.

⁷ 24 U.S.C. §1396p(d)(4)(A).

⁸ See [POMS SI 01120.203.B.2.f](#), *Draper v. Colvin*, No. 12-2757 (8th Cir. 2015).

⁹ [POMS SI 01120.203.B.2.f](#).

¹⁰ 24 U.S.C. §1396p(d)(4)(C).

to Medicaid payback and transfers to a pooled trust can cause a beneficiary over age 65 to lose SSI for a penalty period.

If the individual is not legally entitled to the support or settlement, it is better to direct the funding to a third party trust. A third party trust does not include a Medicaid payback provision. It is a creature of state law and, in Ohio, should be drafted as a wholly discretionary trust.¹¹ A third party trust is funded with assets that do not belong to the beneficiary, and it must be clear in the trust agreement that the beneficiary cannot revoke the trust, direct how trust assets are distributed, nor sell their beneficial interest.¹²

Referencing our earlier examples, a child support payment for a minor with disabilities directed to a special needs trust will have no impact upon SSI benefits. The child can receive child support while continuing to also receive \$733 per month in SSI. An adult child with disabilities receiving child support each month or an ex-spouse with disabilities receiving spousal support each month can have that support directed to a special needs trust and continue to receive \$733 per month in SSI. Property that is part of the divorce settlement can be directed to a special needs trust without counting against the resource limit. Thus, the ex-spouse can provide financial support that enhances the quality of life for the child or other ex-spouse without simply canceling out or replacing government support.

These and other issues with public benefits are why it is critical for family law attorneys, magistrates, and judges to consult with a special needs attorney when helping an individual with disabilities through a divorce or child support case. Together, we can work across practice areas to make sure that individuals with disabilities have the support they need to live full lives.

¹¹ [ORC §5801.01\(Y\)](#).

¹² [POMS SI 01120.200 D.1.](#)



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The Implications of Same Sex Marriage Cases on Family Law Practices

Leeann Massucci, Esq.
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MARRIAGE EQUALITY

*The Practical Application
of the
Obergefell Decision*

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I. SUPREME COURT OF OHIO RESPONSE to *Obergefell*

- *6/26/16 Administrative Actions 2015-Ohio-2568*
- Board Op. 2015-1
 - Prof. Cond. Rule 8.4(g)

II. FORMER UNIONS

- Civil Unions
- Domestic Partnerships

III. PRENUPTIAL AGREEMENTS

- *De Facto* commencement of marriage?
- Previous prenuptial prior to earlier Civil Union or Domestic Partnership

IV. DETERMINATION OF PARENTAGE

- Marital Presumption?
- Children born **AFTER** the marriage
 - Joint Complaint to Establish Parent-Child Relationship
 - Agreed Judgment Entry and Order
 - Affidavit of Health Insurance

V. STEP PARENT ADOPTION

- Children born **BEFORE** the marriage
- “**THE SAME**” as opposite sex couples

VI. DIVORCE

- Length of Marriage
- Distribution of Assets & Liabilities

VII. MISCELLANEOUS

- Office of Vital Statistics
 - Changing birth certificate; ministerial act ONLY
- Couples who choose NOT to marry
(It's a right ... not an obligation) ☺
 - Shared Custody Agreements

RESOURCES:

- GLAD (www.glad.org)
- NCLR (www.nclrights.org)
- LAMBDA LEGAL (www.lambdalegal.org)
- ACLU (<https://www.aclu.org/issues/lgbt-rights>)
- *and:* <http://marriageequalityfacts.org/> which details frequently asked questions about the marriage ruling



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Family Law Session

Case Law Update

Chris Trolinger, Esq.
Dublin, OH

FAMILY LAW CASE UPDATE SUMMER CONFERENCE 2016

**Chris L. Trolinger, Esq.
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Dublin, Ohio**

The below is a sampling of interesting or important cases throughout the state of Ohio, including the Ohio Supreme Court and the various appellate districts 2014 to present.

Ohio Supreme Court Cases

In re Z.R., 144 Ohio St.3d 380 (Aug 20, 2015)

A child was adjudicated dependent and his mother appealed due to lack of proper venue, as the child had no contacts with Summit County, where the adjudication occurred. The appellate court sustained the mother's objection. The Supreme Court subsequently overturned the appellate court, holding that a failure to establish proper venue in a child-dependency complaint does not require a juvenile court to dismiss the complaint for lack of jurisdiction. The statute and rules governing venue do not control the jurisdiction of the juvenile court in dependency adjudications. The appropriate measure is to transfer the child's case to a proper venue rather than dismiss the case. This case clarifies the rules governing venue and jurisdiction of juvenile courts.

State ex rel. Clough v. Franklin Cnty. Child Servs., 144 Ohio St.3d 83 (Aug 27, 2015)

A mother requested a writ of mandamus to compel the Franklin Country Children Services agency to allow her access files concerning her daughter. The mother argued that she has a right to inspect the documents that pertain to herself and her children, as the report would indicate the reasons behind disposition of her case. She further argued that the disclosure would force the agency to comply with its own policies allowing review of case records. However, the files requested contained investigation of a report of potential child abuse and were held to be confidential under R.C. 2151.421(H). The Supreme Court ruled that any pages that do not record the abuse investigation are still confidential under R.C. 5153.7 (only allowing inspection by certain public entities) and may only be inspected on "good cause," which the mother failed to

show. No contrary agency policy can provide access to a file where that access is already prohibited by law.

In re Adoption of H.N.R., 2015-Ohio-5476, reconsideration denied, (Mar 9, 2016)

The Supreme Court affirmed the decision to deny relief to a father to participate in the adoption of his child due to his failure to preserve his rights or ascertain the legal mechanisms under which he could do so. Father knew of the mother's pregnancy and birth of the child, but did not register in Ohio's Putative Father Registry. Father's as-applied challenge to the statute governing the registry (R.C. 3107.07(B)(1) and 3107.062) failed because father was not injured or prejudiced by the registry's 30-day registration deadline. His argument that the failure to allow registration up to the date of adoption petitions risks erroneous deprivation to many responsible fathers was dismissed as a hypothetical situation inappropriate for consideration by the court. This decision validates the constitutionality of the putative father registration system's deadlines, as well as the standards governing adoptions of children of unwed parents.

In re A.G., 139 Ohio St.3d 572 (June 19, 2014)

Excluding a 13-year old child from a hearing in litigation regarding her custody was proper. It was not a violation of her equal protection rights, because she was not similarly situated as her parents in the case, nor was she entitled to be treated equally with them. She was given an opportunity for her opinions and wishes to be heard through an in-chambers interview, and was represented by counsel, further justifying the exclusion from the hearing itself. The Ohio Supreme Court holds that due process does not mandate that a child be permitted to attend custody proceedings that are ancillary to the child's parents' divorce. A court has the discretion to exclude the child if, under the totality of the circumstances, the court determines that exclusion is in the best interest of the child.

Daniel v. Daniel, 139 Ohio St.3d 275 (Mar 26, 2014)

A husband's military pension should be considered marital property and subject to division upon divorce, even though the exact amount would not be ascertainable until husband had completed 20 years of military service. The trial court erred when concluding that these

unvested retirement benefits were not marital property. The benefits earned during the marriage fall within the definition of marital property under R.C. 3105.171(A). The percentage of ownership of the benefits could be discerned upon divorce, so the court did have enough information to equitably divide the benefits and should have done so.

In re B.C., 141 Ohio St.3d 55 (Oct 16, 2014)

The Ohio Supreme Court held that due process does not entitle a parent to a delayed appeal of the termination of parental rights. The court asserts that a parent already possesses statutory protections including notice, representation, the opportunity to appeal, and the ability to fully participate in the termination proceedings. The existence and utilization of these procedures satisfy the due process requirements. Additionally, allowing a delayed appeal would postpone the permanent placement of the child, which is not in the child's best interest.

Ohio Appellate Court Cases

1st District

In re Z.H., 1st Dist. Hamilton No. C-150301, 2015-Ohio-3209

The appeals court held that a child that is the subject of a permanent-custody proceeding has a legal interest in being cared for by his natural parents. Since this interest was injured when the trial court awarded custody to the child services agency, the child had standing to bring an appeal. The termination of the mother's parental rights injured the child, however, there was sufficient evidence that termination was in the best interest of the child so the termination itself was upheld. While a child can bring a suit for injury resulting from termination of his parent's rights, the termination is still subject to the best interest analysis and damages will not be provided if the termination was in the child's best interest.

In re A.B., 1st Dist. Hamilton No. C-150307, 2015-Ohio-3247

The appellate court clarified the difference between reviewing a trial court's judgment for sufficiency of the evidence and a review of the weight of the evidence. A review for sufficiency involves a question of whether evidence exists as to each element of the claim, allowing the

evidence to sustain that the judgment is a question of law. A review for weight, on the other hand, asks whether the existing evidence on each element satisfies the burden of proof for the case. The appellate court reviewed the evidence presented at trial and concluded that it was both sufficient and was able to reach the clear and convincing standard required in permanent custody determinations.

2nd District

Bohme v. Bohme, 2nd Dist. Montgomery No. 26021, 2015-Ohio-339

The appellate court held that using income as a tool to value an individual's business worth and also as actual income for determination of spousal-support was not impermissible double-dipping because the income was from a closely-held business similar to a wholly-owned professional practice. The husband had complete control over the business's retained earnings. The income of the business was the most efficient way to value the business, as well as to determine the husband's actual income for support purposes; because all income generated by the business was controlled by the husband. This was not double-dipping because it did not actually count the marital asset twice, instead, the figure was used separately in valuing the business and in imputing income to the husband. This case clarifies the scope of impermissible double-dipping for support calculation purposes.

3rd District

Montgomery v. Montgomery, 2015-Ohio-2976

The trial court erred in setting mother's updated income for child support purposes because there were no sufficient documentation supporting the figure that was set. The mother had testified to earning commissions that were less than her previous income, but did not provide paystubs or verified documents regarding these earnings. Instead, she testified as to her estimated expected income based upon the typical amount of her commissions. She provided only documentation for three months of the year, none of which contained commission earnings.

Given the lack of sufficient documentation of her income (as required by R.C. 3119.05(A)), the trial court had impermissibly extrapolated the amount she was earning entirely based upon her statements. Failure to obtain the necessary documentation to reduce income, and subsequently child support obligations, renders a trial court's order an abuse of their discretion. Testimony is not sufficient to meet the burden of proof for a reduction in income for purposes of computing child support obligations

Frey v. Frey, 3rd Dist. Hancock No. 5-15-11, 2015-Ohio-4622

The trial court abused its discretion when granting father's motion for changed circumstances because he did not provide the requisite documentation under R.C. 3119.05(A) to show his reduced income (similar to above, Montgomery). Father alleged reduced income due to a workplace injury, but did not provide any documentation of his workers' compensation benefits other than his worker' compensation employee number. The only support for his reduced income was his own testimony, which is insufficient to prove a changed circumstance.

6th District

In re K.M.-B., 6th Dist. Lucas No. L-15-1037, 2015-Ohio-4626

R.C. 3109.02 (granting grandparent visitation rights under certain precipitating circumstances) was ruled unconstitutional in an as-applied challenge. Maternal grandmother petitioned for visitation of grandchildren born during parents' marriage, and visitation of one grandchild who was born several months before the marriage. As to the children born during the marriage, the appellate court held that there was no statutory authority granting visitation rights to the grandmother. For the child born prior to the parents' marriage, the statute was unconstitutionally applied based a strict scrutiny equal protection review, as there was no significant dispositive event akin to those in the statute justifying the State's interference with the parent's preferences regarding the grandmother's contact with the children. This case clarifies that the birth of a child prior parents' marriage is not a dispositive event implicating the independent right of a grandparent to visit their grandchild and cannot supersede a parent's desires regarding that visitation.

8th District

Al-Mubarak v. Chraibi, 8th Dist. Cuyahoga No. 101392, 2015-Ohio-1018

The appellate court here reaffirmed that it is within the discretion of the trial court to set the de facto date of a marriage's termination. In this case, the date upon which the wife left the marital home was not the de facto date of termination because the wife was completely financially dependent upon the husband and assets were entangled throughout the course of the trial, despite the fact that the wife left the home with no intention of returning. Instead, the de facto date of termination was the date on which the trial was concluded. The trial court also was within its discretion to award high levels of spousal support for an indefinite period of time due to wife's immigrant, employment, mental health, and educational status. Additionally, it was within the trial court's discretion to include the nine-year cohabitation period in which the couple presented themselves as married prior to their legal marriage when determining the length of the marriage for support purposes. The appellate court held that the trial court appropriately included this time because not doing so would be inequitable.

In re Adoption of L.C.F., 8th Dist. Cuyahoga No. 101798, 2015-Ohio-1545, appeal not allowed, 143 Ohio St.3d 1407 (2015).

The appellate court found that the trial court did not err in allowing adoption over biological parents' motion to dismiss the adoption petitions. The biological parents' consent is not necessary in their children's adoption proceeding when the biological parents had financial means to provide for their children, or the ability to maintain contact with the children, but chose not to do so. Here, the parents had previously entered into an agreement with the prospective adoptive parents to grant them "temporary guardianship" of the children, which the prospective parents sought to make permanent through adoption due to the biological parents' continued drug use. The temporary agreement did not negate the parents' obligation to support their children, so their failure to do so without a justifiable cause removed their consent as a barrier to the adoption. The court clarifies that parents cannot negate their obligation to financially support their children through giving another the temporary guardianship of the children.

In re R.W., 8th Dist. No. 101742, 2015-Ohio-1031, 30 N.E.3d 254

The trial court abused its discretion by denying a foster mother's emergency motion to intervene in the placement proceedings for children in her care. Due to her in loco parentis status, she had a legal interest in the care and custody of the children such that she should have been permitted to intervene in the proceedings. Foster parents' limited rights with respect to the children in their care does not always permit this intervention, but because in this case the children were living with the foster mother, their maternal aunt, in Arizona, the distance from the Ohio children's services agency placed her in loco parentis to the children. The appellate court's ruling permitted the extension of the rights granted due to in loco parentis status to some foster parents, but limited its applicability by focusing on the distance of the children from the Ohio agency.

In re B.W., 8th Dist. Cuyahoga No. 102475, 2015-Ohio-2768

The removal of children into immediate custody based upon their tardiness and unexcused school absences was improper, because emergency removal requires more than a threat of future harm under R.C. 2151.31 and 2151.33. The appellate court here asserts that removal must be based on factors that existed at the time of the removal, not pre-adjudication of possible future harms to the children. An order for removal under these circumstances is a violation of due process because it deprives the parent of custody of the child without a compelling government interest and opportunity for the parent to be heard.

9th District

In re R.R., 9th Dist. Summit No. 27572, 2015-Ohio-5245

The appellate court reaffirms that under its jurisprudence, R.C. 2151.419(A)(1) (regarding continued removal of a child from his home), requires a the trial court explicitly find that the children's services agency had made reasonable efforts to prevent the removal of the child from the home. In this instance, the trial court failed to do so. While they did engage in a discussion of their concerns regarding the child's placement with his father, they did not address the reasonability of any efforts undertaken to make the home safe for the child. A finding of

reasonable efforts may not be done implicitly in a trial court's ruling, and the court must set forth, in writing, the factual basis for its finding on this matter. The court clarifies that this is required by previous case articulating this rule, In re J.G., 9th Dist. Wayne No. 12CA0037, 2013-Ohio-417.

10th District

In re K.J., 10th Dist. No. 15AP-21, 2015-Ohio-2244

In a termination of parental rights proceeding, the mother's attorney failed to file a timely appeal of the termination. The question before the appellate court centered on whether an Ohio court of appeals may review the termination judgment when court-appointed counsel failed to file the timely notice of the appeal. R.C. 2151.352 provides an express right to counsel at all stages of the termination proceedings, but this right does not override the jurisdictional limitations imposed on the appellate court. Therefore, the attorney's failure to file the timely appeal does not toll the time for the appeal. The court based this opinion on the binding precedent of the Ohio Supreme Court's holding in In re B.C., 141 Ohio St.3d 55 that due process does not require that the parent be afforded the right to file a delayed appeal of termination orders. The court here concluded that a delayed appeal is not available based upon the In re B.C. language stating that "due process does not entitle" the parent to a delayed appeal, regardless of whether the failure to appeal results from ineffective assistance of counsel.

Gallo v. Gallo, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶ 2 appeal not allowed, 144 Ohio St.3d 1426, 2015-Ohio-5225 (2015)

The appellate court clarified the concept of double-dipping for the purposes of support calculations. They stated that double-dipping is not simply the counting of a marital asset twice, but occurs when the trial court twice counts a future income stream when valuing the marital asset and determining a person's ability to pay spousal support. The appellate court criticizes the definition of double-dipping contained in previous 10th District case, Heller v. Heller, 2008-Ohio-3296, because it misleads courts and does not fully articulate when a double-dip has occurred. In this case, the trial court erred in counting a spouse's business interest as an asset and

considered the income from that asset, deriving from a future stream of business, to set spousal support.

12th District

In re E.T.B., 12th Dist. Clermont No. CA2014-07-051, 2015-Ohio-2991

A grandfather was granted visitation rights to his grandson pursuant to R.C. 3109.12(A), but the appellate court reversed the order on the grounds that the trial court had abused its discretion in not affording the requisite special weight to the mother's concerns regarding visitation. The lower court did evaluate the best interests of the child, including the desires of the mother, when awarding visitation and ultimately concluded that grandfather's visitation would be best for the child given their past, positive relationship. However, the appellate court held that "something more" than acknowledgement of mother's wishes was required to subordinate her constitutional right to control of her child. The mother had advanced several legitimate reasons for opposing the visitation, but the trial court erroneously discounted these in favor of the other best interest factors favoring the grandfather's visitation.

In re C.M., 12th Dist. Butler No. CA2014-10-204, 2015-Ohio-1702

Juvenile court was held to have violated a mother's due process rights when a pretrial hearing was unilaterally changed into a permanent custody hearing. The mother failed to show up for the pretrial hearing, which was subsequently converted into a full custody hearing, entering a default judgment against the mother. Custody was awarded to the country department of jobs and family services. The appellate court concluded that due process, along with the Ohio rules of juvenile and civil procedure prohibit the unilateral conversion of custody proceedings. The burden of following the case schedule and providing notice to the mother of the nature of each proceeding is necessary in light of the fundamental right to parent one's child.

In re L.R.M., 12th Dist. No. CA2014-11-229, 2015-Ohio-4445, 42 N.E.3d 799, 801, ¶ 18

The appellate court ruled that the juvenile court had applied the wrong legal standard in determining whether to grant parenting time to the father. The juvenile court had relied on Pettry

v. Pettry, 20 Ohio App.3d 350 (8th Dist. 1984) when it applied the “extraordinary circumstances” standard for denying parenting time. Father in this case was incarcerated for committing a violent crime against the mother, who sought to have his visitation denied. At the time that Petry was decided, there were no R.C. provisions for determining parenting time under these circumstances. However, now R.C. 3109.05, 3109.051, and 3109.12 have been enacted to govern parenting time and visitation. As such, the appellate court determined that the “extraordinary circumstances” standard has been superseded.