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DIVISION OF PROPERTY ORDERS PART II: WHICH BOX SHOULD I CHECK?

By Phillip Wilson and Caitlin Steiner¹

The most common question about DOPOs is “Which boxes should be checked?” The answer to that question depends on the plan and whether the Participant is currently in pay status. Here are the “Types of Payment” as they are listed in the DOPO form:

1. Age and service retirement benefit, INCLUDING Partial Lump Sum Payments (“PLOS”) received under R.C. 145.46(E)(1), 3307.60(B), 3309.46(B)(4), or R.C. 5505.162(A)(3), and Deferred Retirement Option Plan (“DRO”) under R.C. 742.43 or R.C. 5505.50

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2. Age and service retirement benefit, BUT EXCLUDING Partial Lump Sum Payments (“PLOP”) received under R.C. 145.46(E)(1), 3307.60(B), 3309.46(B)(4) or R.C. 5505.162(A)(3), and Deferred Retirement Option Plan (“DROP”) under R.C. 742.43 or R.C. 5505.50
3. Disability monthly benefit
4. Account refund
5. Additional money purchase annuity/ additional annuity lump sum refund
6. Reemployed retiree money purchase

annuity (when monthly payment exceeds \$25.00) or lump sum refund

7. Defined contribution plan benefit

PARTICIPANT NOT IN PAY STATUS

We suggest leaving all boxes unchecked when the member is in the traditional pension plan and not yet in pay status for OPERS, SERS, and STRS. Please note that this may result in the unfair treatment of the plan participant under certain conditions such as a disability retirement, but there is no other way to protect the property rights of the alternate payee if the boxes *are not* left blank. Checking boxes in Section II. (A) of the DOPO form limits the Alternate Payee to a specific type of payment that may not be applicable when the Participant retires. State Plan representatives have confirmed to us that if all boxes are left blank, the Alternate Payee will receive their benefits from the *first source of benefits the Participant receives*. However, this does not apply to STRS and OPERS members who are enrolled in the member directed or combined plans.

STRS and OPERS offer a defined contribution plan known as the *Member Directed Plan* and a *Combined Plan* which has defined benefit and defined contribution components. If the parties intend to divide the Member Directed Plan or Combined Plan under OPERS, the “Defined contribution plan benefit” box must be checked. The same is true for STRS members who are enrolled in the Member Directed Plan but not for members of the Combined Plan. STRS does allow one component of the Combined Plan to be isolated and divided. Thus, if the parties wish to exclude the

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defined contribution component from division, the “Age and service retirement benefit, INCLUDING . . .,” “Age and service retirement benefit, EXCLUDING. . .,” and “Account refund” boxes need to be checked. If the parties only wish to divide the defined contribution component, only the “Defined contribution plan benefit” box should be checked. Checking all of the boxes will result in both components of the plan being divided. Always check with the Plan in filling out such orders because it is easy to make a mistake.

Although OPF and OSHP do not offer defined contribution plan benefits, we suggest checking boxes prior to retirement because these plans offer a Deferred Retirement Option Program (DROP). As noted earlier, leaving all boxes unchecked means the Alternate Payee will receive their benefits from the first source of benefits the Participant receives. This presents an issue if the parties wish to divide the DROP account because the Participant can commence his or her pension prior to taking a distribution from DROP. This could essentially exclude up to eight years of pension payments, as well as interest, from the Alternate Payee’s share. This is why we suggest checking the three forms of benefits available to OPF members prior to retirement: “Age and service retirement benefit, INCLUDING. . .,” “Account refund,” and “Disability monthly benefit.”

PARTICIPANT IN PAY STATUS

We always recommend checking the box that reflects the current benefit being paid to the Participant. For example, if the Participant selected an age and service retirement benefit and chose not to select a partial lump sum payment or participate

in DROP, we would select the “Age and service retirement benefit, EXCLUDING . . .” box to avoid any confusion. We do this primarily to exclude any reemployed accounts or money purchase annuities that could become payable in the future from division. However, it is unlikely that such reemployed accounts or money purchase annuities would be divided, because—as we mentioned earlier—it is only the first form of benefit payable that is awarded to the Alternate Payee. But when we know the benefit that is already being paid out, why take a risk?

Benefit Assignments

As you can see, when it comes to checking boxes in Section II. (A) of the DOPO form, it is important to know the member’s type of benefit and current status with the plan (active or retired). It is also important to know the member’s current status with the plan when it comes to choosing an assignment.

The DOPO form offers a choice between a set dollar amount per month and a percentage of the marital portion when awarding a portion of the pension to the Alternate Payee. But there is a problem with using coverture when the Participant has been retired: using a coverture assignment after the Participant has been retired for more than one full year will exclude all COLAs that have already been paid to the Participant from the Alternate Payee’s share. It is our understanding that some, if not all plan administrators multiply the Alternate Payee’s interest by the base benefit at retirement, not the gross benefit currently being paid to the Participant. To circumvent this issue, we recommend calculating the marital portion of the ben-

efit and utilizing a dollar amount assignment when the Participant has been retired for more than one full year. The dollar amount assignment ensures the Alternate Payee receives a proportionate share of all past and future COLAs.

However, as you will learn in the next section of this article, such dollar amount assignments are not an option for the Member Directed or Combined plans, which is just another example of how little flexibility of movement the DOPO straight-jacket affords.

ASSIGNMENTS FOR DEFINED CONTRIBUTION AND COMBINED PLANS

The defined contribution and combined plans present nearly insurmountable problems in filling out the DOPO. To say that dividing the defined contribution and combined plans under STRS and OPERS is “problematic” is an understatement because the plans require a coverture assignment. Consider the ramifications of forcing a coverture assignment and not a dollar amount upon attorneys wishing to divide an account balance. First, it forces the parties to submit a “placeholder” DOPO because the exact coverture percentage can only be accurately determined at retirement. Then at retirement a tracing of the marital and separate property must be done so that one can “back into” the correct coverture percentage by dividing 50% of the marital account balance by the total account balance *at retirement*.

Let’s revisit those issues one more time. The coverture assignment is unsuitable for these types of plans because (1) the account is not divided until the Participant

takes a distribution and (2) coverture assumes a linear growth that is not reflective of a defined contribution account. These defined contribution plans consist of employee and employer contributions that are then invested into the market, whereas defined benefit plans calculate the Participant’s benefit at retirement based on certain factors (service performed, salary, and age). Time or service-based coverture occurs when a numerator of time or credited service in the plan while married is placed over a denominator of time or credited service in the plan *at retirement*. This approach, which 45 states have adopted, is equitable when determining the Alternate Payee’s share of the vast majority of defined benefit plans because the service credits accrue in a linear manner and no one service credit is worth more than the other. The Ohio Supreme Court established this approach as a guideline in *Hoyt v. Hoyt*²—more recently reinforced in *Daniel v. Daniel*.³ In contrast, market volatility and fluctuating amounts of contributions provide entirely too much inaccuracy for a coverture assignment to be an equitable approach for dividing defined contribution accounts.

Tracing, therefore, is nearly always a necessity in such accounts because there is no way of knowing which party will be negatively impacted by these administrative procedures without a tracing of the account *at retirement*. With more members choosing to participate in these types of plans, the problem is growing. Of course, the legislature needs to correct this DOPO problem as well as a larger one for former spouses of state employees: the lack of pre-retirement survivor protection for former spouses. When a former spouse is awarded

a portion of a state pension for an active plan participant his or her attorney faces a significant challenge: How to protect the property award knowing that the death of the Plan Participant before retirement will leave the former spouse with no pension benefit. This *Cosby*⁴ problem was discussed in much more detail in Part I of this article.

DISABILITY BENEFITS

The inflexibility of DOPOs has generated another major problem when disability benefits are involved. If a box under Type of Payment is not checked and a Plan Participant later retires under a disability pension, the Alternate Payee may well be overcompensated and a return trip to court—or good faith negotiations—need to take place. Remember our earlier warning about how checking the age and service retirement box might deprive the Alternate Payee a share of the pension if the Participant retires under a disability form of payment? However, a disservice may well then be done to the Participant because the entire disability payments will be divided—even the portion of the payments a court might judge to be separate property if looking at the issue *de novo*.

In Ohio it is well-established law that disability pension payments are not a marital asset except to the extent that they represent the retirement component of the pension. Determining how much of the disability payments are foregone retirement benefits is a frequently litigated issue.⁵

First some background is necessary. For STRS, PERS, and SERS, there are two types of disability benefits that a Participant may receive: The original disability plan or the revised disability plan. Those

hired prior to 1992 receive disability payments under the original disability plan, meaning they will continue to receive disability benefits for the rest of their life given their condition does not improve and they do not return to work. Participants under the revised disability plan must apply for an age and service retirement benefit once they reach normal retirement age. The disability issue is further complicated by the fact that the original disability plan is more generous than the revised plan in that it adds in the years of service from the Participant's age at disability until age 60 in determining the size of this benefit. Is the smaller frozen accrued pension at the time of the disability to be divided or should the enhanced pension which adds additional service to the age of 60 to the pension calculation be divided? This issue has been litigated in Ohio with mixed results.

We suggest checking the “Age and service retirement benefit, INCLUDING . . .” and “Account refund” boxes when the Participant is receiving disability under the revised plan. This way, only the retirement benefit at the member's conversion date is divided, not the disability benefit. The original plan is much more difficult because the “Disability benefit” box must be checked to divide the benefit. If the order is submitted prior to the Participant reaching his or her normal retirement age, the plan will divide the benefit immediately. Because disability benefits should not be divided unless they are taken in lieu of retirement benefits, the original disability plan often requires the parties and their attorneys to file an order years after the divorce.

Another issue concerning the original

disability plan has to do with survivorship. The member receiving this benefit will not have the opportunity to elect a joint and survivor annuity, which means the Alternate Payee's share of the benefit ceases upon the member's death. We recommend life insurance for the Alternate Payee, but given the nature of the Participant's disability, this may be difficult to accomplish.

Fewer original disability plans under OPERS, STRS, and SERS are being awarded given the cutoff date of 1992 used to determine the type of disability benefit. OPF and OSHP, however, offer only a disability plan similar to the original disability plan where members receive disability benefits for the rest of their life. The major distinction to be made between this disability plan and the original is that members can elect a survivor annuity.

REMINDER RECAP

As you can see, having the right information is key when it comes to properly drafting a DOPO. Thus, it is important for any attorney who wishes to divide a public plan in the State of Ohio to send discovery. Simply drafting a DOPO to award an Alternate Payee a percentage of the marital portion is inadequate because it is done with insufficient information. While the Plan may send a letter of approval upon reviewing the DOPO and divorce decree, the potential pitfalls may not be realized for years. To avoid problems for your clients, you should always root out all the necessary Plan information before filling out the DOPO.

DID YOU KNOW?

1. Reemployed accounts/ Money

purchase annuities: Two DOPOs need to be prepared and filed at the same time if the attorneys wish to divide the age and service retirement benefit and reemployed account/money purchase annuity. Otherwise, one DOPO will supersede the other if they are not filed simultaneously. Another important note to make is that Participants of the reemployed account do not earn service credits so a dollar amount assignment must be used when dividing the account. The DOPO must include the Alternate Payee's share of a lump sum refund as well as his or her share of an annuity since Participants can take an annuity once they reach age 65.

2. Combining service and DOPOs at retirement: Attorneys need to prepare two DOPOs if they wish to divide two State Plans. Preparing two DOPOs ensures the Alternate Payee will receive both benefits if the Participant decides to commence them separately. The Alternate Payee will also be credited with service from both Plans if the Participant decides to combine benefits at retirement, but it is possible the Alternate Payee is overcompensated in this situation because the Plans will simply add the numerators together without checking for concurrent service like they do for the denominator. This essentially means Participants that are not credited with more than one full service credit per calendar year when combining service, but that Alternate Payees are.
3. Conflicting information: OPERS and STRS will reject a DOPO if the Participant's address does not match the

address they have on file. Discovery can prevent this type of rejection as these plans will provide you with the Participant's address of record.

A MODEST PROPOSAL

While the bench and bar were consulted during the DOPO creation process, it was more a perfunctory consultation than a collaborative effort. At a time when the problems (and the unnecessary expenses and dangers to the parties involved) with DOPOs are so evident, it is well past time that a truly collaborative effort be undertaken to develop a form that better serves all interested parties. This could be remediated by the legislature developing a DOPO work committee in which the state plans receive feedback from the stakeholders in this process, especially domestic relations judges, magistrates, and attorneys, as well as parties who have been involved in the process, in order to accurately assess the problems people currently confront; problems we have only touched upon. It would also be useful for that committee to have professional guidance from outside ERISA attorneys and actuaries experienced in the world of QDROs.

We would also like the plans and legislature to face the anxiety and dangers our current plans impose on former spouses who have been awarded a portion of the pension. It would seem unnecessary to tell state plans that they should treat former spouses as full owners of a portion of the state pension that a domestic relations court has awarded them—but it *is* necessary. This can only be done with legislation that changes the structure of state pensions and allows a type of preretirement survivor protection for a former

spouse. As we noted earlier in Part I of this article as well as in this part, former spouses awarded a portion of a plan participant's pension are treated as non-entities under the plans. They have no right to any of the pension until the participant actually retires. Interestingly, a number of other states have solved this problem with a straightforward solution: separate interest orders. In other words, the portion of the pension awarded to the former spouse is actuarially converted into a pension for that individual. Such changes can be structured so as not impose funding pressures on the plan. Solving the precarious situation former spouses may be in for decades only requires a desire to remedy the situation, because a viable solution can be readily developed by professionals in the field.

Incidentally, the legislature would help the state pensions ward off political pressures to be integrated with Social Security in establishing preretirement survivorship protection for former spouses similar to that afforded by Social Security.

ENDNOTES:

²*Hoyt v. Hoyt*, 53 Ohio St. 3d 177, 559 N.E.2d 1292, 12 Employee Benefits Cas. (BNA) 2584 (1990).

³*Daniel v. Daniel*, 139 Ohio St. 3d 275, 2014-Ohio-1161, 11 N.E.3d 1119 (2014).

⁴*Cosby v. Cosby*, 96 Ohio St. 3d 228, 2002-Ohio-4170, 773 N.E.2d 516, 28 Employee Benefits Cas. (BNA) 2655 (2002).

⁵Disability payments are generally assumed to be separate property. However, there is a notable exception to that general rule and that occurs when the disability payments are accepted in lieu of pension payments. This, of course, makes immense sense in that it prevents the plan partici-

pant from unilaterally converting marital property (the pension earned during the marriage) into separate property. This is the dominant case law in Ohio. See *Arkley v. Arkley*, 2003-Ohio-7021, 2003 WL 22999285 (Ohio Ct. App. 7th Dist. Jefferson County 2003). More specifically courts have found that the disability payments become marital property at the time the plan participant is eligible to retire. See *Mathews v. Mathews*, 2013-Ohio-2471, 2013 WL 3018161 (Ohio Ct. App. 2d Dist. Clark County 2013). *Burkhart v. Burkhardt*, 2009-Ohio-1307, 2009 WL 737394 (Ohio Ct. App. 12th Dist. Clermont County 2009) and *Fannin v. Fannin*, 1999 WL 450205 (Ohio Ct. App. 12th Dist. Preble County 1999) (unreported) simply point to the fact that disability payments transmute into retirement benefits at some point in time. There is one other common refinement that Ohio courts have routinely adopted: The disability payments received before the normal retirement age are separate property because they are wage replacement and not retirement pension benefits. *Motter v. Motter*, 2000-Ohio-1714, 2000 WL 1049311 (Ohio Ct. App. 3d Dist. Wyandot County 2000) is perhaps the most commonly cited case on this refinement to the general rule. An outlier for this wage continuation concept is *Okos v. Okos*, 137 Ohio App. 3d 563, 739 N.E.2d 368 (6th Dist. Lucas County 2000) which held that *all* disability payments from the plan were wage continuation even after the law enforcement officer reached the normal retirement age. This “the payments never become marital property” is routinely ignored across *Henderhan v. Henderhan*, 2002-Ohio-2674, 2002 WL 1058376 (Ohio Ct. App. 5th Dist. Stark County 2002) a trial court determined that the full lump sum settlement annuity that the injured party received in lieu of disability payments was marital in nature and subject

to equitable distribution.

THE SULLIVAN CASE: MILITARY DIVORCE LESSONS FOR LITIGANTS AND LAWYERS

by Mark E. Sullivan*

“Doubt, delay and denial” might have been an appropriate headnote for the *Sullivan* case. Decided October 27, 2020 in the Ohio Court of Appeals for the Second Appellate District, *Sullivan v. Sullivan* dealt with the division of military retired pay, contempt charges against the ex-husband/retiree Brendan Sullivan (“Brendan”), and allocation of the Survivor Benefit Plan to Brendan’s former wife, Lisa Sullivan (“Lisa”).¹ The facts are straightforward.

“JUST THE FACTS, MA’AM • • •”

After a marriage lasting 19 years, the parties were divorced in June 2018. Brendan, a retired military officer, was required to pay Lisa 46.52% of his disposable retired pay. The reduction from 50% was to allocate to her the entire premium for the survivor annuity, the Survivor Benefit Plan (SBP). Brendan was ordered to make all payments until the retired pay center² began garnishment of his retired pay.

Unfortunately, Brendan got behind. In post-divorce proceedings Lisa moved to hold him in contempt for not paying the required part of his military pension. Eight

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months after the entry of the divorce decree ordering him to share his pension, the court found him in contempt of court and ordered him to pay arrears at \$255/mo. (plus attorney fees of \$500) to purge himself. There are five lessons to this story.

WHEN IN DOUBT, KNOW HOW TO COUNT

Brendan said he was *in doubt*. He claimed that he doubted that the calculation of the payable pension-division amount was accurate. He claimed that he had not signed the paperwork due to “false information.”

The first lesson is “know how to count.” The decree said for Brendan to pay Lisa 46.52% of his *disposable retired pay*. While Brendan may not have known precisely what to pay, the trial court *didn’t know how to count*.

Under the rules in the Uniformed Services Former Spouses’ Protection Act, at 10 U.S.C.A. § 1408(a)(4)(A), “disposable retired pay” is (in this case) simply gross pay less the SBP premium. Brendan’s numbers were:

Gross ret’d pay	\$3,071	Shown on RAS ³
SBP premium	200	Ditto
Disposable ret’d pay	2,871	Ditto
Amount for Lisa	\$1,336	Disp. ret’d pay X 46.52%

³ Retiree Account Statement. Each retiree’s RAS is shown at the secure DFAS website, <https://myPay.dfas.mil>.

Even though the math is pretty simple, the trial court still got it wrong. The court ruled that Lisa was entitled to 46.52% of Brendan’s *gross pay*.⁴ Apparently unaware

of this error, the appellate court stated that that trial court’s retired pay calculations were supported by the terms of the divorce decree and the testimony of Lisa.⁵

The court ordered Brendan to pay Lisa \$1,428.02 per month. That’s about 46.52% of the *gross retired pay* for Brendan. The proper number for Lisa was 46.52% of Brendan’s *disposable retired pay*, amounting to approximately \$1,336 per month, a difference of about \$90 per month. At \$1,428/mo., Brendan would be overpaying Lisa by about \$1,000 a year!

DELAY

Brendan claimed delay as a defense. As justification for his actions, Brendan said he hadn’t signed the required documents because he “just got it” on the day of the hearing. Apparently the paperwork was delayed.

The second point could be framed as a question - “Why the delay?” Why should it have taken from June 2018 to February 2019, if one believes Brendan, to prepare a military pension division order (MPDO)? A proper order can be prepared on two or three sheets of paper. One can contract with a firm which prepares QDROs to do the drafting. It’s also simple to do it from examples found on-line.⁶ The “best practices rule” dictates that supplemental orders should be completed simultaneously with the underlying decree or judgment, so that details will not be missed, memories won’t fade, and the matter won’t simply fall off the radar screen.

The author’s firm prepares MPDOs every week of the year. Given the proper facts in a simple case (e.g., wife gets 46.52% of

husband's disposable retired pay, and husband will elect former-spouse SBP coverage for wife), it would take less than an hour to draft such an order. The Court of Appeals opinion says nothing about why the drafting was delayed.

DENIAL

Part of Brendan's defense was his denial regarding underpayment. He didn't believe that he had paid Lisa less than what was owed.

The trial court found—after reviewing a payment schedule that showed wide variances and zero in some months—that Brendan had paid over \$8,000, and that he was behind about \$4,000. Since the definition of *disposable retired* pay is right in the statute,⁷ it's hard to see how he could have gotten it wrong. On the other hand, as we've seen above, even the trial court *got it wrong*, by calculating Lisa's share out of gross retired pay, when the initial order clearly said *disposable retired pay* was the benchmark!

AND DOUBT AGAIN . . .

The fourth point is “doubt” once again. Brendan argued that he doubted whether the share given to Lisa, 46.52%, was the correct adjusted share of his pension.

Since Brendan signed the initial divorce settlement, he shouldn't have made this argument. He was bound, through the doctrine of *res judicata*, from asserting a subsequent attack on the prior decree and from denying the validity of its findings.

Still, it's worth examining whether the counting was done correctly. The simple answer for “cost-shifting” in SBP cases

(i.e., having the former spouse pay the entire premium through a reduction in her share of the pension) goes like this:

1. Determine the cost of SBP (it's 6.5% of the SBP base, usually the entire pension, for those who retired from active duty)
2. Subtract that percentage from 100%—the result is 93.5%
3. Convert the percent to a decimal—that's .935
4. Determine the retiree's share—that's 50% in this case
5. Divide that share by .935—in this case, $.50 / .935 = .5347$
6. Subtract the result in #5 above from 100% to get the new share for the former spouse, which would be $100\% - 53.48\% = 46.52\%$ for Lisa.

This can be done for any case in which the retiree has a “regular retirement,” that is, a retirement after at least 20 years of active duty.

COOPERATION

The last lesson involves the process of submission of the paperwork to the retired pay center. The initial order required *Brendan to cooperate* in signing documents and not to interfere with Lisa's application for direct payment of her share of the pension. Did Brendan violate this? Was this clause even necessary?

The process of submitting orders for SBP and pension division is not complicated. And it requires no cooperation by the servicemember or retiree. All that Lisa's attorney had to do was:

- Write up the MPDO (see above)
- Get it signed and filed
- Fill out DD Form 2293 (former spouse application for pension share)
- Complete DD Form 2656-10 (former spouse deemed election for SBP)
- Fill out forms for direct deposit and tax withholding
- Send DFAS the above documents with certified copies of the divorce decree and MPDO.

That's what it takes. And the retiree's cooperation is not needed for any of these!

CONCLUSION

While military pension division cases are not regular fare for most attorneys, they are not a cause for panic. When the going gets difficult, it's often a wise idea to adopt two strategies:

- First, review the resources which are available. There are dozens of Silent Partner infoletters available at the website of the North Carolina State Bar's military committee, <https://www.nclamp.gov> at Publications. They cover virtually all aspects of dividing the pension, allocating SBP (or defending against it), and dividing the Thrift Savings Plan, among other topics.
- Don't go it alone. Hire an attorney who's "been around the block" with these problems a couple of times. That's what is called a *sidekick* or—among fighter pilots—a "wingman." This can be a Reservist or a lawyer in the National Guard. Or it can be a

lawyer or firm which does DRO's and pension division orders. It could even be an attorney who is retired from the military.

With these basic precautions and the above five lessons, the next military pension division can be faced without fear.

ENDNOTES:

¹*Sullivan v. Sullivan*, 2020-Ohio-5036, 2020 WL 6255267 (Ohio Ct. App. 2d Dist. Montgomery County 2020).

²For the Army, Navy, Air Force and Marine Corps, this is DFAS, the Defense Finance and Accounting Service, located in Cleveland, Ohio. Retired pay for members of the Coast Guard and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration is handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

⁴*Sullivan v. Sullivan*, 2020-Ohio-5036, ¶ 10, 2020 WL 6255267, at *3-4 (Ohio Ct. App. 2d Dist. Montgomery County 2020).

⁵*Sullivan v. Sullivan*, 2020-Ohio-5036, ¶ 16, 2020 WL 6255267, at *5 (Ohio Ct. App. 2d Dist. Montgomery County 2020).

⁶A Silent Partner info-letter prepared by the author, "Getting Military Pension Orders Honored by the Retired Pay Center," contains sample clauses for use in the MPDO; it can be found the Publications tab at www.nclamp.gov Publications.

⁷10 U.S.C.A. § 1408(a)(4)(A).

A “KINDA-SORTA-MAYBE” CLARIFICATION OF TERMINATING A SHARED PARENTING DECREE

By Kendra L. Carpenter, Esq.*

On October 8, 2020, the Supreme Court of Ohio clarified whether a change of circumstances is needed when terminating a shared parenting decree. Well, kinda . . . sorta . . . maybe?

In *Bruns v. Green*¹, the Supreme Court heard a combined jurisdictional appeal and a certified conflict brought by the Tenth District as a result of the Fifth District case *Wright v. Wright*² as to whether a change in circumstances under R.C. 3109.04(E)(1)(a) is required when terminating a shared parenting plan/decree and subsequently modifying parental rights and responsibilities under R.C. 3109.04(E)(2).³ Abrogating *Wright*, the Court found that R.C. 3109(E)(1)(a) does not apply when terminating a shared parenting plan; courts need to consider only if the termination is in the child’s best interest. Notably, the Fifth District was the only Ohio district that interpreted the statute to require a change in circumstance.

Aside from the purported clarification of the law, Justice Kennedy broached a larger issue in her concurring opinion. The jurisdictional appeal in *Bruns* was brought by the father, who relied upon *Fisher v. Hasenjager*⁴ decided by the Court in 2007. Therein, the Court’s syllabus stated:

A modification of the designation of residential parent and legal custodian of a child requires a determination that a “change in circumstances” has occurred, as well as a finding that the modification is in the best interest of the child. (R.C. 3109.04(E)(1)(a), construed.)

While the black letter law is correct in *Fisher*, Justice Kennedy pointed out that the ruling is misleading because it is not consistent with the underlying facts of the case.

Like in *Bruns*, *Fisher* involved a termination of a shared parenting decree. The *Fisher* trial court found that termination was in the child’s best interest. Unfortunately—as Justice Kennedy noted—the trial court failed to identify the statute upon which it relied, causing the Third District Court of Appeals to interpret the trial court’s finding as a modification of the plan that required a change in circumstance. The Third District reasoned:

Since both parties previously agreed to equally allocate the parental rights and responsibilities of [the child], the trial court’s finding “terminates” or removes this specific term or provision of the plan and replaces it with a term * * * that [Mother] is the residential parent and legal custodian * * *.

In essence, the trial court has modified the parties’ shared-parenting plan, when it named [Mother] residential parent and legal custodian.

Additionally, this conclusion is further supported by the trial court’s decision to leave “all other orders not in conflict with the [modifications it made] /sic/ in full force and effect.” This shows that the trial court intended to keep the remaining terms of the plan in effect and enforceable.

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Recognizing that its decision conflicted with rulings by the Twelfth District, the Third District certified the matter to the Supreme Court of Ohio to determine whether a change of a child's legal custodian and residential parent is considered a "term" in a shared parenting decree that did not require a change in circumstance. In a five-two decision penned by the late Chief Justice Moyer, the *Fisher* Court said, "no" and remanded the case to the trial court to determine if there was a change in circumstances.⁵

Though the *Fisher* syllabus correctly stated the law, it did not arise out of the facts of the underlying case. Even Justice Pfeifer seemed baffled by his colleagues' reasoning. In his dissent, he pointed out the case involved a *termination* of a shared parenting decree under R.C. 3109.04(E)(2)(c), which allows a court to terminate based solely on the best interest standard. He noted that after termination, R.C. 3109.04(E)(2)(d) then required the court to *modify* the decree for the allocation of parental rights as if shared parenting had never been granted. Yet, such a "modification" was not a trigger to invoke the need for a change of circumstance under R.C. 3109.04(E)(1)(a).

Circling back to *Bruns*, the Father in *Bruns* relied upon *Fisher* because the facts in the two cases were identical. Both involved a shared parenting plan under which both parents were the residential parents and the legal custodians. Both plans were terminated. And in both cases, the residential parent and legal custodian status was modified, and one parent was named the sole residential parent and legal custodian. Yet, both cases were decided differently.

Justice Kennedy argued that the use of the term "modification" in *Fisher* did not undermine its applicability to *Bruns* and that the *Bruns* Court should have explicitly overruled its finding in *Fisher*. She stated:

[I]f this [*Bruns*] court had applied the correct statutory provision in *Fisher*, then *Fisher* would control this case. But *Fisher* does not apply here, not because there is a relevant factual distinction between that case and this one but because *Fisher* was wrongly decided. *Fisher* treated a termination of a decree and plan of shared parenting as if it were a modification of a shared-parenting plan, when a termination is another thing entirely. A trial court must consider a termination under the standard set forth in R.C. 3109.04(E)(2)(c).

Because the *Bruns* Court did not overrule *Fisher*, it remains good law. As Justice Kennedy pointed out, the Court now has two different holdings on the same fact pattern and appellate courts are without any guidance on future cases. So, *Bruns*, kinda . . . sorta . . . maybe . . .

ENDNOTES:

¹*Bruns v. Green*, 2020-Ohio-4787, 2020 WL 5948530 (Ohio 2020) (official citation not yet available).

²*Wright v. Wright*, 2012-Ohio-1560, 2012 WL 1143664 (Ohio Ct. App. 5th Dist. Stark County 2012) (abrogated by, *Bruns v. Green*, 2020-Ohio-4787, 2020 WL 5948530 (Ohio 2020)).

³*Bruns v. Green*, 157 Ohio St. 3d 1446, 2019-Ohio-4177, 132 N.E.3d 722 (2019).

⁴*Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 2007-Ohio-5589, 876 N.E.2d 546 (2007).

⁵*Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 60, 2007-Ohio-5589, ¶ 36, 876 N.E.2d 546, 553–54 (2007).

ETHICS CASES

DISCIPLINARY COUNSEL V. FORD—NEGLECT AND FAILURE TO ACT WITH REASONABLE DILIGENCE—FAILURE TO COMPLY WITH CLIENT’S REASONABLE REQUESTS FOR INFORMATION—FAILURE TO DEPOSIT CLIENT FUNDS IN IOLTA—FAILURE TO COMPLY WITH DISCIPLINARY COUNSEL—ENGAGING IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION—FAILURE TO DELIVER CLIENT’S PAPERS UPON TERMINATION OF REPRESENTATION—MULTIPLE INSTANCES OF EACH—PRIOR SUSPENSIONS FOR FAILING TO REGISTER—INDEFINITE SUSPENSION

Citation: *Disciplinary Counsel v. Ford*, 159 Ohio St. 3d 558, 2020-Ohio-998, 152 N.E.3d 256 (2020)

Attorney Ford was admitted to practice in Ohio in 1997. She was previously suspended for two years for failure to register for that two-year biennium. This current grievance involved four different clients.

Shelly Hingsbergen hired Ford to handle a divorce. Ford drafted a separation agreement and a shared parenting plan and purportedly sent them to Hingsbergen in

August although Hingsbergen did not receive them until October. Six months later, Hingsbergen sent a letter via certified mail to Ford terminating Ford and requesting a refund. Ford did not respond and Hingsbergen filed a grievance. In responding to Relator’s letter and ensuing investigation Ford lied about having sent a letter to Hingsbergen in an attempt to rectify the situation, lied about having sent Hingsbergen restitution, ignored Relator’s requests for additional information and documentation, and failed to appear for her deposition. It was also revealed that Ford had not had a trust account for at least two years and that she was conducting business out of her husband’s personal checking account.

Michelle Craine hired Ford to file a post-decree contempt matter. Craine’s former husband sent a \$1,500 check to Ford as payment of the attorney fee award. Ford deposited the check into her husband’s personal checking account. Ford did not inform Craine about receipt of the check for over 20 days, and in the email to Craine telling her about it, Ford stated she was mailing a reimbursement check “from escrow” even though she had no trust account. Over the next 40 days Craine continued to inquire about the check, at the end of which time Ford sent an email to Craine falsely stating she, Ford, had “traced it through my escrow and the information for delivery was all correct.” Ford did not respond to further inquiries from Craine or remit the funds to her. Ford ignored inquiries from disciplinary counsel and failed to appear for her deposition. Ford did make restitution to Craine, almost two years after she had received the money from Craine’s former husband.

Ford appeared at a pretrial hearing for Sheri Vidourek, a long-time client, but then did not respond to Vidourek's calls, texts or emails for over two months. Ford did not respond to any of Relator's inquiries.

Shana Zink hired Ford to file a post-decree motion to modify spousal support. After the court denied the motion Ford then tried to file a motion to modify child support. The clerk would not let her file it without paying a \$125 filing fee. Ford then lied to Zink, telling her the motion had been scheduled for a hearing, but that Zink needed to send \$250 for the filing fee. Ford then filed the motion and converted the remaining \$125 to her own use. Ford lied at her disciplinary hearing, telling the panel she had refunded the \$125 to Zink by Venmo the previous Friday, but after the hearing Relator submitted documentation showing Ford had sent the Venmo payment less than one hour before her appearance at the disciplinary hearing.

The parties stipulated and the board found that Ford's conduct violated Prof.Cond.R. 1.3 (requiring a lawyer to act with reasonable diligence in representing a client), 1.4(a)(4) (requiring a lawyer to comply as soon as practicable with reasonable requests for information from a client), 1.15(a) (requiring a lawyer to hold the property of clients in an interest-bearing client trust account, separate from the lawyer's own property), 1.15(c) (requiring a lawyer to deposit into a client trust account legal fees and expenses that have been paid in advance), 1.16(d) (requiring a lawyer to promptly deliver client papers and property as part of the termination of representation), 8.1(b) (prohibiting a lawyer from failing to disclose a material fact

in response to a demand for information from a disciplinary authority), and 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) and Gov.Bar R. V(9)(G) (prohibiting a lawyer from neglecting or refusing to assist in a disciplinary investigation).

Relator recommended that Ford be suspended from the practice of law for two years and that prior to reinstatement, she be required to submit to an evaluation by the Ohio Lawyers Assistance Program ("OLAP"), comply with any treatment recommendations arising from that evaluation, and submit proof that she is capable of returning to the competent, ethical, and professional practice of law. The board agreed with the mental-health aspects of relator's recommended sanction but recommended that Ford be indefinitely suspended from the practice of law for her misconduct. A 6-1 majority of the Court (O'Connor, C.J., and French, Fischer, DeWine, Donnelly, and Stewart, JJ.) agreed with the Board. Kennedy, J., dissented in part and "would not impose the additional conditions for reinstatement."

DISCIPLINARY COUNSEL V. SPINAZZE—MAKING FALSE STATEMENTS TO A TRIBUNAL—ENGAGING IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION—ENGAGING IN CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE—SIX-MONTH SUSPENSION

Citation: *Disciplinary Counsel v. Spinazze*, 159 Ohio St. 3d 187, 2020-Ohio-957, 149 N.E.3d 503 (2020), reinstatement granted, 2020-Ohio-4680, 2020 WL 5833871 (Ohio 2020)

Attorney Spinazze was admitted to practice in Ohio in 2000. No prior disciplinary record was noted in the opinion. At the time the conduct occurred he was serving as a part-time prosecutor in Sylvania, Ohio.

In November 2017 Jeremiah Johnson was arrested for OVI. Spinazze was assigned to prosecute Johnson's case. In April 2018, Spinazze met with Johnson's attorney and a deputy sheriff, Jeff Bretzloff, to view Bretzloff's body-camera video of Johnson's arrest. After watching the video, Johnson's attorney indicated that Johnson would be willing to plead guilty to a reduced charge of having physical control of a vehicle while under the influence. Bretzloff, however, objected to the proposed resolution. Spinazze nevertheless later agreed to recommend reducing Johnson's OVI charge to the misdemeanor physical-control offense. After learning of the plea

agreement, the municipal-court judge—who knew that Johnson had two prior alcohol-related convictions—requested that Spinazze appear in court and explain the basis for the recommendation. When he appeared, Spinazze misled the court regarding the evidence in the city's case against Johnson. Spinazze also falsely stated that the arresting officers, including Deputy Bretzloff, had consented to the plea agreement. Based on Spinazze's representations, the court accepted Johnson's plea.

Spinazze made false notations in the case file about why he agreed to reduce the charge. He also lied to his supervisor (Cole) about whether the arresting officer (Bretzloff) had consented to the plea agreement and failed to inform his supervisor about the false statements he had made to the court. After Cole listened to the court's audio recording of the hearing, she expressed to Spinazze her concern that he had misled the court about the basis for his recommendation and whether he had the arresting officers' consent. In response, Spinazze falsely claimed that he had made a mistake at the hearing by relying on defense counsel's account of the incident and by agreeing to recommend the reduction without first reviewing the file. After Deputy Bretzloff told Cole the truth, she confronted Spinazze again, and he admitted that Bretzloff was correct. Thereafter, the city's law director placed Spinazze on unpaid administrative leave, and Spinazze submitted a written apology to the municipal-court judge and apologized in person to Bretzloff. Spinazze also self-reported some of his misconduct to relator. The city ultimately terminated Spinazze from his position as an assistant prosecutor.

Because the municipal court had relied on Spinazze's false statements in accepting the parties' plea agreement, the city moved to vacate Johnson's plea. The city also requested the appointment of a special prosecutor, and Johnson's attorney moved to withdraw. After the court appointed new attorneys for the case, an acting judge vacated Johnson's plea and found him guilty of OVI.

Spinazze admitted that his conduct resulted in multiple rule violations. By making false statements to the municipal-court judge, he violated Prof.Cond.R. 3.3(a) (prohibiting a lawyer from making a false statement to a tribunal). By making a false notation in the case file and making false statements to his supervisor, he violated Prof.Cond.R. 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). And because his misrepresentations resulted in a series of events that prejudiced the administration of justice in Johnson's case—including requiring the appointment of a special prosecutor and new defense counsel and causing the court to accept and then vacate Johnson's original plea—Spinazze violated Prof.Cond.R. 8.4(d) (prohibiting an attorney from engaging in conduct that is prejudicial to the administration of justice). The Board recommended a six-month suspension and Spinazze objected. The Court unanimously overruled his objections, stating:

“When an attorney's misconduct includes a course of conduct involving dishonesty—and especially when the dishonesty includes making misrepresentations to a court—we generally impose an actual suspension. (Citations omitted)”

DISCIPLINARY COUNSEL V. BRUEGGEMAN—ENGAGING IN CONDUCT INVOLVING DISHONESTY, FRAUD, DECEIT, OR MISREPRESENTATION—NEGLECT AND FAILURE TO ACT WITH REASONABLE DILIGENCE—FAILURE TO COMPLY WITH CLIENT'S REASONABLE REQUESTS FOR INFORMATION—FAILURE TO PROVIDE COMPETENT REPRESENTATION—TWO-YEAR SUSPENSION WITH 18 MONTHS STAYED

Citation: *Disciplinary Counsel v. Brueggeman*, 160 Ohio St. 3d 198, 2020-Ohio-1578, 155 N.E.3d 833 (2020)

Attorney Brueggeman was admitted to practice in Ohio in 1972. In December 2010, he received a conditionally stayed one-year suspension for his neglect of four client matters, failure to reasonably communicate with the affected clients, and failure to cooperate in the ensuing disciplinary investigations. This proceeding involved two separate grievances.

Rebecca Lowry paid Brueggeman \$750 to handle the estate of her deceased brother Christopher. During Lowry's first meeting with Brueggeman, she informed him that she had a buyer for Christopher's truck and asked him how to complete the transaction. At Brueggeman's disciplinary hearing, Lowry testified that Brueggeman told her to sign Christopher's name to the title and backdate the signature so that the truck would not have to pass through the probate estate. Brueggeman denied

that he told Lowry to sign Christopher's name, but he admitted that he notarized the signature—falsely certifying that it had been sworn to and subscribed in his presence by Christopher. The document was never used to transfer ownership of the vehicle. Brueggeman failed to open an estate during the nearly six months he represented Lowry and subsequently stopped working on the matter but failed to inform Lowry. After Lowry filed a grievance Brueggeman refunded the entire \$750.

Angela and Irene Baker retained Brueggeman to probate the estate of their mother Lucille. Brueggeman failed to obtain waivers of the notice of hearing on the inventory from all 14 of Lucille's children, not mailing the required documents to the children until one day before the statutory deadline for filing them. The court issued multiple deficiency notices. Brueggeman sent to the magistrate a certificate of transfer of Lucille's home and requested the magistrate's assistance on how to proceed since the estate's liabilities exceeded its assets. At a status conference, the magistrate informed Brueggeman that because of the way Brueggeman had drafted Lucille's will, her home could not be sold until all her creditors had been satisfied. After that status conference Brueggeman told Irene he could not continue commuting from his home in Mason to the court in Medina (a 400 mile round trip) but never told her he was terminating his representation, did not tell her that she would need to secure new counsel, and in fact told her he would continue to try to work things out with the estate creditors. Eventually Irene obtained new counsel.

The Board recommended a two-year

suspension with 18 months stayed, and a unanimous court agreed.

**CINCINNATI BAR
ASSOCIATION V. TURNER—
FAILURE TO DEPOSIT CLIENT
FUNDS IN A TRUST
ACCOUNT—FAILURE TO
PROMPTLY DELIVER
UNEARNED FUNDS TO
CLIENT—ONE-YEAR STAYED
SUSPENSION**

Citation: *Cincinnati Bar Association v. Turner*, 2020-Ohio-4030, 2020 WL 4690439 (Ohio 2020)

Attorney Turner was admitted to practice in Ohio in 2009. No prior disciplinary record was referenced in the opinion.

In September 2017, a client paid Turner \$2,500 to handle a divorce. The written fee agreement stated Turner would draw against these funds to charge her hourly fee. However, Turner failed to deposit any of the \$2,500 into her trust account. In September 2018, another divorce client paid Turner a \$5,000 retainer and another \$375 for filing fees. Turner again failed to deposit any of these funds in her trust account. Before Turner could file the divorce complaint the client terminated her. Although Turner refunded the \$5,000, she failed to refund the \$375. Between February 2017 and November 2019 Turner was attorney of record on at least 19 other domestic relations cases in which she deposited all the money those clients paid her into her operating account and none into her trust account.

Based on this conduct, Turner stipulated

and the board found that she violated Prof.Cond.R. 1.15(c) (requiring a lawyer to deposit into a client trust account legal fees and expenses that have been paid in advance) and 1.15(d) (requiring a lawyer to promptly deliver funds or other property that the client is entitled to receive).

The board found one aggravating factor—that Turner had committed multiple offenses. As for mitigating factors, the board found that Turner has a clean disciplinary record in Ohio and that she had lacked a dishonest or selfish motive, made full and free disclosures to the board and showed a cooperative attitude toward the disciplinary proceedings, and submitted evidence of good character. The board also credited Turner for her sincere expression of remorse and her commitment to rectify her misconduct. The board noted that Turner is a solo practitioner without any staff and that prior to the disciplinary investigation, she had failed to study and understand Prof.Cond.R. 1.15's requirements. Despite those shortcomings, the board found no indication that Turner had failed to provide the legal services for which her clients had paid her. The board also concluded that at the time of her disciplinary hearing, she was in compliance with Prof.Cond.R. 1.15.

The board recommended a one-year suspension, fully stayed. A unanimous court agreed.

BRIEFLY NOTED

CHILD SUPPORT

Grover v. Dourson

Citation: *Grover v. Dourson*, 2020-Ohio-4353, 2020 WL 5361197 (Ohio Ct. App. 12th Dist. Preble County 2020)

In a previous appeal, the Twelfth District Court of Appeals reversed the trial court's order requiring father to name children as beneficiaries of life insurance of a least \$250,000 so long as he had an obligation to pay child support. The Court of Appeals held that while it is permissible to secure child support by life insurance, the amount of the insurance should not be greater than the amount of support the children would have received if the parent remained alive. Considering the age of the children and that the children would receive social security survivor benefits at father's death, the amount of ordered insurance was excessive.

After remand the trial court revised its order by allowing father to name his trust as the beneficiary of life insurance, but that "the children receive all income from the policies as Mother deems acceptable to provide for their general welfare and education." On appeal, the Court of Appeals again reversed the trial court. Any provision which extends a child support order beyond the death of the obligor is void. Any order of insurance to secure child support must not permit the children to receive an amount in excess of what would have been received had the obligor survived. The new order did not assure that the amount to be received would meet that requirement. As mentioned in the first appeal the trial court, once again, failed to

consider father's social security benefits which were greater than his support obligation. Additionally, it was error to allow mother to determine what an acceptable distribution would be from father's trust.

On remand, the trial court was instructed not only to assure the children would receive no more than if father had survived, but also to take into account the social security survivor benefits they would receive, and that absent an agreement of the parties mother would have no authority over the time or amount of any additional distributions once life insurance proceeds were paid to meet father's support obligations.

Million v. Million

Citation: *Million v. Million*, 2020-Ohio-4849, 2020 WL 5989214 (Ohio Ct. App. 2d Dist. Montgomery County 2020)

The parties had an adopted disabled child at the time of their divorce. They received financial support through the Title IV-E Adoption Assistance Program with two checks every month in the amounts of \$250.00 and \$791.58. They divorced in 2013 and their shared parenting plan provided that there would be no exchange of child support. In lieu of child support, father gave his check to mother each month and she would be entitled to both of the checks. In 2018 mother filed a motion to modify child support. The trial court held that the adoptive assistance checks could not be applied in lieu of child support and were not a proper basis for a deviation in child support. Father was ordered to pay \$565 per month in child support. Husband appealed.

The court of appeals affirmed. It likened

the adoptive assistance funds as analogous to SSI benefits. SSI benefits received by a disabled child are intended to supplement other income, not substitute for it. They are for the benefit of the child and not the parent as the subsidy is based upon the child's special needs. Furthermore, like SSI benefits, the receipt of the adoption assistance stipend does not absolve the parents of the duty to provide for their child.

CONTEMPT

Schneider v. Schneider

Citation: *Schneider v. Schneider*, 2020-Ohio-4326, 2020 WL 5264828 (Ohio Ct. App. 2d Dist. Montgomery County 2020)

The parties ended their marriage in 1991. Husband was a federal government employee and had pension rights in the Civil Service Retirement System. Their separation agreement provided that upon husband's retirement from federal government service and his receipt of full benefits from the pension, he was to cease paying child and spousal support and begin paying wife a monthly sum sufficient to increase wife's monthly gross income to \$3,600.00 said sum not to exceed \$2,000.00.

Husband retired from federal government employment in 2002 and began receiving full pension benefits. He did not notify wife of his retirement. Husband continued to work in the same type of work in the private sector until 2017 when he retired completely. Husband did not make any payments to wife since 2002. When wife learned husband no longer worked, she filed a motion for a finding of contempt. After hearing, the court found husband in contempt, determined that he owed wife \$349,479.87 for the period 2002 through

2018 and \$2,000 per month in 2019. It also awarded wife attorney fees. Husband appealed arguing that he should not have been required to pay wife until he was fully retired in 2017. The court of appeals, found that the parties' separation agreement was unambiguous, and affirmed the trial court's decision. The trial court properly determined that husband retired from federal government service in 2002.

DIVISION OF PROPERTY

Anderson v. Anderson

Citation: *Anderson v. Anderson*, 2020-Ohio-4415, 2020 WL 5507855 (Ohio Ct. App. 12th Dist. Warren County 2020)

During the parties' marriage, husband's employer granted him 241 restricted stock units as part of his compensation. The stock had not vested at the time of divorce. The trial court ordered that the units be placed in a constructive trust. As the stock vested, wife, who was awarded half of the stock, could determine how she wished to exercise her portion of the stock. On appeal, husband argued that the stock should not have been considered marital as it had not vested, and even if marital, wife should not have been awarded half of it. The Twelfth District Court of Appeals rejected both arguments.

It was clear from the record that the award of the restricted stock was part of husband's compensation earned during the marriage, and not an incentive for future employment. The stock was to vest in equal installments over four years beginning in 2020. In *Daniel v. Daniel*, 139 Ohio St. 3d 275, 2014-Ohio-1161, 11 N.E.3d 1119 (2014), the Ohio Supreme Court held that

unvested benefits have value and are subject to division at divorce.

Husband failed to present any evidence as to the nature or purpose of the restricted stock plan. While many such plans provide for forfeiture of the stock if an employee voluntarily or in voluntarily leaves employment during the vesting period, there was no evidence that such a provision existed in husband's plan. Husband also failed to show how it was unreasonable, arbitrary, or unconscionable to equally divide the restricted stock.

Weber v. Devanney

Citation: *Weber v. Devanney*, 2020-Ohio-4450, 2020 WL 5551955 (Ohio Ct. App. 9th Dist. Summit County 2020)

Among other assignments of error, wife argued the trial court erred in awarding husband a premarital interest of \$30,797 in the marital home to be deducted from wife's interest in husband's retirement account. When the home was sold it had no equity as the mortgage had not been paid during the pendency of the divorce case. The trial court reasoned wife had been responsible for a lack of equity in the marital home as she failed to pay the mortgage as ordered.

Wife had, however, also assigned as error the trial court's finding her in contempt for failing to pay the mortgage. The Ninth District Court of Appeals agreed that the trial court erred in that finding. While wife was initially ordered to make the mortgage payments in a temporary order, a subsequent order modified the obligations of the parties as to expenses and debts. The Court of Appeals noted that the magistrate mistakenly omitted the obligation for pay-

ment of the mortgage from husband's column. Neither party was responsible for the mortgage.

As it was error to find wife in contempt for failure to pay the mortgage it was also error to award husband a separate premarital interest in the home which had no equity in it at the time of sale.

DOMESTIC VIOLENCE

Porter v. Porter

Citation: *Porter v. Porter*, 2020-Ohio-4504, 2020 WL 5626106 (Ohio Ct. App. 12th Dist. Butler County 2020)

Wife filed a petition for a civil protection order against husband. An ex parte order was granted and after full hearing the trial court ordered the protection order to remain in full force for a year. Husband appealed. The evidence revealed a troubled couple where alcohol was prevalent. There was testimony of considerable conflict between the parties where wife alleged that husband was physically abusive to her and where husband alleged his actions were defensive and that wife was the perpetrator. The trial court found credibility issues on the part of both parties. The case turned on one incident which occurred one month prior to the filing of the petition where wife sustained an injury to her face when husband pushed her. Wife had gone to her neighbor's home immediately after the incident who testified on her behalf. There was a photograph of her injury. Husband testified that he pushed wife in a defensive move. The trial court held that wife had shown by a preponderance of the evidence that husband recklessly caused her injury. The Court of Appeals would not second guess the trial court's

judgment as it had the best opportunity to view the demeanor, attitude and credibility of the witnesses.

PARENTAL RIGHTS AND RESPONSIBILITIES

Badescu v. Badescu

Citation: *Badescu v. Badescu*, 2020-Ohio-4312, 2020 WL 5250484 (Ohio Ct. App. 10th Dist. Franklin County 2020)

The parties were married in Virginia and worked in the Washington DC area. They moved to Ohio because father obtained a new job. Mother obtained a master's degree and worked on her Ph.D. They had one child. Mother, seeking employment, received two job offers. One was in Dayton and the other was in California. She took the position in California. Father sought employment in California but did not want to move. Father filed for a divorce and they each sought custody of their three year old child. A guardian ad litem was appointed and a trial was held. The trial court found it to be in the best interest of the child that father be named as residential parent and legal custodian. Mother appealed. Mother argued on appeal that the trial court placed undue emphasis on mother's decision to live out of state and placed the burden on her to demonstrate the necessity of her move.

The Tenth District Court of Appeals found that the trial court thoroughly explored the factors of R.C. 3109.04. It found that both parents loved and cared for their daughter and both had good homes. It found that father worked harder at facilitating skype calls when mother did not. It found that mother had great disdain for father and would not answer his calls. The

trial court found mother's overt dislike of father noteworthy. Finally, the court did not find it credible that mother was unable to find employment in Ohio, especially as she had at least one job offer. As the Court of Appeals found the trial court's decision well-reasoned, it could not come to the conclusion that its decision was an abuse of discretion and affirmed its judgment.

PROCEDURE

A.S. v. Gold

Citation: *A.S. v. Gold*, 2020-Ohio-4309, 2020 WL 5250248 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

During divorce proceedings, husband and wife entered into an agreement regarding interim parenting time for their minor children. Several months later, wife filed a motion to modify the interim parenting time orders. The judge assigned to the case scheduled the motion for hearing and communicated to counsel that testimony would be limited to the parties and the Guardian ad Litem. Husband filed a complaint for a writ of prohibition in which he alleged that the judge's restrictions and limitations placed upon the presentation of witnesses and evidence were contrary to the court's local rule and the law.

The Eighth District Court of Appeals dismissed the complaint for writ of prohibition. In order for a writ of prohibition to issue, it must be established that the judge is about to exercise judicial power, the exercise of judicial power is unauthorized by law and there exists no remedy in the ordinary course of law. In the divorce matter, the judge had the jurisdiction to determine parenting rights and husband had an adequate remedy at law

through a direct appeal. The appellate court further determined that husband's arguments that the judge's restrictions and limitations on witnesses and evidence do not support a claim for prohibition.

C.H. v. J.H.

Citation: *C.H. v. J.H.*, 2020-Ohio-4733, 2020 WL 5846077 (Ohio Ct. App. 7th Dist. Columbiana County 2020)

During the parties' divorce, Paternal Grandmother intervened as a party defendant. Neither mother nor father were found to be suitable as the residential parent for the two minor children. Primary custody of the children was awarded to grandmother. In the following three years, mother filed three motions to reallocate parental rights. The first motion was resolved by agreement with father being designated as residential parent and legal custodian. Mother's second motion was overruled as there had been no change in circumstances. Mother's third motion went to full hearing with a magistrate recommending mother being named as primary residential parent. During the objection period, grandmother filed a motion with the court because she had not been served with mother's third motion to modify nor had she been notified of the hearing. The trial court denied grandmother's motion as untimely. On appeal, the Court of Appeals found that grandmother remained as a party defendant and that as such, due process required that she be served with a copy of the motion and notice of hearings. The trial court abused its discretion in overruling grandmother's motion. The matter was remanded to the trial court for a new hearing on mother's motion to modify parental rights.

DeGrant v. DeGrant

Citation: *DeGrant v. DeGrant*, 2020-Ohio-4425, 2020 WL 5512445 (Ohio Ct. App. 11th Dist. Geauga County 2020)

On remand from a prior appeal, the trial court was instructed to reopen a custody hearing to allow the child's therapist to testify, to issue a new custody order, if necessary, and to recalculate child support. While the rehearing was pending, husband filed proposed changes to the parties' shared parenting plan. The trial court incorporated husband's proposed changes in the plan from which wife appealed. Husband maintained that the order was not final and appealable and the Eleventh District Court of Appeals agreed.

Despite the fact that the trial court did not denote the order as temporary or interlocutory, the Eleventh District has held that temporary custody orders are interlocutory in nature. The hearing on remand had not occurred and further evidence was to be presented. The issue of child support was still pending and courts have held that a custody determination is not final and appealable when the issue of support is still pending. The Court of Appeals rejected wife's argument that the order affected a substantial right made in a special proceeding. The entry did not include the no just cause for delay language required by Civ. R. 54 (B).

Durastanti v. Durastanti

Citation: *Durastanti v. Durastanti*, 2020-Ohio-4687, 2020 WL 5821330 (Ohio Ct. App. 1st Dist. Hamilton County 2020)

Wife's petition for a civil protection order was denied by a magistrate for lack of sufficient evidence to demonstrate an act of

domestic violence. The trial court, however, sustained wife's objections to the magistrate's decision and granted her a one year protection order. On appeal, husband argued that the order was against the manifest weight of the evidence and that the trial court applied an incorrect legal standard.

The First District Court of Appeals reversed the trial courts' judgment holding that an incorrect legal standard was applied by the trial court. Domestic violence civil protection orders are governed under R.C. 3113.31 and Civ. R. 65.1 and not Civ. R. 53. Civil protection orders are not magistrates' orders. The rule does not provide for a trial court's independent review of the magistrate's factual determination. The party who objects to the magistrate's decision has the burden, under Civ. R. 61 to demonstrate one of three things:

- (1) That an error of law or other defect is evident on the face of the order, or
- (2) That the credible evidence of record is insufficient to support the granting or denial of the protection order, or
- (3) That the magistrate abused the magistrate's discretion in including or failing to include specific terms in the protection order.

Before ruling on wife's objections, the trial court adopted the magistrate's denial of wife's petition effectively holding that there were no errors of law or defect evident on the face of the order.

The trial court, also, did not find that there was insufficient evidence to support the magistrate's denial of the petition. The Court of Appeals held that the failure of

the trial court to make that finding constituted error in granting the protection order. Wife did not sustain her burden of proof under Civ. 61. On remand the trial court was to apply the correct legal standard.

Whited v. Whited

Citation: *Whited v. Whited*, 2020-Ohio-5067, 2020 WL 6286330 (Ohio Ct. App. 4th Dist. Washington County 2020)

The parties were divorced in 1999. Each party was to receive 50% of husband's pension by a QDRO. In 2003 husband filed a motion to modify parental rights as wife confessed to having sexual relations with her then adult child beginning at age twelve. Wife was then in a mental health facility. Husband was named residential parent.

In 2019 wife filed a motion to implement the division of the pension plan as a QDRO had never been filed. The trial court granted the motion and ordered that a QDRO be prepared. Husband then filed a Civ. R. 60 (B) (2), (3), and (5) seeking relief from judgment which was denied by the trial court without a hearing as being untimely. Husband argued that the motion was timely as he was seeking relief from the 2019 order requiring the QDRO be prepared. The Fourth District Court of Appeals noted that wife's "repulsive, immoral and criminal actions" were learned of by husband in 2003. He could have filed his motion at that time. Instead, husband waited twenty years from the divorce and sixteen years after learning of wife's criminal conduct.

The 2019 order for preparation of the QDRO was not a new proceeding and did

not constitute a final judgment. A QDRO is not a further adjudication on the merits of the property division, but rather its purpose is to implement the terms of the divorce decree. Husband, in reality was collaterally attacking the original judgment of divorce. While a Civ. R. 60 (B) (5) is not subject to the one year filing requirement of other sections of the rule, the motion must still be filed within a reasonable time. As husband's allegations to support his motion revolved around wife's criminal conduct he learned of in 2003, the 2019 motion was untimely. The decision of the trial court was affirmed.

CASE SUMMARIES

DOMESTIC VIOLENCE

J.M. v. L.J.

Citation: *J.M. v. L.J.*, 2020-Ohio-4419, 2020 WL 5509071 (Ohio Ct. App. 9th Dist. Lorain County 2020)

Headnote: Domestic Violence—Modification and Termination of Civil Protection Order

Summary: Appellant-Wife appealed trial court's order modifying the Civil Protection Order.

Two separate incidents led to Wife filing a request for a domestic violence Civil Protection Order (CPO). The first incident occurred in June 2017 wherein Wife was not physically harmed. The second incident occurred in the presence of the children in September 2017. Wife alleged that Husband kept following her around their residence accusing Wife of seeing another person. During this altercation, Husband

grabbed Wife leaving red marks on her neck, chest and shoulder.

Wife filed a petition for a CPO on September 11, 2017. Wife was granted an ex parte order. After a full hearing, the magistrate granted Wife a CPO for a term of five years based upon Husband's physical abuse while apparently under the influence of alcohol or illegal substance. Husband objected. The objections were overruled except that the children were removed as protected parties.

In April 2019, Husband filed a motion to terminate CPO. The basis of Husband's request was that he had not violated the CPO, and Husband did not feel Wife was in fear of him at this time. The court denied Husband's request to terminate the CPO. However, based upon Wife's admission during her testimony that Husband did not physically harm her or the children, the court modified the duration of the CPO. The court reduced the CPO from a term of five years to two years, expiring on September 11, 2019. Wife appealed.

Wife argued that the trial court abused its discretion in modifying the CPO. Pursuant to R.C. 3113.31(E)(8)(a), a court may modify or terminate a CPO based upon either party filing a motion. Husband had the burden of proof, by a preponderance of the evidence, to show that the modification or termination of the CPO is appropriate and there is no longer a need to protect the other party. R.C. 3113.31(E)(8)(b). In determining whether to modify or terminate the CPO, the court shall consider the twelve factors of R.C. 3113.31(E)(8)(c).

In its decision to modify the CPO, the court weighed heavily upon Wife's testimony that Husband never physically

harmed her or the children. However, this finding is not supported by the record and is misplaced. During counsel's cross-examination of Wife at the termination hearing, Husband's counsel presented the 2017 trial transcript. Husband's counsel questioned Wife as to her testimony wherein she testified that she was never physically harmed. However, the trial court in modifying the CPO took this testimony out of context. Upon a close review of the original trial transcript, counsel's questioning of Wife related to the June 2017 incident wherein Wife has always admitted she was not physically harmed. Husband's counsel failed to discuss Wife's testimony as to the September 2017 altercation wherein Wife testified that Husband did physically harm Wife. Wife never admitted that Husband did not physically harm her in September 2017. Since the trial court placed substantial weight on the fact that Wife was never physically harmed by Husband, which is not supported by the record, the Appellate Court reversed and remanded the modification of the CPO.

JUVENILE CUSTODY

In re P.B.

Citation: *In re P.B.*, 2020-Ohio-4471, 2020 WL 5569466 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Headnote: Guardian Ad Litem—In Camera Interview—Separate Counsel for Children

Summary: Appellant-Mother appealed the decision of the trial court, which terminated her parental rights and granted permanent custody of three of her minor children to Appellee-Cuyahoga County

Division of Children and Family Services (CCDCFS or the “agency”).

The appeal involved three of Mother’s four minor children, K.B., P.B., and A.B. The agency first filed a complaint for neglect and temporary custody of K.B. The complaint alleged that Mother had refused to provide for K.B.’s basic needs and to address his behavioral issues. Mother had refused to participate in the services offered to her. The juvenile court committed K.B. to the emergency temporary custody of the agency and appointed a guardian ad litem.

The guardian reported that K.B. had behavioral problems. He also stated that both Mother and K.B. acknowledged that Mother had hit K.B. and that Mother did not want K.B. to come home. She agreed to emergency temporary custody.

The guardian recommended that temporary custody be granted to the agency. In May 2017, K.B. was adjudicated to be neglected and committed to the temporary custody of the agency.

The agency filed a complaint for temporary custody of Mother’s other children, B.S., P.B. and A.B. in June 2017. Mother had pulled out a weapon at a barbershop in front of the children. It was further alleged that Mother had anger management issues and failed to complete anger management classes. The trial court granted temporary custody and appointed the same guardian ad litem as in K.B.’s case.

All four children were placed with their grandmother. The guardian recommended that the children continue placement with their grandmother while Mother worked on the case plan.

The agency filed a case plan that required Mother to attend parenting classes, complete anger management counseling and undergo a mental health assessment. The goal was reunification with Mother.

Mother completed the parenting classes and the anger management counseling. Mother then spent several months in jail after being convicted of several offenses related to the incident in the barbershop. When Mother was released from jail, the agency filed an amended case plan, which required Mother to obtain housing, demonstrate financial stability and complete a mental health assessment.

Grandmother informed the agency that she was unable to continue caring for the children and a new placement would be needed. The boys were removed from her care and placed into foster care. B.S. remained with Grandmother.

The agency filed a motion for permanent custody of all four children. The motion alleged that Mother had failed to comply with the recommendations from mental health professionals and was not in mental health treatment as required under her case plan. Mother had failed to benefit from services designed to address her anger management. She continued to display aggressive and inappropriate behavior. Mother also failed to secure appropriate housing.

The trial court conducted in camera interviews of each of the children on two occasions. The guardian issued his final report and recommendation. He recommended that the children be committed to the permanent custody of the agency. The guardian stated that he did not believe his

recommendations were in conflict with any of the children's wishes at the time.

Mother asked for the court to appoint an attorney for the children if their position was not aligned with the recommendation of the guardian ad litem. The trial court denied the request, stating that neither the guardian nor the court found a conflict between the guardian's recommendation and the boys' wishes.

The trial court granted the agency's motion for permanent custody as to K.B., P.B., and A.B. The court found, based on the evidence, the in camera interviews and the recommendation of the guardian ad litem, the children could not be placed with either parent within a reasonable time. The children had been in the temporary custody of the agency for 12 or more months of a consecutive 22 month period. The trial court also found it was in the best interests of the children to grant permanent custody to the agency. The trial court found that the three boys did not want to be reunified with their mother. The trial court denied the motion for permanent custody with regard to B.S. as he had constant contact with her mother and wished to maintain the relationship.

The appellate court overruled Mother's argument that the trial court erred by failing to appoint independent counsel for the children. Mother never filed a motion to have independent counsel appointed. Rather, she requested it at one of the hearings. The trial court made repeated inquiries as to whether a conflict existed between the guardian's recommendation and the children's wishes. The trial court also conducted two in camera interviews of the children to ascertain their wishes. The

appellate court found that the trial court did not err in failing to appoint separate counsel for the children.

Mother's assignment of error was overruled and the decision of the trial court affirmed.

In re E.M.B.T.

Citation: *In re E.M.B.T.*, 2020-Ohio-4308, 2020 WL 5250395 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Headnote: Best Interests of the Child—R.C. 2151.414(D)

Summary: Appellant-Mother appealed the trial court's decision granting permanent custody of her three children, E.T., E.B., and M.B., to the Cuyahoga County Department of Children and Family Services ("the agency").

The agency filed a complaint alleging the children, E.T. and E.B., to be abused and E.T., E.B., and M.B., to be neglected. The agency sought temporary custody. The complaint alleged allegations of sexual abuse and rape by the biological father, S.B., Mother's failure to protect the children from S.B., and Mother's mental health and substance abuse issues. The complaint also alleged domestic violence issues between Mother and S.B.

Emergency custody was granted to the agency. E.T. was placed with his maternal great uncle. The other children were placed together in a therapeutic foster home.

Mother and S.B. stipulated to an amended complaint. The magistrate issued a decision that adjudicated E.T. and E.B. abused and E.T., E.B., and M.B. neglected. The trial court adopted the magistrate's decision and granted temporary custody to

the agency. Mother and S.B. were incarcerated for offenses involving the children as victims.

The agency filed a motion to modify temporary custody to permanent custody. Mother filed a motion for legal custody to the great uncle for all three children. S.B. filed a motion for legal custody with a non-relative of the children.

At the permanent custody hearing in January 2020, the three case workers and the guardian ad litem all testified in support of permanent custody to the agency. The testimony demonstrated that the three children witnessed domestic violence involving S.B. and Mother. E.T. was the victim of rape and sexual abuse from S.B. Mother was home during the time, but was asleep or passed out. E.T. was in the temporary care of his maternal great uncle.

The evidence showed that E.B. and M.B. were later removed from the home due to unsanitary conditions. E.B. later disclosed that she had also been sexually abused by S.B.

S.B. was convicted of sex offenses involving E.T. and E.B. as the victims. He was designated a Tier III sex offender and sentenced to life in prison. Mother was charged with child endangerment and was sentenced to three years in prison.

The testimony showed that E.B. and M.B. were in a stable therapeutic foster home. They were receiving services to address their needs and were doing well.

The agency had concerns about the great uncle and his ability to care for E.T.'s aggressive and sexualized behavior. The great uncle testified that he had appropriate housing for all three children. He

stated that E.T.'s negative behaviors had improved.

The guardian recommended an award of permanent custody to the agency. The trial court granted permanent custody of all three children to the agency.

Mother argued that the trial court's grant of permanent custody to the agency and denial of legal custody to the maternal uncle was an abuse of discretion and not in the best interests of the children.

The appellate court stated that the trial court found by clear and convincing evidence that the children could not be placed with Mother within a reasonable period of time or should not be placed with her. The appellate court stated that the dispute centers on whether the grant of permanent custody to the agency was in the best interests of the children.

The appellate court held that the trial court considered all relevant factors pursuant to R.C. 2151.414(D)(1). The appellate court noted that there were significant factors that supported the trial court's award of permanent custody. The trial court considered that both parents were incarcerated for offenses committed against the children. Mother had a chronic mental illness and issues with chemical dependency. The children lived in deplorable conditions.

The appellate court held that the trial court's award of permanent custody to the agency was supported by competent, credible evidence.

The judgment of the trial court was affirmed.

In re A.K.

Citation: *In re A.K.*, 2020-Ohio-4700, 2020 WL 5834507 (Ohio Ct. App. 6th Dist. Ottawa County 2020)

Headnote: Permanent Custody—Guardian ad Litem

Summary: The trial court terminated the parental rights and responsibilities of D.K., the legal father of A.K., and granted permanent custody to the Ottawa County Department of Job and Family Services.

A.K. was born while mother was in jail. The parents realized they could not care for A.K. A.K. tested positive for drugs and birth and required treatment for symptoms of drug withdrawal. Mother and Father asked the agency to place A.K. with C.F. The agency determined that C.F. would not be an appropriate caregiver. C.F. had prior children services reports and had a history of an uncooperative attitude with the agency. The agency placed A.K. with a certified foster parent.

The trial court adjudicated A.K. a dependent child with Mother and Father admitting the dependency allegations in the complaint. The trial court approved the continued placement with the foster parent.

Mother and Father partially completed their respective case plans. However, Mother died unexpectedly. C.F. then filed another motion for custody. The agency filed for permanent custody.

The trial court held a five-day trial. The trial court heard testimony from Father, C.F., the agency's caseworker, CASA, and the guardian ad litem. There was extensive testimony regarding A.K.'s placement with

her foster mother. There was also testimony concerning C.F.'s own special needs children, her own health issues, and C.F.'s past contacts with Children's Services. C.F.'s past contacts with the agency involved allegations of neglect and truancy of her own children.

The trial court terminated Father's parental rights and found that permanent placement with the agency was in the best interests of the child.

Both Father and C.F. appealed the trial court's decision. Among several challenges, Father and C.F. challenge the testimony and reports of the guardian. They argue that the guardian's testimony should have been stricken from the record. The allegation was that the guardian did conduct an adequate investigation.

The appellate court stated that the duties of a guardian include investigating and delivering a report and recommendation regarding the best interests of the child, to assist the juvenile court in its determination of the child's best interests.

Father claimed the guardian failed to speak with him about his choices for custody of A.K. The guardian testified that she spoke with A.K.'s foster mother and conducted a visit. The guardian stated that Father was never considered for placement because the terms of his parole barred him from having any contact with a child, and he was later sentenced to a lengthy prison sentence. The guardian spoke to C.F. early on in the case and had concerns about placement with C.F. A.K.'s caseworker had similar concerns about C.F. due to past cases with her regarding her own children. The guardian did not visit C.F.'s home

because the agency was not considering a change of placement for A.K.

The appellate court found that the guardian's investigations did not fall below the minimum standards and that her testimony and report should be included in the record. Accordingly, Father and C.F.'s assignment of error regarding the guardian was overruled.

PARENTAL RIGHTS AND RESPONSIBILITIES

Mullaji v. Mollagee

Citation: *Mullaji v. Mollagee*, 2020-Ohio-4618, 2020 WL 5759770 (Ohio Ct. App. 9th Dist. Lorain County 2020)

Headnote: Parental Rights and Responsibilities—Adoption of Shared Parenting Plan and Subject Matter Jurisdiction

Summary: Appellant-Wife appealed trial court's determination that it had subject matter jurisdiction to proceed with Appellee-Husband's divorce complaint and trial court's creation of a shared parenting plan.

The parties, in 2012, participated in a Muslim marriage ceremony in South Africa. A civil ceremony was never performed. The parties moved to the United States and obtained permanent resident status in 2014. One child was born as issue of the marriage. The couple had marital issues, and Wife returned to South Africa with minor child.

In February 2016, Husband filed for a legal separation in Lorain County Court of Common Pleas. Further, under the Hague Convention of Civil Aspects of International Abduction, Husband filed an applica-

tion for the return of child with the South African High Court. Wife moved to dismiss the complaint for legal separation arguing that the trial court lacked subject matter jurisdiction. The basis of Wife's argument was that no civil ceremony solemnized the marriage. Wife's motion was denied. Husband amended his complaint seeking a divorce and moved to adopt his proposed shared parenting plan. Parties reached an agreement on all issues except custody and support.

The day trial commenced, the South African High Court ruled on Husband's Hague Convention Application, which ordered the return of the child to the United States with specific conditions. The order was stayed until the Ohio court issued an order as stated by the South African High Court. Both parties appealed the South African ruling. The trial court granted the parties a divorce; incorporated the parties' stipulated property division; determined spousal support; ordered Husband to pay child support, and adopted Husband's shared parenting plan subject to several revisions made by the trial court sua sponte. Wife appealed.

Wife argued that the court erred in denying her motion to dismiss for lack of subject matter jurisdiction since the parties' ceremonial marriage was not recognized by South African law. Subject matter jurisdiction of a court connotes the power to hear and decide a case on its merits. It is determined without regard to the rights of each party involved in the case. A legal separation and a divorce are causes of action that are within a domestic relation court's subject matter jurisdiction. The issue of whether the parties' marriage is recognized by South African law is a ques-

tion of fact and does not implicate the subject matter jurisdiction of the trial court.

Wife further contended that the trial court erred by adopting a shared parenting plan that varied from the terms proposed by Husband. Husband claimed the error was harmless. R.C. 3109.04(G) allows either, or both, parties to file a motion for shared parenting with a proposed plan. The court must determine if any proposed plan is in the child's best interest. If the court finds that a plan submitted is not in a child's best interest, the court may order each parent to submit appropriate changes to meet the court's objections. If the submitted changes meet the court's objection, the court may approve the submitted revised plan. If not appropriately submitted, the court may reject the shared parenting plan. R.C. 3109.04(D)(1)(a)(iii). A court cannot create its own shared parenting plan. A court can only make suggestions for modification of the plans presented by the parties. If those suggested changes are not made to the proposed shared parenting plan and resubmitted to the court, the court may deny the request for shared parenting. The court failed to follow proper procedure and improperly modified Husband's proposed shared parenting plan sua sponte. Judgment affirmed in part and reversed in part and remanded.

In re M.R.F.-C.

Citation: *In re M.R.F.-C.*, 2020-Ohio-4400, 2020 WL 5498758 (Ohio Ct. App. 2d Dist. Montgomery County 2020)

Headnote: UCCJEA—Home State—Continuing Jurisdiction

Summary: Mother appealed the trial

court's decision, which concluded that it lacked subject matter jurisdiction over the parties' child custody cases. Mother argued that the trial court erred in holding that it did not have exclusive continuing jurisdiction as the home state.

The parties had twin sons born in January 2007. The parties were together until October 2007 when Father moved to Grand Rapids, Michigan. Father filed a petition in Montgomery County, Ohio to establish parenting time and child support. Orders were established for visitation and child support.

Child support was terminated in 2011 when the parties reconciled and the parties purchased a home together in Michigan. For nine years, the parties lived together in Michigan.

In 2019, Father filed a motion in Montgomery County to transfer the case to Michigan. He alleged that Mother removed the children from the home, took them out of school and traveled to Ohio with them. The trial court denied the motion because no case was pending in the court.

Father filed a motion in Michigan, requesting that it accept jurisdiction. Mother filed a motion in Ohio for reallocation of parental rights and responsibilities.

The Michigan court granted Father's motion and accepted jurisdiction over the parties' custody matter. The Michigan court stated that it had consulted with the magistrate in Ohio pursuant to the UCCJEA and both courts agreed that Michigan was the more appropriate forum due to the family's residing there since 2010.

Mother filed a motion in Ohio asking it to retain jurisdiction and for a hearing.

She argued that the Ohio court had exclusive continuing jurisdiction. She stated that she lived in Ohio for a month prior to filing her motion. The magistrate denied Mother's motion, finding that when Mother filed her motion to reallocate parental rights and responsibilities, neither the parties nor the children resided in Ohio within R.C. 3127.16. The magistrate noted that a court's exclusive continuing jurisdiction ceases when the parents and children no longer reside in the state of the original decree. The magistrate found that the parties and their children lived in Michigan since 2010 and they had only resided back in Ohio for one month prior to Mother's motion. The magistrate concluded that Michigan was the home state and Ohio lacked exclusive continuing jurisdiction.

The trial court overruled Mother's objections to the magistrate's decision. The trial court found that although Ohio was the home state for the initial custody proceedings in 2008, Ohio was no longer the home state. The parties lived in Michigan for approximately nine years. They had Michigan driver's licenses, registered to vote in Michigan and used the Michigan school systems. The trial court also stated that the Michigan court agreed to accept jurisdiction and the Michigan court was the more appropriate forum.

The appellate court noted that under the UCCJEA, a state court that rendered an initial custody decree had exclusive jurisdiction over the ongoing custody dispute if that state had continuing jurisdiction. The home state is defined as the state in which a child lived with a parent for at least 6 consecutive months immediately preceding the commencement of a child custody proceeding.

The appellate court stated that it was undisputed that in 2008, Ohio was the children's home state and the trial court properly made the initial child custody determination. However, Ohio was no longer the children's home state due to the family's relocation to Michigan and residing there as a family for nine years. The appellate court also noted that Mother did not satisfy Ohio's residency requirement when she attempted to reestablish residence in Ohio shortly before filing her motion.

The appellate court concluded that the trial court's consideration of the family's long-term residence in Michigan was appropriate in determining whether the trial court retained exclusive continuing jurisdiction. Mother's assignment of error was overruled.

The decision of the trial court was affirmed.

In re E.B.

Citation: *In re E.B.*, 2020-Ohio-4139, 2020 WL 4882453 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Headnote: Abused Child—Dependent Child—Reunification

Summary: Appellant-Mother appealed from the adjudication and disposition of her minor children, E.B. and K.B.

Mother and Appellee-Father were divorced in January 2015. They had two children during the marriage. At the time of the divorce, Mother and Father entered into a shared parenting plan that provided equal parenting time.

Mother married her current husband, A.O., in 2016 and gave birth to their minor child, Z.E.

In June 2017, the Cuyahoga County Division of Children and Family Services (“CCDCFS” or the “agency”) filed a complaint seeking temporary custody of the minor children. The complaint alleged K.B. and E.B. to be abused children and Z.E. to be a dependent child. The complaint stated that A.O. had engaged in sexual behavior with the minor children, K.B. and E.B. Mother lacked the appropriate judgment to ensure the safety of the children. She continued to allow the stepfather access to the children despite E.B.’s disclosures. Mother allowed A.O. to stay in the home. The complaint also alleged that the incidents with the other children put Z.E. in danger.

The children’s guardian ad litem testified that K.B. indicated to her that stepfather had touched her while she was in the shower. K.B. indicated that Mother did not believe her and Mother told other people that it was not true. This caused her to have suicidal thoughts. Father had a tape recording of E.B. disclosing that she had been inappropriately touched by her stepfather.

The magistrate issued a decision adjudicating E.B. and K.B. abused and Z.E. dependent. The magistrate found that E.B. and K.B. were victims of sexual activity. The magistrate found that returning the children to the Mother’s home would be contrary to their best interests. E.B. and K.B. were ordered to remain in their placement with Father.

The trial court approved the magistrate’s decision in part. The trial court deter-

mined, unlike the magistrate, that E.B. was a dependent child, but not abused.

Father filed a motion for legal custody of K.B. and E.B. He claimed there had been a significant change of circumstances since the parties entered into a shared parenting plan, including the allegation of sexual contact with the children.

The agency filed a motion for an order of legal custody to Father. Later, the agency amended it to legal custody to Mother and Father.

The guardian testified that legal custody should go to Father. She testified that the children’s participation in reunification therapy with their alleged sexual abuser was not beneficial to the children.

The magistrate ordered that legal custody of E.B. and K.B. should be granted to both Mother and Father. Father was designated the residential parent for school purposes. The magistrate noted that while Mother participated in reunification therapy, she did not participate in counseling for trauma for the children or parenting education classes. The magistrate stated that Mother would have parenting time with the children on Tuesdays and Thursdays from 3:30 p.m. to 7:30 p.m. and alternating weekends. The magistrate also ordered that stepfather was not allowed to be present in the home during visitations.

The trial court adopted the magistrate’s decision. The trial court emphasized that stepfather shall not be present during Mother’s visitation time and further suspended its prior order for reunification therapy pending an in camera interview with K.B.

Mother argued that the trial court

abused its discretion in finding K.B. to be abused and E.B. to be dependent.

The appellate court overruled Mother's assignments of error. The appellate court stated that the social worker provided extensive testimony concerning her investigation into the allegations of inappropriate touching. Consistent statements were made by K.B. to the social worker, the detective and the children's guardian. The appellate court found that the agency presented clear and convincing evidence that K.B. was an abused child.

The appellate court found that the trial court properly determined that E.B. was a dependent child. Having found that K.B. was sexually abused, the trial court's adjudication of E.B. as dependent was supported by clear and convincing evidence. Her environment warranted the state's involvement. Mother refused to believe the children's allegations and permitted A.O. to live in the household.

The judgment of the trial court was affirmed.

PROCEDURE

Bartko v. Bartko

Citation: *Bartko v. Bartko*, 2020-Ohio-4302, 2020 WL 5243129 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Headnote: Procedure - Personal Jurisdiction, Civ. R. 4.1 and Service

Summary: Appellant-Wife appealed trial court's judgment entry of divorce for lack of personal jurisdiction.

Husband filed for divorce in August 2019 and requested Wife be served by certified mail to two separate addresses. Both certi-

fied mails were returned unclaimed. Husband then requested that certified mail be sent to a new address on Roanoke Avenue. The certified mail was signed by a Ms. Tighe and returned to the Court. Wife failed to file an Answer and the uncontested hearing went forward on November 6, 2019. Wife filed a motion for relief from judgment and a notice of appeal based upon lack of personal jurisdiction. After the appellate court remanded the matter to trial court to rule on the motion for relief from judgment, the trial court denied the motion for relief from judgment, and Wife failed to appeal that denial.

Wife argued that the court lacked personal jurisdiction over her since she was not properly served with the Complaint for Divorce. Wife alleged that there was nothing that connects her to the Roanoke Avenue address. She stated that serving "a friend" is not good service. However, Husband's counsel had represented that she spoke with Wife in August, and Wife confirmed she was living with a friend at the Roanoke Avenue residence. Further, Husband's counsel and Wife's counsel had conversations regarding discovery and discussed attendance of the November 6, 2019 hearing.

Plaintiff has the burden of obtaining proper service on a defendant. Civ. R. 4.1(A) states that service of a complaint may be made by certified mail, personal or residential service. The service must be made in a manner reasonably calculated to apprise the party of the action and afford them an opportunity to respond. If there is a lack of effective service of process and defendant fails to appear at a hearing, the court lacks jurisdiction to enter a judgment. If a judgment is entered,

it is void. Certified mail service is presumed to be made when the envelope is received by any person at the defendant's residence. When the signed receipt for the certified mail is returned to sender (Clerk of Court), a prima facie case of delivery is established.

Husband's service is presumed proper since he followed the civil rules governing service of process. Defendant must rebut this presumption with sufficient, uncontradicted evidentiary-quality information that he/she did not receive service. Based upon the facts stated by Husband's counsel as to discussions with Wife and Wife's counsel (no transcript was filed with Appellate Court) and the return receipt, the trial court did not abuse its discretion in concluding service had been completed upon Wife. Wife failed to sufficiently rebut the presumption of proper service. The appellate court is limited to the record of the proceedings at trial. Nothing in the record states that Wife did not reside at the Roanoke Avenue address. Wife filed an affidavit attesting her residence with her motion for relief from judgment, but Wife failed to appeal the denial of the motion; therefore, the affidavit is not part of the record. Judgment affirmed.

Ceccoli v. Budd

Citation: *Ceccoli v. Budd*, 2020-Ohio-4176, 2020 WL 4933622 (Ohio Ct. App. 9th Dist. Medina County 2020)

Headnote: Procedure - Disqualification of Counsel and Final Appealable Orders

Summary: Appellant-Wife appealed trial court's order disqualifying her counsel and order requiring Intensive Case Management without evidentiary hearing.

Parties were divorced in March 2019. Based upon the high conflict between the parties regarding their children, the court ordered the parties to participate in Intensive Case Management while the divorce was pending. In the decree, the parties agreed Wife would be named residential parent with Husband's parenting time supervised. The Husband and children were to participate in reunification counseling as recommended by the counselor. Wife was to participate without Husband if counselor requested.

In August 2019, Husband filed numerous motions including a motion for Intensive Parenting Conferences. Further, Husband filed a motion to disqualify Wife's counsel in October 2019 citing to Prof. Cond.R. 1.7(a)(2). Husband asserted that Wife's counsel also represented one of the parties' minor children in a juvenile court action involving unruliness for habitual truancy. The court granted Husband's motion to disqualify Wife's counsel and ordered the parties into Intensive Case Management "to assist with the parties' coordination and communication with the reunification counselor" without a hearing. Wife appealed.

Wife argued that the court abused its discretion in disqualifying her counsel without adequate justification. The court has the inherent authority to supervise members of the bar who practice before the court, which includes the power to disqualify an attorney. However, disqualification of counsel is a drastic measure, which shall be imposed only upon absolute necessity since parties have a right to choose their own attorney. An attorney should be disqualified only if real harm is likely to result by failing to disqualify the attorney.

There is no requirement that an evidentiary hearing must be held on every motion to disqualify an attorney. Husband provided very little factual details to support his motion. He simply cited to Prof. Cond.R.1.7(a)(2) which states that an attorney's representation of a client creates a conflict when there is a substantial risk that the attorney's ability to carry out his duties will be materially limited by the attorney's responsibilities to another client, former client, or third person. In granting the motion to disqualify, the court noted that there was high conflict between the parties and between Husband and the children. This conflict led to Wife and the children refusing to participate in reunification counseling. Therefore, the court held "[t]his could create an appearance of a conflict—e.g. there potentially could be a situation where [Ms. Budd's counsel's clients] blame each other for not participating in the reunification counseling—that could warrant the removal of [Ms. Budd's] counsel." However, this is only a potential conflict and not similar to "real harm likely to result from failing to disqualify the attorney." There is no demonstration of substantial risk in Wife's attorney continuing his representation. Judgment reversed and remanded.

Wife further argued that the court violated her due process rights by failing to hold an evidentiary hearing prior to ordering Intensive Case Management. However, Wife failed to demonstrate that ordering the parties to participate in Intensive Case Management was a final appealable order. A final appealable order is an order that affects a substantial right made in a special proceeding requiring immediate review. A divorce and related custody ac-

tions are special proceedings. However, the Court does not agree that Wife's right to liberty would be negatively impacted if the order was not immediately appealed. Wife is simply contending that she simply does not want to participate in Intensive Case Management. An inconvenience to a party in the midst of litigation does not affect a party's substantial rights. Therefore, the judgment ordering the parties to participate in Intensive Case Management is not a final appealable order and is dismissed.

SPOUSAL SUPPORT

Bailey v. Bailey

Citation: *Bailey v. Bailey*, 2020-Ohio-4333, 2020 WL 5268592 (Ohio Ct. App. 6th Dist. Sandusky County 2020)

Headnote: Spousal Support—Retaining Jurisdiction to Modify and Duration

Summary: Husband appealed trial court's failure to retain jurisdiction to modify spousal support. Wife appealed the duration of the spousal support award.

After 35 years of marriage, the parties filed for divorce. The parties settled all issues except spousal support and attorney fees. Each party was 53-years-old. Husband earned an annual income of \$84,500 as a laborer, and Wife received Social Security disability of \$13,326 annually. Wife could earn additional income as a licensed daycare provider, but she chose not to work. Upon briefs, the court issued Wife an award of nonmodifiable spousal support in the amount of \$1,750/month for a term of 8 years, which was to terminate upon Wife's remarriage or cohabitation with an unrelated male. Husband and Wife both appealed.

Husband argued that the court erred in failing to retain jurisdiction to modify spousal support. Husband claimed that if a future misfortune occurred (ie disability or layoff), he would have no recourse if he was unable to satisfy his obligation. R.C. 3105.18(E)(1) provides that the court has discretion as to whether to retain jurisdiction to modify spousal support. The Appellate Court found that the trial court abused its discretion when it failed to retain jurisdiction since over the period of 8 years, either Wife or Husband's circumstances may change. The parties could encounter major medical problems and with the pandemic, Husband's income could vary greatly in the upcoming years. Eight years is a relatively lengthy period of time. Judgment is reversed and remanded.

Wife contended that the court erred in limiting spousal support to eight years. Wife stated that spousal support should be of indefinite duration, or in the alternative, spousal support should be for a term of at least twelve years. Wife was disabled, and she claimed that there was nothing in the record that suggested that she had any potential to become self-supporting. The Court disagreed. Pursuant to R.C. 3105.18(B), the court, upon request of a party, may award reasonable spousal support after a property distribution. Thirty five years of marriage is a lengthy duration wherein an indefinite award of spousal support is not unreasonable. However, case law does not mandate permanent spousal support in a marriage of long duration. Even though Wife is on Social Security disability, she is relatively young and her disability does not prevent her to work as a daycare provider out of her home. An award of indefinite spousal support is

proper only where "under reasonable circumstances, a divorced spouse does not have the resources, ability or potential to become self-supporting." Wife offered no evidence that she does not have the potential and ability to become self-supporting. Wife failed to provide any explanation as to why spousal support should be extended beyond eight years. Judgment affirmed.

Branden v. Branden

Citation: *Branden v. Branden*, 2020-Ohio-4134, 2020 WL 4876806 (Ohio Ct. App. 8th Dist. Cuyahoga County 2020)

Headnote: Spousal Support—Doctrine of Merger; Court's Continuing Jurisdiction; Cohabitation; Deposition Testimony and Termination Date

Summary: Wife appealed trial court's order terminating spousal support based upon her cohabitation and Husband appealed trial court's retroactivity of the termination.

In parties divorce decree of 2008, Husband was ordered to pay \$2,000 per month in spousal support for an indefinite duration, subject to the court's continuing jurisdiction. In 2011, Husband motioned the court to modify his spousal support. Husband's spousal support obligation was reduced to \$1,275 per month until Wife's death, remarriage or cohabitation. This order was appealed, but the Appellate Court determined it was not a final appealable order since it failed to determine arrears.

On July 10, 2015, Husband filed to terminate spousal support based upon Wife's cohabitation with Nicole. Prior to hearing Husband's motion in February and May of 2019, the court held a hearing to determine Husband's spousal support arrears based

upon the Appellate Court remand. An order on the arrears was issued on May 10, 2016, which was appealed and affirmed. In June 2019, the court terminated Husband's spousal support obligation based upon Wife's cohabitation with Nicole since 2013 and substantial change of circumstances in Wife's income. The termination was effective May 10, 2016. Both parties appealed.

Wife argued the court erred in terminating spousal support since it lacked jurisdiction. Wife claimed Husband's July 2015 motion to terminate was merged into the court's May 10, 2016 judgment since it "resolved all pending motions," and therefore, was implicitly denied. Doctrine of Merger does not apply here since the spousal support order was not a temporary or interlocutory order, but a final order. Husband's motion concerned a post decree claim.

Wife further claimed Husband's motion to terminate was implicitly denied in May 2016 when the court issued a final appealable order. However, Husband filed his motion to terminate spousal support well after the issuance of the final decree. The post decree motion was filed to invoke the court's continuing jurisdiction pursuant to Civ.R. 75. Husband's motion was not heard during the pendency of the appeal and was independent of the appeal on arrearages and modification. Husband's motion to terminate was heard after the appeal was completed and was not inconsistent with appellate jurisdiction.

Wife contended that there was insufficient evidence to support termination of spousal support based upon cohabitation. Cohabitation is a question of fact for the

trial court. Three relevant considerations are 1) actual living together, 2) sustained duration and 3) shared expenses with financing and day-to-day incidentals. Cohabitation and remarriage are not statutory grounds for termination of spousal support, but are grounds to show a change in circumstances to warrant a modification or termination of support as long as the court retained jurisdiction. Here, the court retained jurisdiction and held a full evidentiary hearing on Husband's motion. Wife and Nicole physically lived together in a romantic relationship since 2013. They each contributed \$1,500 into a joint checking account, which paid the mortgage, utilities and groceries each month. Wife failed to establish that she was financially strapped and needed support. Wife and Nicole purchased a \$310,000 condo, had \$12,000 in savings and traveled. The spousal support award was no longer reasonable or appropriate. Therefore, even though cohabitation alone is not enough to terminate spousal support automatically, Wife's change in her financial situation constituted a change in circumstances to warrant a termination of spousal support.

Wife also argued that the court erred in permitting Husband to read Nicole's deposition testimony into the record since Nicole resided in Cincinnati at the time of the hearing and was not considered "unavailable" pursuant to Evid.R. 804(B)(1). The court previously granted Husband's motion to take Nicole's deposition in Missouri and the deposition was filed with the court prior to trial. At the commencement of the trial, Wife's counsel stated that Nicole was "unavailable" to testify since she recently moved to Cincinnati. However, Wife failed to timely inform the court or

Husband of Nicole and Wife's new address. Cincinnati is "beyond subpoena power of the court under Civ. R. 32(A)(3)." The court did not abuse its discretion in permitting Husband to read Nicole's deposition testimony into the record, which was mirrored Wife's testimony.

Husband contended that the court erred in failing to terminate his spousal support obligation effective July 10, 2015 when he filed his motion. The Appellate Court found the trial court did not abuse its discretion as to the termination date of Husband's spousal support obligation. Based upon the history of delays in the case that occurred due to the numerous legal actions that prolonged any finality, the date the hearing on Husband's motion began was proper. This is the date Husband presented sufficient evidence to show Wife's cohabitation with Nicole significantly improved Wife's economic situation and constituted a change in circumstances to warrant a termination of spousal support. Judgment affirmed.

VISITATION

Green v. Quint-Green

Citation: *Green v. Quint-Green*, 2020-Ohio-4141, 2020 WL 4875331 (Ohio Ct. App. 7th Dist. Belmont County 2020)

Headnote: Supervised Visitation—Contempt

Summary: Appellant-Mother appealed the trial court's decision granting Appellee-Father's motion for supervised visitation.

Husband filed for divorce in 2018. The parties had one child during the marriage. During the divorce, Father filed motions for contempt alleging that Mother failed to

provide him with visitation. Father also alleged that Mother subjected the child to unnecessary medical testing in violation of court orders. Mother admitted to the contempt charges and the trial court ordered her to serve a 10 day jail sentence.

The trial court granted Father's complaint for divorce in September 2018. Father was named the residential parent of the parties' child. Mother was granted visitation every other weekend and alternating Wednesday overnights.

In January 2019, Father filed another motion for contempt and requested that Mother's parenting time be suspended or supervised. Mother was continuing to take the child for unnecessary medical testing. Mother had also filed six unsubstantiated complaints with various children's services agencies. The trial court suspended Mother's parenting time and scheduled the matter for hearing.

Prior to the hearing, Mother filed a motion to immediately resume parenting time. The trial court put on an order for supervised visitation.

The trial court held a three day hearing. Mother was found to exhibit concerning and erratic behavior. The trial court found it was in the best interests of the child to have supervised visitation with Mother. The trial court set forth a graduated schedule for supervised visitation.

Mother argued that the trial court erred by terminating her fundamental right to parent her children. She claimed that the trial court denied her all contact with her son in violation of her due process rights. The appellate court disagreed with Mother. The appellate court stated that the trial

court ordered supervised visitation. Initially, the trial court ordered one supervised visitation session a week. A second trial court order added a second supervised visit. In neither judgment entry did the trial court terminate Mother's parental rights. Termination of parental rights ends the parent-child relationship. The appellate court noted that termination of paren-

tal rights did not occur in this case. Rather, Mother was entitled to bi-weekly supervised visitation. Mother continued to have the right to modify the order over time. The appellate court overruled Mother's assignment of error.

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