DOMESTIC RELATIONS JOURNAL OF OHIO

SEPTEMBER/OCTOBER 2021 | VOLUME 33 | ISSUE 5

MILITARY DIVORCE: THE DEATH TRAP

by Mark E. Sullivan and Alicia L. Hohl***

INTRODUCTION

Like most people caught up in a lengthy divorce settlement session, Nancy Erndt and her lawyer were working hard at a resolution that would avoid a trial. And they thought that they'd covered everything when, after three days of negotiations, they signed and recited in court a stipulation that divided equally the community portion of Nancy's federal civil service retirement.

But unlike most full and complete divorce settlements, their's left out one thing. What did they miss? They forgot to *close the door on death*. The settlement omitted one essential element, that is, the survivor annuity associated with the government plan.

There were no overt statements in the court session regarding the survivor annuity. Neither party waived the

*Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law for over 30 years. He works with attorneys nationwide as a consultant on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and at mark.sullivan@ncfamilylaw.com.

**Ms. Hohl is an associate attorney with Terry & deGraauw, P.C., where her practice focuses on family law in the State of New Mexico in addition to representing children as a Guardian ad Litem. Ms. Hohl can be reached at 505-206-5044 and at alh@tdgfamilylaw.com.

IN THIS ISSUE:

Mat #42718300

THOMSON REUTERS®

right to receive a share of any plan benefit. When it came time to write up the stipulated judgment, the husband (who was directed to prepare the document) inserted language that awarded each party ". . .any survivor's benefits . . . related to their share of the community interest awarded to them."

In an attempt to close the door on death, Nancy refused to sign the document. With no agreement in sight, Nancy had to turn to the court. The trial court determined that "the survivor benefits were found to be an 'omitted asset' [under Cal. Fam. Code § 2556] subject to an equal division [under Cal. Fam. Code § 2610]."[1]

DOMESTIC RELATIONS JOURNAL OF OHIO (ISSN 1042-5934) is a journal on domestic relations law and practice in Ohio, edited by Stanley Morganstern, Esq. It is issued 6 times per year; published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. POSTMASTER: send address changes to DOMESTIC RELATIONS JOURNAL OF OHIO, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

Nancy appealed the decision, arguing that her ex-husband should not receive a survivor benefit because their settlement was silent on the topic. She further argued that there was no "meeting of the minds" regarding the survivor annuity.

The appellate court affirmed the trial court's ruling and stated, "We see no merit to wife's contentions and, accordingly, we affirm that portion of the judgment that provides husband is to receive a survivor benefit related to his community property share of the retirement plan."[2] In order for Nancy to successfully close the door on death, she should have defined a clear agreement to do so with her ex-husband.

THE "DEATH TRAP" IN MILITARY DIVORCE CASES

The survivor annuity "death trap" is not limited to federal and state government retirement. It often comes up in military divorce cases.[3] When a military pension is involved, the former spouse needs to bargain hard for the inclusion of Survivor Benefit Plan coverage to prevent the termination of payments if the military member dies first. The rule here is: "When the servicemember dies, the pension dies." There is no provision in the Uniformed Services Former Spouses' Protection Act (USFSPA) for the continuation of pension payments after the death of the member.[4]

To protect the spouse or former spouse, Congress enacted provisions for a survivor annuity, the Survivor Benefit Plan (SBP), to continue the flow of payments after the death of the servicemember.[5] If Mary Smith is the military member and the dissolution settlement provides for SBP coverage for her ex-husband, Jack Smith, then Jack will

receive 55% of the SBP base amount (usually Mary's full retired pay, unless the court or the parties decide differently) for the rest of his life.

COST AND ADVANTAGES OF SBP COVERAGE

SBP coverage isn't cheap, and it costs a lot more than life insurance. For a retirement from active duty, the premium is 6.5% of the base amount. When the member is in the Reserves or the National Guard, the cost is closer to 10% of the base. Premiums are deducted from the member's retired pay, and they come "off the top" before the pension is divided,[6] which means that the cost is shared by the parties in proportion to their shares of the pension (e.g., 60-40 or 75-25). The payments, once Jack begins to receive them, are taxable income for him.

The advantages of SBP are substantial. The payments to Jack are adjusted annually for inflation through a cost-of-living adjustment (COLA). There are no health exclusions or annual physicals, and the coverage cannot be cancelled by Mary once it's elected.[7] Most important for Jack, the payments go on for the rest of his life; he can't outlive the money, which cannot be said for life insurance.

SAMPLE LANGUAGE TO CLOSE THE SURVIVOR ANNUITY "DEATH TRAP"

It's all too easy to forget about SBP in the midst of a military divorce. Most military divorce discussions deal with the spouse's share of the pension and the issue of indemnification when disability pay is involved, which may reduce the amount paid to the former spouse. Much time is spent figuring out the necessary wording and the required data and language for the pension division order. It's not surprising that some lawyers *forget to remember the SBP*! Whether it's the result of a sudden accident for a servicemember or a protracted illness for a retiree, the lack of SBP can be a financial fiasco for the former spouse.

To prevent this predicament, the attorney representing the former spouse (Jack Smith in the example above), should include the following sample clause or something similar in the settlement:[8]

> The servicemember, Mary Smith, will promptly elect former-spouse Survivor Benefit Plan (SBP) coverage for her husband, Jack Smith, with her full retired pay as the base amount. Mary will make this election using DD Form 2656-10. Jack will promptly execute DD Form 2656-10 to claim his deemed election for SBP.

Without the inclusion of similar language, the former spouse will have to fight to protect his or her portion of the death benefit associated with the retirement. In some cases, it may be necessary to pursue action in court to have it treated as an omitted asset.

TERMINATING SBP COVERAGE AFTER ELECTION

With the valuable benefits provided by SBP, why would a servicemember ever want to eliminate that coverage? Cost is usually the reason. Alternatively, the former spouse may have passed away, or the member may have remarried.[9] SBP cannot be subdivided between a former spouse and a current one, so "*your next or your ex*" is the mantra to use. And SBP coverage can only be terminated between the 25th and

36th month after the servicemember begins to receive retired pay. Despite the cancelation of the coverage, the member is not entitled to a refund of the previous premiums, and he or she would be prevented from re-electing SBP coverage in the future, unless the coverage was terminated due to the death of a covered spouse or former spouse.[10]

CONCLUSION

As stated above, to successfully close the door on the survivor annuity "death trap," terms for the Survivor Benefit Plan must be specifically stated in the settlement. Otherwise, the SBP could be treated in some states as an omitted asset, subject to equal division later. Avoid the stress and the cost of expensive litigation by including the SBP in the overall negotiations when the goal is to protect the former spouse's stream of income after the death of the servicemember/retiree. If SBP is not intended, then "bolt the door" by saying that in the settlement.

ENDNOTES:

[1]*In re Marriage of Erndt and Terhorst*, 59 Cal. App. 5th 898, 900, 273 Cal. Rptr. 3d 765 (1st Dist. 2021).

[2]*In re Marriage of Erndt and Terhorst*, 59 Cal. App. 5th 898, 900, 273 Cal. Rptr. 3d 765, 766 (1st Dist. 2021).

[3]The leading case in this area is *In re Marriage of Smith*, 148 Cal. App. 4th 1115, 56 Cal. Rptr. 3d 341 (6th Dist. 2007), reh'g denied, (Apr. 19, 2007) and review denied, (June 20, 2007). The Court of Appeals found in that case that using the SBP to ensure that the former spouse continues to receive payments after the ex-husband's death makes division of the military retirement more equitable. Thus, the appellate court determined that the SBP election was part of the judge's overall effort to divide fairly the military pension specified in the judgment, the order was reasonable, and it was not an abuse of discretion. The former spouse also prevailed in her "omitted asset claim" in a Washington State case, *Buchanan v. Buchanan*, 150 Wash. App. 730, 207 P.3d 478 (Div. 3 2009), as amended on reconsideration in part, (July 21, 2009).

[4]10 U.S.C.A. § 1408(d)(4) states, "Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first."

[5]The Survivor Benefit Plan is found at 10 U.S.C.A. §§ 1447 to 1455.

[6]10 U.S.C.A. § 1408(a)(4)(A)(iv).

[7]Jack's coverage will, however, be suspended if he remarries before turning 55. The suspension will be removed if that marriage ends in divorce, annulment, or the death of the new spouse.

[8]Note that there is no reference to who pays for the SBP. It's to Jack's benefit that the stipulation is silent on this since both parties will be sharing the cost of SBP coverage for him. If the cost is mentioned in negotiations, the servicemember or retiree usually insists on the premium being the responsibility of the former spouse. While the retired pay center cannot do the premium-shifting, it is possible to reduce Jack's share of the pension to accomplish the cost-shift, or else Jack can just pay Mary directly each month, or annually, to reimburse her for the money coming out of her portion of the pension.

[9]10 U.S.C.A. § 1448(b)(7)(A) states "A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) and whose former spouse subsequently dies is no longer a participant in the Plan, effective on the date of death of the former spouse."

[10]10 U.S.C.A. § 1448(b)(1)(E) states "Once participation is discontinued, benefits may not be paid in conjunction with

the earlier participation in the Plan and premiums paid may not be refunded. Participation in the Plan may not later be resumed except through a qualified election under paragraph (5) of subsection (a) or under subparagraph (G) of this paragraph." See 10 U.S.CA. § 1448(b)(7)(B)(i)(ii) for guidelines to elect SBP coverage for the member's current spouse after the death of the covered former spouse.

EMPLOYEE RETENTION TAX CREDIT

By Rachel Kohuth CPA, MBA

In light of the economic disruption caused by the coronavirus pandemic, businesses are turning to government stimulus programs and tax credits for financial assistance. One such tax credit is the employee retention tax credit. This is not a new tax credit. It had primarily been utilized by businesses affected by natural disasters, such as hurricanes, up until now.

The employee retention tax credit is a refundable tax credit received against federal employment taxes. Employers who are eligible receive it on their quarterly payroll Form 941 tax returns. The credit is currently available until the end of 2021 and a business may go back retroactively until March 13, 2020 to claim the credit. Originally in March 2020 under the CARES Act, an employer could only qualify for either the PPP loan or employee retention credit. At this time, most employers opted to receive the PPP loan. However, in December 2020, the rules pertaining to the employee retention credit were modified by the Consolidated Appropriations Act. Under this Act, employers were now able to qualify to receive both the PPP loan and employee retention credit as long as the employer did not use the same wages to count towards both. As of the time of this publication, the Infrastructure Investment and Jobs Act has been approved by the Senate and is being considered in the U.S. House. This Act would cancel the employee retention credit for the fourth quarter of 2021 which would mean the eligible period for the employee retention credit would end on September 30, 2021.

There are two tests to determine if a business qualifies for the credit. First, the employer may qualify if they had a full or partial suspension in the operations of their business due to governmental orders. A business which experienced a full shutdown of their non-essential business due to mandates on the federal, state, or local level would be eligible to receive the credit. Furthermore, a business who was considered to be essential but had a non-essential piece which was shutdown could qualify under the partial suspension shutdown provision. For example, this would include hospitals who were mandated not to perform elective surgeries. To be considered to have a partial shutdown, the part of the business which was suspended must comprise more than 10% of a business' gross receipts or total hours in 2019. Factors to consider when determining whether a business had a partial shutdown would include whether hours were restricted due to government mandate and whether social distancing restrictions reduced normal capacity such as restaurants who may have been forced to close indoor dining but were still able to offer carryout options to customers. A business who was able to operate remotely and experienced no substantial decline in gross receipts would not be eligible for the credit.

A business who experienced a significant

decline in gross receipts may also be eligible to receive the employee retention credit. The test to determine if there is a significant decline in gross receipts is different depending on if the business is analyzing 2020 or 2021. For 2020, a business would be eligible if their gross receipts are less than 50% compared to the same calendar quarter in 2019. For 2021, gross receipts must be less than 80% compared to the same calendar quarter in 2019 in order to qualify for the credit. When determining the amount of gross receipts, a business must use the same accounting method used on their tax returns (i.e. cash basis or accrual basis). The PPP loan and stimulus grants are excluded from the amount of the business' gross receipts.

There are several factors to consider when determining the amount of employee retention credits a business can receive. First, a business needs to determine the amount of their employees' qualified wages. All wages, bonuses, tips, and commissions an employer pays its employees are used to determine the amount of qualified wages. Furthermore, the business may also include the cost of their employer paid health insurance in the amount of qualified wages. Wages used for PPP loan forgiveness, other employment credits, and government grants are not eligible to be used in the amount of qualified wages. Second, the amount of the employee retention credit is dependent on the year in which the business qualifies. Businesses can go all the way back to March 13, 2020 to claim the credit. For 2020, 50% of an employee's wages up to $10,000 can qualify for the credit. Thus, the maximum amount of the credit for 2020 is $5,000 per each employee. Also, for 2020, businesses with 100 or less full-time equivalent employees qualify for the credit. Businesses must use 2019 numbers when determining the number of full-time equivalents. If a business has over 100 employees, they may be eligible for the credit based on the wages paid to employees they continued to pay even though they were not providing services to the business.

For 2021, a business can use 70% of wages for each quarter in which the business qualifies for the credit up to $10,000 in wages per employee per quarter. Thus, the maximum amount a business may receive in employee retention credits for 2021 is $7,000 per employee per quarter. This is a significant increase compared to 2020 which capped the credit at $5,000 per employee for the entire year. For 2021, a business can also have up to 500 employees to qualify for the credit as opposed to only 100 employees in 2020.

When determining the amount of qualified wages, businesses need to be aware of specific rules relating to family attribution rules. If a person has a greater than 50% ownership either directly or indirectly through their spouse, children, grandchildren, or parents, then the owner's wages are excluded from the employee retention credit calculation. Family members' wages of greater than 50% owners are also excluded from the calculation. Simply put, if a person owns 50% or more of a business either directly or indirectly, they and their family members are excluded from receiving the benefits of the employee retention credit. Self-employed taxpayers are also ineligible to receive the credit based on their self-employed earnings. However, self-employed individuals are able to claim the credit for the wages they pay their employees.

Another employee retention credit rule

for businesses to consider pertains to aggregation. When there are two or more entities that have common ownership or control, all employees of all aggregated businesses are included when determining the total number employees. Likewise, a company needs to include all gross receipts for all aggregated companies to determine if they meet the gross receipts test. If a business has employees who work for both companies, the $10,000 maximum wage limit is in total so if a business is paying an employee out of more than one company, the employee's wages need to be allocated between each company as to not exceed $10,000.

Businesses can file amended quarterly payroll tax returns (Form 941X) to claim the credit. The third and fourth quarter 2021 941 form will have specific line items for the employee retention credit built directly on the form. Finally, businesses need to beware any wages which qualify for the employee retention credit are not able to be deducted on their business tax return. Since the credit needs to be recorded on a company's books for the year the credit relates to, it is probable a business who qualified for the credit based on 2020 will need to amend their 2020 tax return if it has already been filed.

ETHICS OPINIONS AND CASES

TOLEDO BAR ASSOCIATION V. YODER—MULTIPLE VIOLATIONS INCLUDING ENGAGING IN UNDIGNIFIED OR DISCOURTEOUS CONDUCT THAT IS DEGRADING TO A TRIBUNAL—TWO-YEAR SUSPENSION WITH SIX MONTHS STAYED

Citation: *Toledo Bar Association v. Yoder*, 162 Ohio St. 3d 140, 2020-Ohio-4775, 164 N.E.3d 405 (2020)

Attorney Yoder was admitted to practice in Ohio in 1977 and had no prior disciplinary record cited in the opinion.

While representing grandparents in a Juvenile Court custody dispute Yoder sent correspondences to Dowe, a relative of the children who was also seeking custody of them. In his correspondence to Dowe, Yoder made false and threatening statements, accusing Dowe of kidnapping the children, accused Dowe of being delusional, claimed Dowe lied in an emergency custody hearing, claimed Dowe had lied about him (Yoder) in a motion Dowe had filed, and claimed the court had appointed a GAL "to show that [Dowe had] some serious, serious mental problems." In a subsequent motion to terminate the children's contact with Dowe, Yoder repeated his claims that Dowe was delusional and needed professional help. In another letter to Dowe (a nurse), Yoder told Dowe he had contemplated reporting Dowe's actions to the Ohio

Board of Nursing and threatened her financial well-being. Yoder later wrote to the Michigan and Ohio regulatory boards, urging them to investigate Dowe's mental condition and fitness to be a nurse—and sent copies of several of those letters to Dowe. In the letters to those regulatory agencies, Yoder repeated his claims that Dowe had mental problems, was a liar, and posed a danger to her patients and those around her. At the disciplinary hearing, the children's caseworker, the magistrate, and the two GAL's all testified that they had no concerns about Dowe's mental stability. The hearing panel also found Dowe to be sincere, intelligent, and believable. The panel also found that Yoder's allegations against Dowe were unfounded and found that Yoder had reported Dowe to professional regulatory organizations solely to obtain an advantage in a civil matter. The board found that Yoder's conduct with respect to Dowe violated Prof.Cond.R. 1.2(e) (prohibiting a lawyer from presenting, participating in presenting, or threatening to present professional-misconduct allegations solely to obtain an advantage in a civil matter) and 4.4(a) (prohibiting a lawyer in representing a client from using means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person).

In the same Juvenile Court proceeding, Yoder filed objections to the magistrate's order regarding GAL fees and filed an affidavit of prejudice and bias against the magistrate. In that document, Yoder characterized the magistrate's ruling on one of Dowe's motions as "the most absolutely insane decision [he had] ever encountered in almost 40 years" and was not what "a normal, competent magistrate would have done." He also accused the magistrate of lying about communications with a caseworker and the GAL regarding his clients. Based on the magistrate's alleged lies, "incredible arrogance," "taunts, threats and lectures," and "vendetta" against him, Yoder suggested that the magistrate could not be objective and opined that either he should voluntarily remove himself from the case or the affidavit of prejudice and bias should proceed to a full hearing. Even after the judge transferred the case to another magistrate, Yoder voiced his displeasure with the original magistrate in a court filing and in a letter to the Michigan Department of Licensing and Regulatory Affairs. And at his disciplinary hearing, Yoder testified that he stood by everything he had said about the magistrate. The panel found that there was a legitimate disagreement regarding the magistrate's findings in the emergency custody hearing, but the panel also found the magistrate's testimony at Yoder's disciplinary hearing to be "at all times completely credible." The board determined that Yoder had no reasonable basis in fact to allege that the magistrate had lied, in violation of Prof.Cond.R. 3.3(a)(1) (prohibiting a lawyer from knowingly making a false statement of fact or law to a tribunal), and that his statements about the magistrate's conduct were undignified or discourteous and degrading to the tribunal, in violation of Prof.Cond.R. 3.5(a)(6) (prohibiting a lawyer from engaging in undignified or discourteous conduct that is degrading to a tribunal).

In a separate matter, Yoder represented the seller in a land contract dispute. Zhang, counsel for the purchasers, Steven and Lisa Thomas, wrote letters to Yoder advising him that the Thomases would file suit if certain documents were not provided. In his letter responding, Yoder accused Zhang

of threatening Yoder and accused Zhang of "churning" to increase his fees (and made the same accusations in his letter to relator during the disciplinary proceedings). The Thomases filed a complaint against the sellers in the common pleas court. In a letter to Zhang, Yoder referred to Zhang as "a complete idiot," said Zhang was too "stupid to know how stupid you are," and closed with "No more idiotic letters!!!" After Zhang stopped representing the Thomases, Yoder sent the Thomases a letter in which he stated "Zhang lied to you so that he could file the lawsuit. * * * You paid him for absolutely nothing! I have tried to make him understand, but he is unable to grasp the concept." In a letter to the Thomases' new counsel, Yoder said that Lisa Thomas was a "very ignorant, troubled woman," "a liar," and "an idiot" and opined that Zhang was a "mentally ill attorney advising an idiot." While the Thomases' lawsuit was pending in the common pleas court, Yoder filed a suit against Steven Thomas in municipal court. The municipal court granted Steven's motion to dismiss on the grounds that the complaint raised the same facts and issues that were pending in the common pleas court case. Based on Yoder's conduct in the Thomas matter, the board found that he violated Prof.Cond.R. 3.1 (prohibiting a lawyer from asserting or controverting an issue in a proceeding unless there is a basis in law or fact for doing so that is not frivolous), 4.1(a) (prohibiting a lawyer, while representing a client, from knowingly making a false statement of material fact or law to a third person), 4.4(a) (prohibiting a lawyer in representing a client from using means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person), and 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice).

Finally, during the pendency of the disciplinary proceedings, Yoder sent letters to Dowe's father and to the Thomases. In his letter to Dowe's father, Yoder stated his intention of having a subpoena served on him and stated, "Since you will put [sic] under oath and subject [sic] to the laws of perjury should you lie, may I respectfully suggest that you retain an attorney to advise you as to the ramification of your testimony?" In his letter to the Thomases, he included documentation "to show that [you] consistently lied about [my] conduct" and suggested the Thomases contact an attorney "to advise [them] about [their] rights and obligations, as [they would] be under oath at the hearing." The board found that these letters served no substantial purpose other than to strike fear in, embarrass, harass, or burden the recipients with the cost of hiring counsel to address Yoder's inappropriate threats and innuendo. Consequently, the board found that Yoder's conduct also violated Prof.Cond.R. 4.4(a).

The three-member hearing panel recommended a two-year suspension with one year stayed, which recommendation the full board adopted. Yoder objected, arguing that the board's findings of fact and misconduct were not supported by the record and that the recommended sanction was unduly harsh. A unanimous Court disagreed and imposed a two-year suspension with only six months stayed, stating:

> Indeed, the record demonstrates that over the last eight years, Yoder has been unable or unwilling to address his frustrations in the underlying cases—be they adverse court rulings, perceived criticism of his own conduct, or his own perceptions

that others are performing incompetently—in a concise, rational, and professional manner. Instead, he has lashed out at a magistrate in an undignified and discourteous fashion and degraded the tribunal for granting what he considered to be an erroneous and absurd emergency custody order—though he never moved the court to set aside the order. He has also made numerous false and inflammatory statements about the magistrate, Dowe, Lisa Thomas, and Zhang in correspondence with them and with others, threatened Dowe's financial well-being, and made false and derogatory statements to professional-licensing boards about her conduct, veracity, and mental health for the sole purpose of gaining an advantage in the custody case. Based on the foregoing, we overrule Yoder's objections to the board's findings of fact and misconduct and we adopt as our own the board's findings as set forth above.

Yoder's final objection is that the board's recommended sanction is "unduly harsh" because it is based on "totally fabricated facts" and "unsubstantiated conclusions." But we have already found that the board's findings of fact and misconduct are supported by clear and convincing evidence, and Yoder has neither offered any precedent to support his claim nor suggested any alternative sanction. The board's recommended sanction of a two-year suspension, with one year conditionally stayed, might be an appropriate sanction for Yoder's extensive pattern of false allegations, his repeated insistence that he stands by every word of those allegations, and his refusal to acknowledge that he has done anything wrong—if his misconduct had stopped there. But Yoder has continued to levy false and inflammatory accusations with little or no basis in fact against anyone who disagrees with him—including relator's counsel and the member of the board responsible for drafting the report in this disciplinary proceeding. Consequently, we believe that a more severe sanction is necessary to protect the public and to convey that Yoder's conduct will not be tolerated going forward.

STARK COUNTY BAR ASSOCIATION V. KELLEY—MULTIPLE VIOLATIONS INCLUDING FAILURE TO MAKE REASONABLE EFFORTS TO PREVENT THE INADVERTENT OR UNAUTHORIZED DISCLOSURE OR UNAUTHORIZED ACCESS TO INFORMATION RELATED TO THE REPRESENTATION OF A CLIENT—CONTRACT WITH OLAP—TWO-YEAR SUSPENSION CONDITIONALLY STAYED

Citation: *Stark County Bar Association v. Kelley*, 2021-Ohio-770, 2021 WL 966941 (Ohio 2021)

Attorney Kelley was admitted to practice in Ohio in 2011 and had no prior disciplinary record cited in the opinion.

During a 24-hour period in early March 2018, emergency medical personnel twice transported Kelley to a local hospital for psychiatric evaluation. The first time, Kelley was medically cleared and discharged, but the second time, he was taken from the hospital to an inpatient mental-health-and-chemical-dependency facility after acknowledging that he was suffering from suicidal ideation and had recently abused several substances, including cocaine and Adderall. After he was admitted to the rehabilitation center, Kelley had his girlfriend placed a message on his office-telephone answering

machine, informing callers Kelley was no longer accepting new clients. It also informed current clients to contact either the Stark County Bar Association or "the prosecutor's office" to get new counsel. At that time, Kelley represented at least 15 clients in domestic-relations and criminal matters that were pending in Stark, Wayne, Trumbull, and Mahoning counties. He missed at least one hearing and made no arrangements to communicate with his clients, to continue representing them, or to withdraw as counsel in their pending court proceedings. Patrick Cusma, a member of the Stark County Bar Association who had recently confronted Kelley with suspicions of Kelley's substance abuse, heard rumors that Kelley was in trouble and called to check on him. Cusma heard the outgoing message on Kelley's answering machine and subsequently arranged to obtain client files from Kelley's girlfriend and transfer them to himself and other attorneys, all of whom had agreed to represent Kelley's affected clients pro bono. Kelley did not assist Cusma in that effort. After Kelley suffered a relapse, his girlfriend discovered approximately 20 client files that Kelley had left in the trunk of her car (which he had abandoned at a gas station in Akron) and delivered them to relator's counsel.

Kelley admitted that he abandoned 15 clients because of his substance-abuse and mental-health issues. He also stipulated, and the board found, that his conduct with respect to those clients violated five Rules of Professional Conduct, namely Prof.Cond.R. 1.3 (requiring a lawyer to act with reasonable diligence in representing a client), 1.4(a)(3) (requiring a lawyer to keep the client reasonably informed about the status of the matter), 1.16(b)(1) (permitting a lawyer to withdraw from the representation of a client if the withdrawal can be accomplished without material adverse effect on the interests of the client), 1.16(c) (prohibiting a lawyer from withdrawing from representation in a proceeding without leave of court if the rules of the tribunal so require), and 1.16(d)(3) (requiring a lawyer withdrawing from representation to take steps that are reasonably practicable to protect a client's interest). The board also found that Kelley violated Prof.Cond.R. 1.4(a)(2) (requiring a lawyer to reasonably consult with the client about the means by which the client's objectives are to be accomplished) and 1.4(a)(4) (requiring a lawyer to comply as soon as practicable with reasonable requests for information from a client) with respect to each of the 15 affected clients. However, we find that those violations were charged only with respect to one of the affected clients and therefore, we limit our findings accordingly. Additionally, the board found that Kelley's abandonment of client files in his girlfriend's car violated Prof.Cond.R. 1.15(a) (requiring a lawyer to properly hold and safeguard property of clients that is in a lawyer's possession in connection with a representation) and 1.6(c) (requiring a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure or unauthorized access to information related to the representation of a client).

At the disciplinary hearing the parties also stipulated to a sanction of a two-year conditionally stayed suspension. The board adopted the findings and the sanction. A unanimous Court (with Kennedy, J., concurring in judgment only) agreed. Kelley's drug addiction began with a drug prescribed to treat a disorder first diagnosed during his childhood. Although Kelley did

not present certification that he had successfully completed an approved treatment program, his counselor reported he had recently completed 11 weeks of a 12-week outpatient program. The associate director of Ohio Lawyers Assistance Program ("OLAP") also reported that Kelley was following his counselor's treatment recommendations and had entered into a contract with OLAP. The Court cited "multiple rule violations" as the only aggravating factor, while citing multiple mitigating factors of no prior discipline, no dishonest or selfish motive, full and free disclosure to the board, demonstration of a cooperative attitude toward the disciplinary proceedings, and other interim rehabilitation—namely, treatment for his addiction.

DISCIPLINARY COUNSEL V. PETRACCI—MULTIPLE VIOLATIONS INCLUDING FAILURE TO HOLD CLIENT FUNDS IN AN INTEREST-BEARING TRUST ACCOUNT AND KNOWINGLY MAKING FALSE STATEMENTS IN CONNECTION WITH A DISCIPLINARY MATTER—INDEFINITE SUSPENSION

Citation: *Disciplinary Counsel v. Petracci*, 163 Ohio St. 3d 164, 2021-Ohio-249, 168 N.E.3d 500 (2021)

Attorney Petracci, formerly known as Schartiger, was admitted to practice in Ohio in 2015 and had no prior disciplinary record cited in the opinion.

Tucker hired Petracci regarding injuries Tucker sustained in an automobile accident. Upon receiving the $4,800 settlement check from the insurance company (which failed to deduct the amount owed to the State of Ohio for Medicaid reimbursement) Petracci first deposited it into her then empty IOLTA account. One week later she transferred all of it to her personal checking account. In a letter to Tucker she falsely stated the amount due to Tucker, stated that a check in that amount was enclosed, but failed to enclose the check. Petracci twice scheduled meetings with Tucker to pay Tucker but canceled both meetings. After Tucker's mother filed a grievance with the Akron Bar Association, Petracci met with Tucker at the bar association's office and gave her two checks comprising the entire amount owed to Tucker. The smaller check cleared but the larger one did not. Petracci subsequently paid the rest to Tucker by cashier's check, but still owed money to the insurance company for the State of Ohio Medicaid claim. During the bar association's investigation, Petracci made false statements about actions she said she had taken to pay Tucker, the reasons why she canceled the meetings with Tucker, and what she had done with Tucker's funds, all of which caused the bar association to dismiss Tucker's grievance. Based on this conduct, the parties stipulated and the board found that Petracci violated Prof.Cond.R. 1.5(c)(1) (requiring a lawyer to set forth a contingent-fee agreement in a writing signed by both the client and the lawyer), 1.5(c)(2) (requiring a lawyer entitled to compensation under a contingent-fee agreement to prepare a closing statement to be signed by the lawyer and the 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), 8.1(a) (prohibiting a lawyer from

knowingly making a false statement of material fact in connection with a disciplinary matter), 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).

In a separate matter, Jackson hired Petracci to recover the cost of a faulty auto repair. Petracci did not deposit the retainer check into her IOLTA account. After obtaining the funds from the auto repair shop, Petracci lied to Jackson stating there was a problem with the check from the auto repair shop. Petracci then spent most of those funds. After Jackson informed Petracci that he had confirmed with the bank there was no problem with the check, Petracci stopped communicating with Jackson and still owed the settlement funds to Jackson at the time of the disciplinary hearing. The parties stipulated and the board found that this conduct violated Prof.Cond.R. 1.3 (requiring a lawyer to act with reasonable diligence in representing a client), 1.4(a)(3) (requiring a lawyer to keep the client reasonably informed about the status of a matter), 1.15(a), and 8.4(c).

In two other matters, Beck retained Petracci to represent him in a divorce and Youngen retained Petracci to seek modification of his child support and parenting time. Each paid a retainer. Before she performed any significant work on the matters, Petracci deposited both retainers into her overdrawn personal checking account and began to misappropriate those funds. She ceased communicating with both clients without performing any service of value to them and failed to refund their unearned retainers—though Youngen received a full refund from his credit-card issuer. The parties stipulated and the board found that Petracci's conduct in these matters violated Prof.Cond.R. 1.3, 1.4(a)(3), 1.15(a), 1.16(e) (requiring a lawyer to promptly refund any unearned fee upon the lawyer's withdrawal from employment), and 8.4(c).

In the Quick matter, after signing a contingent-fee agreement, Petracci lied to the client about having filed a complaint for personal injuries she had not filed. After Petracci filed the complaint, the defendant filed a motion to dismiss on statute of limitations grounds. Without consulting with Quick about it, Petracci filed a response in which she falsely stated the statute should be tolled because Quick was of unsound mind following the incident. After the complaint was dismissed, opposing counsel sought and received an award of attorney's fees based on Petracci's frivolous conduct, requiring Petracci and Quick to jointly pay the fees. Petracci failed to inform Quick about this and failed to respond to Quick's inquiries about it. Months later, when opposing counsel filed a motion for contempt based on failure to pay the attorney's fee award, Petracci avoided service and failed to respond to Quick's inquiries about the motion. The parties stipulated and the board found that Petracci's conduct in this matter violated Prof.Cond.R. 1.3, 1.4(a)(4) (requiring a lawyer to comply as soon as practicable with reasonable requests for information from the client), 3.1 (prohibiting a lawyer from bringing or defending a proceeding that is unsupported by law or lacks a good-faith argument for an extension, modification, or reversal of existing law), 8.4(c), and 8.4(d) (prohibiting

a lawyer from engaging in conduct that is prejudicial to the administration of justice).

During the investigation of the grievances, Petracci failed to provide documents and client files as requested, failed to appear at one deposition and failed to produce subpoenaed documents at another, falsely stated she had paid the Medicaid lien, and made other false statements to the investigator. The parties stipulated and the board found that Petracci's conduct during the investigation of her clients' grievances violated Prof.Cond.R. 8.1(a) and 8.1(b) and Gov.Bar R. V(9)(G) (requiring a lawyer to cooperate with a disciplinary investigation).

The board recommended an indefinite suspension. A unanimous Court agreed.

DISCIPLINARY COUNSEL V. BURCHINAL—MULTIPLE VIOLATIONS INCLUDING KNOWINGLY MAKING A FALSE STATEMENT OF MATERIAL FACT IN CONNECTION WITH A DISCIPLINARY MATTER AND TO A TRIBUNAL, FAILURE TO HOLD CLIENT FUNDS IN AN INTEREST-BEARING TRUST ACCOUNT, AND PRACTICING LAW IN A JURISDICTION IN VIOLATION OF THE REGULATION OF THE LEGAL PROFESSION IN THAT JURISDICTION—PERMANENT DISBARMENT

Citation: *Disciplinary Counsel v. Burchinal*, 163 Ohio St. 3d 436, 2021-Ohio-774, 170 N.E.3d 855 (2021)

Attorney Burchinal was admitted to practice in Ohio in 1999. In 2012 he was suspended for two-years with 18 months stayed for misappropriating client funds in three matters, missing the statute-of-limitations deadline in a fourth client matter, and then deceiving the clients in the fourth matter for two years. He had also been briefly suspended on two other occasions for failure to timely register. This proceeding also involved multiple grievances.

In the B.C. matter, Burchinal was appointed to represent B.C. in a criminal matter. Burchinal filed a motion for a psychiatric evaluation to determine whether B.C. was competent to stand trial. The court granted that motion and released B.C. from jail on a surety bond. While that motion was pending, Burchinal convinced B.C. to loan him $8,000. He did not inform B.C. of the terms of the loan nor advise him to seek independent counsel. Burchinal continued to borrow more money from B.C. even after the trial court found B.C. incompetent to stand trial. After B.C.'s bond was revoked and he was confined to a psychiatric facility, Burchinal convinced B.C. to give him signed blank checks for Burchinal to use, ostensibly to pay B.C. bills. Burchinal used three of those checks to obtain $10,000 for his own personal use. Later, he lied to B.C. about needing money to hire an investigator for B.C.'s criminal case. B.C. gave him the checks, Burchinal wrote "Investigator" on the memo line, but used the funds for his own benefit. The check he wrote as partial repayment to B.C. bounced. By the time the court released B.C. on a finding his competency had been restored, Burchinal had misappropriated $22,000 in addition to the $19,000 he had borrowed from B.C. When B.C. confronted Burchinal about

the misappropriation of funds, which B.C. mistakenly believed was only $7,300, and demanded repayment of those funds as well as the $19,000 borrowed funds, Burchinal instead signed a promissory note. The amount stated in the note was $14,000 less than he had actually misappropriated. When B.C. discovered the true extent of the misappropriation, Burchinal prepared and signed a second promissory note. After failing to make payments required by the notes, Burchinal offered to sign over titles to two motor vehicles without telling B.C. they had liens on them. He repaid B.C. in full about a year later. When relator initiated the disciplinary investigation, Burchinal asked for and received two extensions to respond in writing but never did provide a written response and made false statements which convinced the investigator to cancel his deposition. The parties stipulated and the board found that Burchinal's conduct violated Prof.Cond.R. 1.8(a) (prohibiting a lawyer from entering into a business transaction with a client unless the client is advised in writing of the desirability of obtaining independent legal counsel and the terms of the transaction are fair, reasonable, and fully disclosed in a writing signed by the client), 8.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact in connection with a disciplinary matter), 8.1(b) and Gov.Bar R. V(9)(G) (both prohibiting a lawyer from knowingly failing to respond to a demand for information by a disciplinary authority during an investigation), Prof.Cond.R. 8.4(b) (prohibiting a lawyer from committing an illegal act that reflects adversely on the lawyer's honesty or trustworthiness), and 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). The board also adopted the parties' stipulation that Burchinal's misappropriation of funds from a vulnerable client was sufficiently egregious to warrant a separate finding that he violated Prof.Cond.R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law).

In separate matters, Burchinal failed to act with reasonable diligence in his representation of Monica Poole, Angela Riley, and Omar Gutierrez. Although these clients repeatedly reached out to Burchinal for information regarding the status of their cases, he often failed to return their calls or respond to their text messages. When Burchinal *did* respond to communications from these clients, he repeatedly lied to them. He either claimed that he had performed (or would soon perform) the requested services or fabricated excuses for not having done so. He blamed his court schedule and his secretary for his failure to file some documents. Burchinal received relator's letters of inquiry regarding all three of these matters. He did not respond to relator's inquiries regarding Poole and Riley. And although he twice submitted information regarding the Gutierrez matter, he did not comply with relator's additional requests for information regarding that case. The parties stipulated and the board found that Burchinal committed three violations of Prof.Cond.R. 1.3 (requiring a lawyer to act with reasonable diligence in representing a client), 1.4(a)(3) (requiring a lawyer to keep the client reasonably informed about the status of a matter), 1.4(a)(4) (requiring a lawyer to comply as soon as practicable with reasonable requests for information from the client), 8.1(b), and 8.4(c) and Gov.Bar R. V(9)(G).

They also agreed that Burchinal's conduct in the Poole and Gutierrez matters violated Prof.Cond.R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice), and that his failure to return the Riley and Gutierrez files violated Prof.Cond.R. 1.16(d) (requiring a lawyer to promptly deliver client papers and property as part of the termination of representation).

In yet other separate matters, Burchinal made false statements to three separate tribunals and engaged in other misconduct while representing Robert Clay, Aaron Piendl, and Robert Garcia. (1) In Clay, at the sentencing hearing the court ordered Clay to pay restitution. Burchinal falsely stated to the court that he had money from Clay sitting in his trust account sufficient to pay the restitution in full. In fact, Clay had paid the money to Burchinal but Burchinal no longer had it. A year later Clay's probation officer asked Clay why restitution had not been paid. Burchinal stipulated that when Clay then contacted Burchinal about the money Burchinal falsely stated he had sent a check to the court, but it had never been cashed. (2) By June 2019, the B.C. disciplinary matter had progressed to the point of having a hearing panel assigned. Burchinal advised the hearing panel that because he was being investigated for criminal theft, he was willing to wind down his practice and register his license inactive by September 1, 2019. Based on that representation, and with relator's agreement, the panel chair stayed the disciplinary case against Burchinal until his criminal case was resolved. But, on September 26, 2019, Burchinal appeared at court with Piendl to represent Piendl on an extradition matter. The prosecutor had discovered that Burchinal's registered status with the Ohio Supreme Court was "Not registered" effective September 1, 2019. When confronted by the judge about his registration status, Burchinal falsely stated that his "Not registered" status would not take effect until October 1, 2019. When the judge informed Burchinal that in fact his suspension had already taken effect Burchinal replied "Oh. Okay." (3) Several months later, Garcia retained Burchinal for a probation violation matter. Burchinal did not inform Garcia that his law license was under suspension. When the judge, in open court, expressed discomfort in going forward given Burchinal's nonregistration status on the Supreme Court's website, Burchinal falsely stated that he had submitted his paperwork and fees for reinstatement but that the Supreme Court had not timely processed the documents or reinstated him to the practice of law. He explained, "[L]ike you, I'm uncomfortable. Even though I know I've done everything they told me to do, I would agree with the Court, the website says exactly what Your Honor saw." The parties stipulated and the board found that Burchinal's conduct in the Clay, Piendl, and Garcia cases violated Prof.Cond.R. 3.3(a)(1) (prohibiting a lawyer from knowingly making a false statement of fact or law to a tribunal) and that his conduct in the Piendl and Garcia cases was prejudicial to the administration of justice in violation of Prof.Cond.R. 8.4(d). They also agreed that his conduct in Clay's case 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 8.4(c) and that his conduct in Garcia's case violated Prof.Cond.R. 5.5(a) (prohibiting a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

A unanimous Court rejected Burchinal's arguments that the board's recommended sanction of permanent disbarment was excessive. The Court agreed with the board that the presumptive sanction for both the finding of misappropriation of client funds and the finding of continuing to practice law while under suspension is disbarment. The few mitigating factors ("*postcomplaint* cooperation and the sanctions imposed for his criminal conduct") did not outweigh the aggravating factors, including "we have already given Burchinal a second chance, and he came back to tell more lies and again steal money from vulnerable clients."

OHIO SUPREME COURT

Ostanek v. Ostanek

Citation: *Ostanek v. Ostanek*, 2021-Ohio-2319, 2021 WL 2929980 (Ohio 2021)

Headnote: Subject Matter Jurisdiction—QDRO—Federal Employees Retirement System

Summary: The parties were married for 23 years and divorced in October 2001. The parties agreed that Husband's pension with the Federal Employees Retirement System ("FERS") would be divided equally. The trial court would retain jurisdiction to issue a QDRO.

Federal law required the Office of Personnel Management ("OPM"), the administrator of FERS, to abide by a state court's divorce decree providing for FERS benefits to a former spouse. The regulations require a former spouse to submit a "[a] certified copy of the court order acceptable for processing ['COAP'] that is directed at employee annuity."

Wife's attorney submitted a proposed order meant to qualify as a COAP in January 2013. Husband was scheduled to retire the following month. The proposed order was not signed by Husband or his counsel. The order indicated that Husband had been served at the former marital home, which had been sold.

Service of the proposed order was not proper as Wife's counsel did not serve Husband's attorney or use his proper address. Wife knew the marital home had been sold and Husband had moved to Washington D.C. Further, at the time of the divorce, Husband directed that his final divorce decree be sent to his mother's address as he was not living at the marital home.

The domestic relations court adopted and signed the order submitted by Wife's counsel. The order provided that Wife would receive 50% of the marital portion of Husband's monthly retirement benefit. The marital portion was to be calculated using the coverture method. The order required OPM to provide Wife a survivor benefit and for the parties to share the cost of the benefit. The domestic relations court did not direct the clerk to serve the order on Husband.

Husband retired the end of January 2013. He received paperwork from OPM indicating that Wife was receiving $2065 a month from his retirement benefit. He attempted to change the amount with OPM, but he was unsuccessful. Husband did not take any further action until April 2018. He claimed he had only recently received a copy of the COAP and Wife was receiving $1300 a month more than the parties had contemplated at the time of the divorce.

OPM determined that it had been over-

paying Wife and it began reducing Wife's monthly payment to recoup the overpayment. OPM required Husband to repay the cost of the survivor benefit or $18,542. Husband was notified that going forward he would be responsible for one-half the cost of the survivor benefit.

Husband moved the trial court to vacate an order that set forth how his federal retirement benefits would be shared with Wife. He argued that the order had improperly modified the divorce decree's division of property. At the hearing, a representative from QDRO Group testified that when a divorce decree is silent as to the method used to calculate the marital share of federal retirement benefits and whether a survivor benefit is included, the QDRO Group defaults to the coverture method and a survivor benefit. He also testified that it was OPM's policy to order former spouses to share equally the cost of the survivor benefit if the order is silent on the issue.

The trial court denied the motion to vacate indicating that the motion was untimely filed and that the order had not modified the divorce decree. The Eleventh District Court of Appeals affirmed in part and reversed in part. The appellate court rejected Husband's argument that the COAP was void because it applied the coverture method to calculate Wife's share. The appellate court held that the trial court's order had modified the divorce decree by including a survivor benefit at Husband's expense when it was not mentioned in the divorce decree. The appellate court held the order was void because the domestic relations court lacked subject matter jurisdiction to modify the divorce decree's division of property.

The Ohio Supreme Court accepted Wife's appeal and was asked whether an order issued by a domestic relations court that violates O.R.C. 3105.171 is void for lack of subject matter jurisdiction.

The decision noted that a court has subject matter jurisdiction when it has the statutory or constitutional power to adjudicate a particular class or type of case. If a court lacks subject matter jurisdiction, any order issued by the court is void ab initio.

R.C. 3105.171(I) sets forth that division of property is not modifiable by the trial court except with the express written consent or agreement of both parties. The Ohio Supreme Court stated: "However, R.C. 3105.171(I) does not explicitly divest the domestic-relations court of its subject-matter jurisdiction. Therefore, any error in the domestic-relations court's exercise of its jurisdiction in issuing an order that divides retirement benefits in a way that modifies a divorce decree in violation of R.C. 3105.171(I) renders the resulting order voidable, not void."

The Ohio Supreme Court held that "because the domestic-relations court had subject-matter jurisdiction to issue the order, any error in its exercising its jurisdiction in violation of R.C. 3105.171(I) rendered the order voidable, not void." The Court reversed the judgment of the appellate court to the extent it determined that the trial court's order was void and remanded the cause to the court of appeals to review the assignment of error that it declined to address as moot.

BRIEFLY NOTED

ATTORNEY'S FEES

Weinsziehr v. Weinsziehr

Citation: *Weinsziehr v. Weinsziehr*, 2021-Ohio-1568, 2021 WL 1752091 (Ohio Ct. App. 4th Dist. Hocking County 2021)

The parties were divorced in 2017. Their uncontested agreement provided that father would be legal custodian of the minor children and mother would have standard parenting time. Not long after, the parties had significant post decree issues. Both parties filed motions for contempt. Mother alleged that father had denied her parenting time for nearly one year. Father alleged that mother was behind in her child support obligation. After trial, the trial court found both parties in contempt. Mother was in contempt for being one month behind in child support and was ordered to pay father $750 in attorney's fees. Father was found to be in contempt for denying mother's parenting time and was ordered to pay mother $9,630 in attorney's fees. Father appealed challenging the trial court's determination of the reasonableness of mother's attorney's hourly rate and the time spent by her attorney.

The court of appeals affirmed the trial court's decision. Father admitted to denying mother parenting time. Much of the time of the hearing was focused on father's attempt to justify this denial of parenting time. Father testified that his attorney's hourly rate at $250 was reasonable and that his attorney's fees in the amount of $9,266.73 were reasonable. Mother's attorney's hourly rate was also $250 per hour and her total fees were $9,630.

R.C. 3109.051(K) provides a court with the authority to impose sanctions, including reasonable attorney's fees when a parent disobeys court orders and interferes with the other parent's parenting time. The court of appeals opined that as father believed his attorney's hourly rate of $250 was reasonable, he acquiesced that mother's attorney's hourly rate was reasonable. As most of the trial was focused on father's conduct of denying mother parenting time, there was no abuse of discretion in the award of attorney's fees to mother.

CHILD SUPPORT

Polanco v. Polanco

Citation: *Polanco v. Polanco*, 2021-Ohio-1450, 2021 WL 1608559 (Ohio Ct. App. 12th Dist. Butler County 2021)

The parties were divorced in New York in 2007. Father was ordered to pay child support for their two minor children. Subsequently, mother and the children moved to Ohio and father moved to Florida. Father attempted to modify his child support obligation in New York and his motion was dismissed for lack of subject matter jurisdiction as no one resided in New York any longer. Father then filed a motion to register his child support order in Ohio and a motion to modify child support asking that support be terminated as both children were emancipated, one child was 21 and one child was almost 19. The trial court dismissed father's motions without a hearing holding that the Ohio Court lacked the authority to modify the existing child support obligation because the statutory termination of a child support obligation pursuant to New York law is nonmodifiable. In New York, parents are obligated to support their children until age 21. Father appealed.

The court of appeals reversed the trial court's decision. RC 3115.611 governs when an Ohio Court may modify a child support order from another state. Because no one resided in New York, the requirements of RC 3115.611 were met. RC 3115.611 (C) also provides that Ohio may not modify a child support order that may not be modified under the law of the issuing state, including the duration of the obligation of support. The trial court in its decision concluded that the New York child support order was nonmodifiable. However, the court of appeals noted that New York's requirement of child support until age 21 is applied to any unemancipated child under the age of 21. New York law provides that a child may become emancipated before that age if the child becomes economically independent through employment, is self-supporting, is in the military service, or has withdrawn from parental control and supervision. As such the appellate court determined that the trial court erred by dismissing father's motions on the grounds that the order is nonmodifiable. On remand, the trial court was instructed to determine the merits of father's motions on the grounds of emancipation of the children and permit father to present evidence on the issue.

V.C. v. O.C.

Citation: *V.C. v. O.C.*, 2021-Ohio-1491, 2021 WL 1696276 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021), appeal not allowed, 164 Ohio St. 3d 1420, 2021-Ohio-2923, 172 N.E.3d 1044 (2021)

During divorce proceedings, the trial court granted mother's motion for temporary child support and adopted the child support worksheet attached to her motion. Father was ordered to pay temporary child support in the amount of $2,444.83 per month for their four minor children. Father requested an oral hearing on the issue of support and the court scheduled the issue to be heard at the same time as the scheduled trial. After trial, the court in its entry quoted R.C. 3119.02 and ordered the interim child support order to be permanent. Father appealed.

The combined gross income of the parties exceeded $460,000. Effective March 28, 2019, R.C. 3119.04 is to be applied when the parents' combined income exceeds $336,467. In this situation the trial court is mandated, on a case-by-case basis, to consider the needs and standard of living of the children and of the parents. As there was no indication in the court's final judgment entry that the court complied with R.C. 3119.04 or that it considered the needs and standard of living of the children and the parents, the court of appeals determined that the trial court applied the wrong legal standard in determining father's child support obligation. It found an abuse of discretion and reversed and remanded for the trial court to follow the mandates of R.C. 3119.04.

DIVISION OF PROPERTY

Pack v. Pack

Citation: *Pack v. Pack*, 2021-Ohio-2233, 2021 WL 2711492 (Ohio Ct. App. 4th Dist. Lawrence County 2021)

Husband appealed a trial court order which granted wife's post judgment motion requiring the division of property designated in the divorce decree. The divorce decree provided that "other items of personal property, i.e. furniture shall be divided on an alternating basis." Husband

argued that the post decree order which spoke to household goods other than furniture was an improper modification of the original property division without the consent of both parties. R.C. 3105.0171(I).

It was undisputed that the parties owned other items of personal property in addition to furniture which were not dealt with in the divorce decree. While i.e. when used properly indicates "an exhaustive list," it was evident from the record that its use was a clerical mistake. The correct abbreviation was e.g. meaning "for example." The trial court could have corrected its clerical mistake under Civ. R. 60 (A). The trial court also had jurisdiction to divide all items of personal property other than furniture. If the divorce decree had not done so it would not have been final and appealable.

Roxburgh v. Richardson

Citation: *Roxburgh v. Richardson*, 2021-Ohio-2229, 2021 WL 2694202 (Ohio Ct. App. 9th Dist. Summit County 2021)

The parties were divorced in 2000. Wife was to receive a portion of husband's SERS retirement benefits upon his retirement. As the benefit could not be divided by a QDRO at the time of divorce, the court retained jurisdiction to assure wife received the appropriate amount of benefit pursuant to the divorce decree. In 2018, a dispute arose as to the interpretation of the provision relating to the offset of wife's social security. Husband's attorney requested wife to provide a copy of her social security benefit statement and prepared a proposed Division of Property Order. When wife refused to sign the DOPO husband filed a contempt motion.

In an attempt to resolve the dispute between the parties, the trial court suggested that a report from Pension Evaluators be obtained. The parties agreed. The report calculated the offset excluding that portion of wife's social security benefit earned outside of the marriage. Husband argued that the offset should be the entire amount of wife's benefit as the provision in the divorce decree was unambiguous so as to entitle him to an offset of the entire social security benefit. The proposed DOPO prepared by Pension Evaluators was adopted by the trial court in its decision, which Husband appealed.

The majority of the Ninth District Court of Appeals affirmed the trial court's decision. Contrary to husband's claim, the trial court found the language in the divorce decree to be ambiguous. The Court of Appeals concluded that considering the intent of the parties and the equities involved it could not find that the trial court abused its discretion or acted unreasonably, arbitrarily, or unconscionably.

A dissenting opinion opined that there was no ambiguity in decree, and that the trial court's decision was inconsistent with the plain language of the parties' separation agreement. The trial court merely tried to effectuate a more equitable result.

JURISDICTION

Rossi v. Rossi

Citation: *Rossi v. Rossi*, 2021-Ohio-2348, 2021 WL 2878603 (Ohio Ct. App. 7th Dist. Mahoning County 2021)

The parties' separation agreement included a waiver of spousal support so long as husband paid wife agreed payments for her interest in a closely held company. The

trial court retained jurisdiction to grant spousal support should husband default on the payments required under a stock redemption agreement, promissory note, and personal guarantee.

When husband failed to make the required payments, wife file a complaint in the general division alleging causes of action including, breach of contract, breach of fiduciary duty, and other minority shareholder derivative claims. Husband filed a Civ. R. 12(B)(1) motion to dismiss asserting that the domestic relations court had priority jurisdiction. The trial court denied husband's motion. Wife had filed a motion to find husband in contempt in the domestic relations court. Wife's remedy would be the right to seek spousal support per the separation agreement. The trial court reasoned that wife was seeking a money judgment in the general division for breach of the redemption agreement and that remedy would not be available in the domestic relations court.

On appeal husband argued that it was error to deny his motion under the jurisdictional priority rule. The Seventh District Court of appeals disagreed and affirmed the trial court. The jurisdictional priority rule provides that when state courts have concurrent jurisdiction, the first court whose power is invoked acquires exclusive jurisdiction. The Court of Appeals noted that wife's complaint in the general division was filed before she filed her motion for contempt in the domestic relations court. The Court of Appeals also agreed with the trial court that the remedies wife sought and were available to her were different in each court.

PARENTAL RIGHTS AND RESPONSIBILITIES

Short v. Rhodes

Citation: *Short v. Rhodes*, 2021-Ohio-1845, 2021 WL 2182125 (Ohio Ct. App. 6th Dist. Wood County 2021)

The parties divorced in 2015 by entering into a consent judgment entry. Mother was designated as the legal custodian of the two minor children. Father was granted parenting time. One-and-half years later they began post decree litigation which was described by the court as a war by "sophomoric" parents who were irresponsibly damaging their children. The current appeal was in response to the third round of motions for modification of custody, parenting time and contempt. There was much testimony concerning the fact that the children did not want to visit with mother. By the time of trial, both children had not been with mother for some time. Father argued to the court that there had been a change in circumstances which justified a change in custody. The Guardian ad Litem recommended that the custodial arrangement be maintained. He did not perceive that they were unsafe with mother and recommended a 2-2-3 parenting time schedule. The trial court, after hearing, determined that there had not been a change in circumstances to warrant a change in residential parent. Father appealed.

After its review, the court of appeals opined that it was clear there had been a change in circumstances in light of the fact that the children were not visiting with mother. It noted that a change in circumstances is only a threshold determination and that a trial court should not modify parental rights and responsibilities unless

the modification is in the best interests of the children and unless the harm caused by a change of environment is outweighed by the benefits from a change of environment. The appellate court determined that the language of the trial court's order, while not artful, was based on the best interests of the children and the potential harm to the children. As the court based its ruling upon its best interest analysis, the court of appeals declined to find an abuse of discretion and affirmed the trial court's decision.

PROCEDURE

Bosch v. Bosch

Citation: *Bosch v. Bosch*, 2021-Ohio-2649, 2021 WL 3291734 (Ohio Ct. App. 5th Dist. Fairfield County 2021)

The Fifth District Court of Appeals had previously affirmed the trial court's 2017 decree of divorce in an appeal brought by husband. In 2020 husband filed a motion to vacate certain previous order and to reconsider a February 2016 order, Husband claimed there had never been a final and appealable order issued in the divorce case. Neither the trial court nor the Court of Appeals agreed with husband.

In March 2016 an order dealing with parenting issues and granting of divorce was entered. In October an entry dealing with financial issues was entered. After denying husband's objections, the trial court issued a judgment entry adopting magistrate's orders "as an order of the Court." The Court of Appeals noted that husband had never challenged the lack of a final appealable order in the trial court or in the prior appeal. While objections to subject matter jurisdiction may be raised at any time, the 2017 order was appealable. Considering both prior orders entered by the trial court there was nothing left for consideration. All issues had been resolved. While it is better practice to file one final decree resolving all decision on all issues, the trial court did not err in finding a final and appealable order had been filed.

Dodaro v. Dodaro

Citation: *Dodaro v. Dodaro*, 2021-Ohio-2569, 2021 WL 3173772 (Ohio Ct. App. 10th Dist. Franklin County 2021)

Husband appealed the denial of his Civ. R. 60 (B) motion which had been filed during the pendency of his appeal of a decree of divorce. After the Tenth District Court of Appeals affirmed in part and reversed in part, the trial court without holding a hearing, denied the motion. The trial court found that husband had not presented a meritorious defense or claim and an entitlement to relief under the grounds husband stated. The tenth District Court of Appeals agreed.

While claiming he had a meritorious claim, husband only asserted that he believed there was a more equitable manner in which to resolve the issue of division of real property owned by the parties. The manner in which the property was divided was actually determined pursuant to the parties' agreement. Husband did not argue that the agreement did not effectuate the intention of the parties. In finding that appellant Husband failed to establish a meritorious claim, the trial court articulated: "A request to set aside an agreement entered into by both parties merely because [appellant] now believes there is a mere equitable solution does not rise to the amount of a meritorious claim or defense."

Pursuant to local rule, a party is not automatically entitled to a hearing on a Civ. R. 60 (B) motion unless the motion is based on lack of service or lack of jurisdiction. If the materials submitted allege operative facts which, if proven, would warrant relief, a hearing will be set. All other such motions are to be determined without oral hearing.

SPOUSAL SUPPORT

Jones v. Jones

Citation: *Jones v. Jones*, 2021-Ohio-1498, 2021 WL 1686912 (Ohio Ct. App. 4th Dist. Highland County 2021)

After protracted divorce litigation, the trial court entered a final order which among many other things, required husband to pay spousal support directly to wife by bank deduction order. Husband appealed the order on issues other than the spousal support payment method, which appeal was dismissed for lack of a final appealable order. After another final order, appeal and dismissal the trial court's final order of divorce was entered on January 27, 2020. This order required husband to pay spousal support through the support enforcement agency. Husband appealed on this issue arguing that the trial court erred in entering conflicting instructions regarding his payment method. The Court of Appeals overruled his assignment of error.

Until a trial court enters a final order of divorce, any previous orders are considered to be interlocutory orders. A court may reconsider any of its interlocutory orders before it enters its final judgment. R.C. 3121.44 generally requires spousal support payments to be made through the office of child support, however, the court has the discretion to allow the payor to pay directly. As this decision is discretionary the court of appeals could not conclude the trial court's order to be an abuse of discretion.

Simon v. Simon

Citation: *Simon v. Simon*, 2021-Ohio-1387, 2021 WL 1558901 (Ohio Ct. App. 9th Dist. Summit County 2021), appeal not allowed, 164 Ohio St. 3d 1404, 2021-Ohio-2742, 172 N.E.3d 175 (2021)

This is the fourth appeal of issues between the parties' relating to contempt and support. At the time of their divorce in 2008, husband was ordered to pay wife $250.00 in spousal support which was a modifiable order both as to amount and duration. The decree also provided that it was subject to termination upon wife's remarriage. In the years post decree, spousal support had been modified and husband was currently ordered to pay $2,650 per month. The motions at issue this time were wife's motion seeking to find husband in contempt and for attorney's fees and husband's motion requesting that spousal support be terminated or reduced based upon his decrease in income. After a hearing, the trial court, in part, found that there had been a change of circumstances pursuant to R.C. 3108.18 and terminated spousal support. Wife appealed.

The evidence at trial revealed that wife had been cohabitating with her fiancé since 2015 and during prior litigation between the parties. She asserted that there was no change in circumstances and that the issue of her cohabitation was a consideration for the previous litigation but the court should not have considered it in the present litigation. The court of appeals disagreed. Wife's fiancés level of support of wife had

increased since previous litigation. It included providing wife with a home, a car, health insurance, and the majority of her expenses. The court of appeals held that the trial court could have reasonably concluded that a change of circumstances had occurred and that the termination of support was appropriate. The finding of cohabitation was not unreasonable as the three factors determining whether a former spouse is cohabitating had been met: an actual living together, of a sustained duration, with shared expenses with respect to financing and day to day incidental expenses.

CASE SUMMARIES

CHILD SUPPORT

Sypherd v. Sypherd

Citation: *Sypherd v. Sypherd*, 2021-Ohio-2490, 2021 WL 3077219 (Ohio Ct. App. 9th Dist. Summit County 2021)

Headnote: Child Support—Modification; Substantial Change of Circumstances; CSEA Administrative Order

Summary: Appellant-Father and Cross Appellant-Mother appealed trial court's order regarding the court's ruling on the modification of child support.

Parties were divorced in 2008. Three children were born as issue of the marriage. Parties entered into a shared parenting plan wherein Father was awarded parenting time every Monday evening through Wednesday evening plus alternating weekends. Father was ordered to pay monthly child support of $625. The parties modified the shared parenting plan numerous times since their divorce. Except for a short period of time, the child support remained $625 per month.

On April 11, 2018, Father filed a motion for reallocation of parental rights and responsibilities plus modification of child support. Father was requesting more time with the children and to be named primary residential parent based upon the wishes of the children. Prior to Father filing his motion, Mother had requested an administrative review of the child support order with the child support agency ("CSEA"). On June 25, 2018, CSEA issued its recommendation, which increased Father's monthly child support obligation to $972.23. Father filed objections to the court and requested a hearing be held at the same time his motion was to be heard.

The parties entered into an agreement in regards to increased parenting time for Father. A hearing was held on child support. On February 12, 2019, the magistrate issued a decision wherein the court ordered Father to pay child support in the amount of $774.67 per month from May 1, 2018 through January 31, 2019. Thereafter, the child support would decrease to $399.67 per month based upon the parties' agreed modification of parenting time. Both Mother and Father filed objections. On January 14, 2020, the court summarily overruled and dismissed both parties' objections stating that no substantial change of circumstances had occurred and ordered that the current child support order remain in place. Both parties appealed.

Father and Mother argued that the court erred in failing to determine that a substantial change of circumstances had occurred. Mother further contended that the court erred in determining that a change of circumstances was necessary for

an administrative review of the child support order. Since the current order of child support resulted from an agreement of the parties, R.C. 3119.79(A) and (C) shall be read in concert with one another to determine if a modification is appropriate. If a party requests a modification of child support, the court shall recalculate support in accordance with the applicable schedule and worksheet. If the recalculated amount is 10% more or less than the current order, the change shall be considered substantial enough to require a modification of the child support order. R.C. 3119.79(A). If the court finds a substantial change of circumstances, the court shall modify the order, unless the new amount would be unjust or inappropriate and not in the best interest of the child. R.C. 3119.17(C).

Besides R.C. 3119.79 modification of support, a party, every 36 months, may request an administrative review through CSEA pursuant to R.C. 3119.60, 3119.61 and 3119.76. The modification is appropriate if the recommended amount of child support is more than 10% different from the existing order. No substantial change of circumstances must be found. The court did error when it summarily overruled and dismissed both parties' objections to the magistrate's decision. The court failed to conduct an independent review as to the objected matters to determine if the magistrate appropriately determined the factual issues and properly applied the law. Civ.R.53(D)(4)(d). Instead, the court simply stated that there was no substantial change of circumstances and retained the existing child support order. However, a substantial change of circumstances is not required in a CSEA administrative review. The matter is reversed and remanded to the trial court for further proceedings.

Story v. Story

Citation: *Story v. Story*, 2021-Ohio-2439, 2021 WL 3013468 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021)

Headnote: R.C. 3103.03—Duty of Support for Minor Children—R.C. 3109.05—Power of Trial Court to Make Child Support Orders When a Marriage Terminates

Summary: Appellant-Father appealed the trial court's judgment modifying his child support obligation.

Father argued that the trial court erred because there was no legal basis for imposing a child support order upon him. He claimed the child support order was void. He requested that his child support payments be terminated and that he be granted restitution and reimbursement of all monies paid.

At the time of the parties' divorce in 2009, Father was ordered to pay child support of $903.25 a month for the parties' three minor children. One of the children, B.S., graduated high school in June 2017. The trial court modified Father's support obligation for the remaining two minor children. Father was ordered to pay $994.96 a month.

The parties' second child was emancipated in June 2018. Both parties filed motions to modify support. Father also filed a motion to dismiss Mother's motion to modify support and for a recalculation of support. A hearing was held over the course of three days in March, April, and May 2019. The magistrate issued a decision in August 2019. The magistrate found that the support obligation should be modified to reflect the emancipation of the parties' middle child. The magistrate also found

that a change of circumstances had occurred and ordered an upward deviation of $200 a month based upon the relative financial resources of the parties, the disparities in income, and a comparison of the current standard of living. The magistrate also found that Father had an overpayment of $300.83, which should be credited to his account. This was based on the calculation provided by the child support agency.

Both parties objected to the magistrate's decision. The trial court overruled both parties' objections and adopted the magistrate's decision. The amount of support ordered was $976.50 a month.

Father argued that the trial court's support order was void because there was "no child support law" and "no legal right to child support" under Ohio law. The appellate court found Father's arguments lacked merit. The appellate court noted R.C. 3103.03 and R.C. 3109.05(A)(1) provide that a parent has a legal obligation to support his or her minor children under Ohio law.

R.C. 3103.03 sets forth a parent's general obligation to support his or her children in the absence of a child support order. R.C. 3103.03(A) provides in pertinent part: "The biological or adoptive parent of a minor child must support the parent's minor children out of the parent's property or by the parent's labor."

R.C. 3109.05 "sets forth the power of the trial court to make child support orders when a marriage terminates." According to R.C. 3109.05(A)(1), "[i]n a divorce, dissolution of marriage, legal separation, or child support proceeding, the court may order either or both parents to support or help support their children." The appellate court stated that the trial court also has the ability to modify a child support order when a change in circumstances requires it under R.C. 3119.79.

The appellate court held that the trial court properly ordered Father to pay child support and properly modified the order. Accordingly, the judgment of the trial court was affirmed.

Al-Bermani v. Fadul

Citation: *Al-Bermani v. Fadul*, 2021-Ohio-2260, 2021 WL 2764621 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021)

Headnote: Registration of a Foreign Support Order—UIFSA

Summary: Appellant-Husband appealed the trial court's judgment, which granted Appellee-Wife's amended petition to register a foreign support order. He challenged the confirmation of a child support order from Virginia and the trial court's decision declining to vacate the registration.

The parties were divorced in Fairfax County, Virginia in 2011. According to the divorce decree, Husband was to pay child support of $1196 per month until his monthly spousal support obligation ended. Husband was paying spousal support of $3000 a month.

Upon Wife obtaining full-time employment, Husband's spousal support terminated and his child support obligation was modified pursuant to an agreed order to $2186 per month.

The original divorce decree contemplated a future change of employment for Husband. The parties were to address and recalculate support in July 2011.

Husband claimed that the parties reached an agreement outside of court and modified the support amount to $917 a month. Husband began paying $917 a month in July 2011. Wife denied that any agreement was reached. She did not dispute that Husband was making monthly payments of $917. The prior order of $2186 per month was never formally modified in the court and remained the existing child support order.

In September 2018, Wife filed a petition and later an amended petition to register a foreign support order with the Cuyahoga County Domestic Relations Court. Wife requested that the last order of the court from Fairfax County, which was the $2186 in child support per month from May 2011, be registered and confirmed for the purpose of enforcing and modifying the order. Wife's affidavit alleged the amount of the arrearage. Husband filed a request for hearing to contest registration of the foreign support order.

The trial court held a hearing to determine whether registration was appropriate and if the amount of the arrearage alleged in Wife's petition was correct. The magistrate granted the motion to register the support order and held that the Virginia order had not been vacated, suspended, or modified by later order. The arrearage was determined to be $109,134.

Both parties filed objections to the magistrate's decision. Husband claimed that the Virginia support order should have been vacated because of the parties' extrajudicial agreement of $917 a month in child support. He claimed he made full payment of the Virginia support order. Wife claimed the magistrate failed to award interest on the arrearage, failed to calculate the arrearage through the date of the decision, and failed to reduce the arrearage to judgment. The trial court overruled all of the parties' objections and adopted the magistrate's decision.

The appellate court noted that Ohio has the Uniform Interstate Family Support Act ("UIFSA") "provides jurisdictional rules designed to ensure that only one state or country at a time has jurisdiction to address child support, including the modification of an order of another state or country." R.C. 3115.601 provides that a support order issued in another state or foreign support order may be registered in this state for enforcement. The filing of the petition and required documents constituted registration of the foreign support order. The appellate court noted that there was no dispute that Wife followed the proper steps for registration. The appellate court noted that a party may seek to have registration of a foreign support order vacated by proving a defense under R.C. 3115.607(A).

Husband argued that the trial court erred in declining to vacate the registration because he had paid in full pursuant to the terms of the out of court agreement. He claimed the parties entered into an agreement that the child support amount was modified to $917 a month. Wife disputed the agreement.

The appellate court stated that the Virginia support order specifically stated that it would continue "until further order of the Court." There was no evidence presented indicating that there was a subsequent order modifying the Virginia support order. An out of court agreement would not constitute an order of the court if it was not filed with the court.

The appellate court also rejected Husband's argument that the trial court should have vacated the Virginia order because he made partial payment. The appellate court agreed with the trial court that "accepting [Husband's] position would mean that any party could avoid the registration of a foreign support order simply by paying any amount, no matter how small." The appellate court noted that "[t]his would negate the very purpose of the UIFSA."

The appellate court held that the trial court did not err in declining to vacate registration of the Virginia order because Husband failed to establish that he made full payment of the order, and the defense of partial payment did not apply to an ongoing support order. The judgment of the trial court was affirmed.

CONTEMPT

Bridgeland v. Bridgeland

Citation: *Bridgeland v. Bridgeland*, 2021-Ohio-2587, 2021 WL 3204446 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021))

Headnote: Contempt—Civil Contempt; Property Division and Burden of Proof

Summary: Appellant-Wife appealed trial court's order finding her in contempt for failure to use her best efforts to refinance the mortgage on the marital home within one year of the decree.

Parties' marriage was dissolved on March 12, 2015. Wife was awarded the marital home. Wife was ordered to use her best efforts to refinance the mortgage on the home within one year of the journalization of the decree. After Wife failed to refinance the home in four years, Husband filed a motion to show cause on May 31, 2019 requesting that Wife be found in contempt for failure to remove Husband's name from the mortgage.

At trial, both parties testified. Husband testified that his name was still on the mortgage, and Wife failed to use her best efforts to refinance within the one-year period established in the decree. Husband further testified that he received no documents from Wife demonstrating any effort to refinance the mortgage within the prescribed period of time. Husband admitted he was aware of Wife's poor credit history.

Wife argued that she was in compliance with the court order. She testified that she has continuously made reasonable efforts to refinance the mortgage. However, due to her poor credit history, she has been unsuccessful. Wife testified that she attempted to refinance the mortgage with Wells Fargo and U.S. Bank during the year proceeding the decree of dissolution. However, Wife failed to provide any documented proof of said attempts. Wife presented exhibits of her attempts to refinance the mortgage in July 2019 with U.S. Bank and Quicken Loans, but once again was denied due to her poor credit. In 2017, Wife enrolled into a debt consolidation program to strengthen her credit.

After the trial, the magistrate issued a decision finding Wife in contempt since she failed to use her "best efforts" to refinance the mortgage from March 12, 2015 to March 12, 2016. Wife objected. The trial court overruled her objection to the finding of contempt but modified the purge condition. Wife appealed.

Wife contended that the court erred when it granted Husband's motion finding Wife in contempt of court. Wife argued that she

used her best efforts to comply with the court order; however, Husband held that regardless of Wife's actions after March of 2016, Wife did not use her best efforts the year following the decree per the mandates of the separation agreement. Contempt is a disregard of a judicial order and tends to embarrass, impede or obstruct the performance of the court. The purpose of a finding of contempt is to secure the dignity of the court. Civil contempt is "a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance" wherein the movant bears the initial burden of illustrating, by clear and convincing evidence, that the other party violated the court's order. The movant must establish there is a valid court order and provide sufficient proof that the other party failed to comply with the order. The noncompliance does not have to be purposeful or intentional. Once the movant has satisfied his burden, the burden shifts to the alleged contemnor to either rebut the showing of noncompliance or establish an affirmative defense by a preponderance of the evidence.

Wife maintained that she used her "best efforts" to refinance the mortgage; however, based upon her poor financial status it was impossible for her to refinance. Impossibility is an affirmative defense, which Wife beared the burden to prove. Even though Wife provided ample evidence as to her poor financial status, which demonstrated it would be impossible for her to refinance the mortgage, the court order did not require Wife to refinance the mortgage in one year, it simply required Wife to use her "best efforts" to refinance in one year. Therefore, the focus is on whether Wife used her "best efforts," defined as diligent attempts to carry out an obligation, to refinance within the required period of time. Wife's affirmative defense of impossibility failed.

Husband, by clear and convincing evidence, established a valid court order, that his name was still on the mortgage four years after the decree of dissolution, and that Wife failed to provide any documented proof that she used reasonable efforts to refinance the mortgage within one year of the journalization of the decree. Even though Wife provided evidence that she attempted to refinance the mortgage in July 2019, this was well after the deadline of March 2016 and immaterial to the issue of contempt. Wife's financial status did not preclude Wife from using her best efforts to improve her credit and apply to refinance the mortgage within the given time period. Wife failed to rebut Husband's showing of noncompliance and failed to establish an affirmative defense. Judgment affirmed.

DIVISION OF PROPERTY

Bradley v. Bradley

Citation: *Bradley v. Bradley*, 2021-Ohio-2514, 2021 WL 3121397 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021)

Headnote: Equitable Not Equal Division of Property—Credibility Determination by Trial Court

Summary: Appellate-Husband argued that the trial court erred in its allocation of marital debt and in not valuing the marital property. He challenged the trial court's decision allocating 100% of the marital debt to him, including Wife's credit card debt. Husband claimed Wife's credit card debt was incurred prior to the marriage.

Husband claimed that the trial court's

allocation of the marital debt was in contravention to R.C. 3105.171, which provides for an equal allocation of marital property and debt. If the court determines that an equal division of property would be inequitable, the court shall determine an equitable division.

The appellate court held that Husband's argument regarding Wife's credit card debt predating the marriage was unsupported by the evidence. His argument was based solely on his own testimony that he did not have any credit cards. He claimed that Wife had unpaid credit card bills from previous years. Husband failed to specify the years in which the credit card debt incurred.

At trial, Husband testified that the outstanding credit card debt was $45,000. He claimed there was a lien on the marital home in the approximate amount of $30,000. He testified that it was based on Wife's credit card debt and the lien holder was Unifund CCR.

The appellate court noted that Husband's testimony contradicted the information he submitted in his financial disclosure statement. Husband did not disclose a lienholder on the martial home in his disclosure statement. His disclosure statement also indicated that the credit card with a $45,000 balance was a joint card used by both parties.

Husband further argued that the trial court erred in failing to value the marital estate. He claimed the trial court did not consider the debt when dividing the property. The trial court noted that both parties had ample time to value all marital and separate property. The parties filed briefs regarding their assets, incomes and debts when addressing the temporary support issue. The magistrate concluded that "the evidence submitted by Husband in relation to the temporary orders was the most credible evidence in order to determine Husband's actual income, assets, debts, and liabilities."

The magistrate noted that the assets and debts in dispute were the marital home, the 2013 Jeep, the 2012 GMC Acadia, Bradley Metal Fabricating and personal property. Both parties submitted financial disclosures and affidavits in which they identified real estate interests, debts, incomes, assets, and expenses.

Neither party presented expert testimony as to the valuation of the property, assets and debts at issue. While Husband assigned a value to these items in his submitted documentation, the magistrate and the trial court did not find his statements credible.

The appellate court stated that the trial court was in the best position to determine the credibility of the parties. The trial court concluded that it would not be equitable to divide the property equally based upon the factors in R.C. 3105.171(F). The trial court made a specific finding that Wife disclosed all her assets and debts, but Husband did not. "Husband employed every possible measure imaginable to both conceal his financial information from Wife and the Court, and confuse the financial issues present in this case." The trial court acknowledged that the division of property was not equal, but it was equitable given that Husband failed to present any credible evidence as to his income, assets and liabilities. The trial court noted it was impossible to accurately determine Husband's financial situation.

The appellate court held that the trial court did not err in its allocation of marital debt. Husband's assignment of error was overruled.

JUVENILE CUSTODY

In re C.T.

Citation: *In re C.T.*, 2021-Ohio-2274, 2021 WL 2766379 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021)

Headnote: Permanent Custody to Agency—Parents Fail to Complete Case Plan—Best Interest of the Child—Consideration of Placement with Relative Versus Foster Placement for Child

Summary: Mother appealed the trial court's decision, which terminated her parental rights, granted permanent custody to the agency, and denied Mother's motion for legal custody to the child's maternal aunt.

Mother and Father were married when the minor child in question, C.T. was born in April 2020. They had three other children together, who were in the temporary custody of the agency.

The agency filed a complaint for abuse and dependency and permanent custody. The agency also filed a motion for predispositional temporary custody. The complaint alleged that Mother and C.T. had tested positive for marijuana and cocaine at C.T.'s birth. It was further alleged that Mother and Father had substance abuse problems and mental health issues. C.T.'s three siblings had been adjudicated neglected and had been committed to the temporary custody of the agency.

The juvenile court granted the agency's motion for pre-dispositional temporary custody. C.T. was placed with the foster family with whom her three siblings were then living. The agency filed a case plan that required Mother and Father to undergo a substance abuse assessment, psychological evaluation, and submit to random drug screens.

In the guardian ad litem's initial report, he reported that Mother and Father seemed unwilling or unable to care for their children and that the foster parents were taking great care of the children. The foster parents expressed an interest in adopting all of the children.

Mother stipulated to the allegations of an amended complaint and C.T. was adjudicated an abused and dependent child. Mother filed a motion for legal custody, requesting that legal custody of C.T. be granted to the maternal aunt, H.T. Mother claimed that H.T. had appropriate housing, gainful employment, and can provide for the child's needs.

The guardian ad litem filed a second report recommending that C.T. be placed with her maternal aunt, H.T. The report indicated that it would be in C.T.'s best interests to be raised by family.

Neither Mother nor Father were present at the first day of the hearing. The caseworker testified that neither parent made any significant progress on any of the case plan objectives. Father did not complete his assessments. He never allowed the caseworker to visit his apartment, indicating that it was not appropriate for the children. Mother started her assessments, but did not complete them. She was supposed to submit to weekly drug tests, but had not submitted to a drug screen since

November 2019. Mother tested positive for marijuana at the time. The caseworker further testified that the foster family was very bonded to the children. She explained that while the maternal aunt was a possibility and had proper accommodations, she could not be approved because of the history of domestic violence in her home and several cases with Children and Family Services with her own four children.

Mother did appear for the second part of the hearing in January 2021. Mother presented the testimony of her sister, H.T., who confirmed that she wished to become the legal custodian of C.T. She testified that she had proper housing accommodations to take care of another child, but admitted that she did not have a relationship with C.T. and did not know C.T.'s routines or medical needs. H.T. testified that she could take care of C.T., but not her siblings as she did not have the time to take care of children with special needs.

The trial court terminated Mother's and Father's parental rights as to C.T. and awarded permanent custody to the agency. The trial court found by clear and convincing evidence that C.T. could not be placed with one of her parents within a reasonable time. The trial court held it was in C.T.'s best interest to be placed in the permanent custody of the agency.

Mother appealed the decision, arguing that the trial court erred by terminating her parental rights and not placing C.T. with her maternal aunt, H.T., and by ignoring Mother's wishes.

The appellate court stated that the trial court found by clear and convincing evidence that the parents failed to remedy the problems that initially caused the child to be placed outside the home. Neither parent completed the case plan services. Neither parent submitted to a drug screen in the last year, despite numerous requests. The parents stopped visiting with the child in July 2020. Siblings were placed in the permanent custody of the agency. The appellate court also noted that neither parent was present for the dispositional hearing. The appellate court held that there was clear and convincing evidence that C.T. could not be placed with either parent within a reasonable time.

The appellate court also stated that the evidence demonstrated that the child was bonded with her foster parents where she had been living since birth. H.T. had no bond with the child. The appellate court noted that "the issue before the juvenile court was not whether H.T. was—or could be—a suitable caregiver for C.T. The issue before the juvenile court was what was in the best interest of C.T." The willingness of a relative to care for a child does not change what a court must consider in a best interest determination. Rather, R.C. 2151.414 required that the juvenile court find the best option for the child based on a weighing of all the relevant factors.

The appellate court held that the juvenile court considered and weighed all of the relevant factors in determining that permanent custody was in C.T.'s best interest. The judgment of the trial court was affirmed.

PARENTAL RIGHTS AND RESPONSIBILITIES

Perrin v. Perrin

Citation: *Perrin v. Perrin*, 2021-Ohio-2581, 2021 WL 3204063 (Ohio Ct. App. 8th Dist. Cuyahoga County 2021)

Headnote: Parental Rights and Responsibilities—Termination of Shared Parenting Plan; Change of Circumstances; Best Interest of Child, and Motion in Limine

Summary: Appellant-Mother appealed trial court's order terminating shared parenting plan and naming Appellee-Father sole residential parent and legal custodian and granting Father's Motion in Limine.

Father filed for divorce in December 2015. The parties were divorced on May 25, 2016. At the time of the divorce, the parties entered into a shared parenting plan regarding their minor son. The parties were to exercise equal parenting time. Mother was named residential parent for school purposes as long as she resided in Bay Village School District. If either party was to relocate, they were to file a Notice of Intent to Relocate. Neither party was to remove the child from Ohio without the consent of the other party or a court order.

Mother filed a Notice of Intent to Relocate and a Motion to Terminate or Modify Parenting Order in 2017 based upon 1) Father's alleged failure to comply with shared parenting plan, 2) Mother's engagement, 3) Mother's plans to move to Florida, where her fiancé resided, with her older children and 4) Mother's possible promotion with FBI in Orlando, Florida. The court appointed a GAL, and the parties agreed to joint appointment of Dr. Lovinger to perform a custody evaluation. GAL issued a report on July 11, 2018 wherein the GAL recommended that the court deny Mother's attempts to relocate the child to Florida and grant her long-distance parenting time with the child. Mother relocated to Florida in December 2017 leaving the child with Father.

In September 2018, Father filed a Motion in Limine to exclude the presentation of evidence that occurred prior to the journalization of the parties' existing parenting order issued in the divorce decree on May 25, 2016. The court granted Father's motion at a pretrial. A nine-day trial commenced on October 29, 2018 and concluded on February 22, 2019. At trial, the parties, GAL, Dr. Lovinger, Mother's current husband, Mother's co-worker and a detective testified. Numerous exhibits were admitted and others were excluded by objection of the parties based upon the ruling on the motion in limine.

The court heard testimony that Mother suffered from PTSD from the stress of her employment with the FBI and was now working for Disney in Orlando. Mother and others, based upon secondhand knowledge from Mother, testified that Father was stalking her, threatening her and breaking into her home. Dr. Lovinger testified that he conducted his evaluation and administered psychological tests. He spoke with the parties, their child, Mother's older children and current husband. The court allowed leeway in Dr. Lovinger's testimony in regards to referring to predecree evidence being presented in order to show context to his and other witnesses' testimony. Based upon this leeway, Mother filed, in midst of the trial, a motion for reconsideration of the court's ruling on

Husband's motion in limine, which the court denied. The magistrate issued a decision on April 10, 2019 wherein the court found that Mother failed to show a change of circumstances of the minor child or the parties. The court extensively considered the best interest factors of R.C. 3109.04(F)(1) and ordered that it was in the child's best interest that the parties' shared parenting plan be terminated and that Father be named residential parent of the minor child. Mother filed objections. The court overruled the objections and adopted the magistrate's decision. Mother appealed.

Mother argued that the court erred when it granted Husband's motion in limine and denied her motion for reconsideration. The purpose of a motion in limine is to prevent the presentment of irrelevant, inadmissible and prejudicial evidence. The court's ruling was an interlocutory and precautionary ruling. R.C. 3109.04, the governing statute, states that a court shall not modify a prior decree allocating parental rights and responsibilities unless it finds a change of circumstances has occurred, based upon facts that arose since the present parenting order or facts unknown at the time of the current order, and the modification is in the best interest of the child. The trial court is obligated to determine whether a change of circumstances occurred, based upon new or previously unknown facts, before modifying a shared parenting plan. Therefore, the court's granting of Father's motion in limine was to exclude evidence and testimony as to facts that arose prior to the existing parenting order journalized on May 26, 2016. The court can consider the context of the evidence presented and the arguments to determine if the evidence or testimony would be admissible. The court was merely complying with the mandates of R.C. 3109.04. The court's evidentiary rulings as to admissibility of evidence were not arbitrary or unconscionable.

Mother further contended that the court erred in denying her motion to modify the current parenting order to name her sole residential parent of the parties' child. The trial court is given wide latitude in considering the evidence in a custody matter. Mother's primary argument as to a change in circumstances was Father's history of domestic violence. Mother stated she only agreed to the shared parenting plan to escape from the abusive relationship with Father. However, Mother relied upon case law concerning domestic violence matters and not case law pertaining to R.C. 3109.04, which limits a court's inquiry to facts that have arisen since the existing order or were unknown at the time of the existing order. Based upon the facts and circumstances that have occurred since the prior parenting time order, the court did not abuse its discretion in finding that a change of circumstances did not exist.

In determining the best interest of a child in a custody dispute, the court is required to consider the factors of R.C. 3109.04(F)(1) and (2). For nine days, the court heard extensive testimony from the parties, GAL, Dr. Lovinger and other witnesses as to these factors. The court, in its order, extensively discussed the facts of the case and considered the relevant factors, including but not limited to the fact that the child was thriving in Ohio with Father after Mother moved to Florida with her new husband and older children. Giving the trial court the utmost deference, the trial court's finding that the shared parenting plan be terminated and that Father be

named sole residential parent was not an abuse of discretion. Judgment affirmed.

SPOUSAL SUPPORT

Reinhold v. Reinhold

Citation: *Reinhold v. Reinhold*, 2021-Ohio-2786, 2021 WL 3574084 (Ohio Ct. App. 2d Dist. Miami County 2021)

Headnote: Spousal Support—Modification; Periodic Payments Versus Lump Sum Payments of Support

Summary: Appellant-Wife appealed trial court's orders denying her motion to modify spousal support and motion for relief from judgment.

The parties were married in 1984. Husband was a successful pediatrician earning $275,000 annually. Wife was his office manager making a modest income. The parties had an extravagant lifestyle until 2007 when Husband was arrested for possession of child pornography. Husband pleaded guilty and was sentenced to prison. He lost his medical license. Wife was placed in financial hardship. Wife filed for divorce in 2011 while Husband was still incarcerated. His only source of income was $800 per month from a trust established by his grandparents. However, Husband was to receive a substantial amount of money from the trust in the unknown future. The date he was to receive the trust funds and the amount were speculative.

After a trial, the court granted Wife a $27,500 lump-sum spousal support award. The court retained jurisdiction to revisit spousal support after Husband was released from prison and Wife established herself due to Husband's criminal conduct and the possibility of Husband receiving over $1,000,000.00 from the family trust. In 2019, Husband's mother passed and he received a substantial inheritance. Wife filed a motion to modify the spousal support order. The court denied Wife's request and held that the court lacked jurisdiction to modify the spousal support order since R.C. 3105.18(E) does not apply to lump-sum spousal support orders. Wife then filed a Motion for Relief from Judgment under Civ. R. 60(B)(4) and (5) to vacate the divorce decree, which the court denied. Wife appealed.

Wife argued that the court incorrectly concluded that it lacked continuing jurisdiction to modify the spousal support order. R.C. 3105.18(E) permits a court to modify periodic payments of money as spousal support when the court specifically retained jurisdiction over spousal support. In the present matter, the court retained jurisdiction over the issue of spousal support, but the original order was a lump-sum payment of spousal support and not a periodic payment of spousal support. Therefore, the court did not have statutory jurisdiction to modify the parities' spousal support order since it was not an order for continuing periodic payment of spousal support. R.C. 3105.18(E) does not apply to lump-sum payments. A court cannot create its own jurisdiction, which was not granted to it by statute.

Wife further contended that the court erred when it denied her Motion for Relief from Judgment pursuant to Civ. R. 60(B)(4) or (5). Civ. R. 60(B)(4) permits relief if the order is no longer equitable, and Civ.R. 60(B)(5) allows relief for "any other reason justifying relief from judgment." However, Civ. R. 60(B) may not be used to vacate an award of spousal support in order to modify

since the only mechanism to modify spousal support is by substantive law such as R.C. 3015.18(E). Judgment affirmed.

Carr v. Carr

Citation: *Carr v. Carr*, 2021-Ohio-2530, 2021 WL 3123957 (Ohio Ct. App. 2d Dist. Montgomery County 2021)

Headnote: Spousal Support—Modification, Cohabitation and Change of Circumstances

Summary: Appellant-Husband appealed trial court's order denying his motion to terminate or modify spousal support.

In the parties' 2016 divorce decree, Husband was ordered to pay Wife $4,000 per month in spousal support plus an annual lump sum payment of $12,000 each December for a period of 112 months. The award was based upon Husband's annual income of $269,000 and Wife's annual income of $80,000. The court retained jurisdiction as to the amount of support but not the duration. Spousal support would terminate upon the death of either party or Wife's remarriage. Wife's cohabitation with an unrelated male who contributes to Wife's income shall be considered to modify support. During the divorce proceedings, Wife started to date Mr. Boch. In November 2019, Husband filed a motion to reduce/terminate his spousal support obligation. After a hearing, the court denied his motion finding Husband failed to demonstrate that Wife was cohabitating with Mr. Boch and that no change of circumstances existed to warrant a modification. Husband appealed.

Husband argued that the court erred when it failed to find Wife was cohabitating with Mr. Boch. Cohabitation is a question of fact for the court. Cohabitation is established "when a paramour voluntarily undertakes a duty of total support or otherwise assumes obligations equivalent to those arising from a ceremonial marriage." A cohabitation provision of a decree is to prevent a spouse from receiving support from two sources. Since August of 2016, prior to the finalization of the divorce, Wife had been residing in an apartment until Husband filed his motion to modify/terminate child support wherein she purchased a house. The court found that Wife and Mr. Boch would occasionally stay at each other's residences but did not reside together nor share expenses for each others' residences.

Husband presented numerous documents showing that almost all of Wife's mail (passport, credit cards, driver's license, car loan and bank statements) and packages were addressed to and sent to Mr. Boch's residence. Wife testified that she originally had her mail sent to Mr. Boch's residence since Husband would take her mail and hide it when they resided together. Further, as a real estate agent, she did not want client's knowing she resided in an apartment. Additionally, she had numerous issues with mail delivery at her apartment wherein it was delivered to the wrong apartment or soaked when it would rain. Husband admitted that he could not prove that Mr. Boch deposited any monies into Wife's account, Mr. Boch and Wife did not have any joint accounts or debts and no evidence that Mr. Boch assisted with Wife paying any expenses for her apartment. There was no evidence that Mr. Boch and Wife were financially supporting one another. The trial court did not error in holding that Mr. Boch and Wife were not cohabitating.

Husband also contended that the court erred in not finding a change of circumstances that warranted a modification of spousal support. In order to modify a spousal support order, the court must first determine if the court retained jurisdiction to modify spousal support and a substantial change of circumstances exists wherein the current award of spousal support is no longer reasonable and appropriate, which was not contemplated at the time the spousal support was ordered. If the court determines that a change of circumstances exist, the court must next determine whether the change merits a termination or modification of support by considering the factors of R.C. 3105.18(C)(1). Husband carried the burden to establish that a reduction in spousal support was warranted.

Husband failed to establish that a change of circumstances existed to warrant a reduction in spousal support. The court found Wife and Mr. Boch did not cohabitate, and that Husband earned approximately $136,000 additional annual income wherein Wife's income remained the same as when the parties' marriage was terminated. Further, Wife did not have a significant change in her expenses. Since Husband failed to establish a change in circumstances, the court did not error in failing to consider the factors of R.C. 3105.18(C)(1). Judgment affirmed.

Kemp v. Kemp

Citation: *Kemp v. Kemp*, 2021-Ohio-2419, 2021 WL 2983196 (Ohio Ct. App. 5th Dist. Delaware County 2021)

Headnote: Spousal Support—Termination and Cohabitation

Summary: Appellant-Husband appealed trial court's order denying his motion to terminate spousal support.

In the parties' divorce decree dated August 7, 2018, Husband was ordered to pay Wife spousal support in the sum of $250 per month. Spousal support was to terminate upon the death of either party or Wife's cohabitation with another comparable to marriage. Husband filed a motion to terminate spousal support on April 13, 2020 based upon Wife's alleged cohabitation with Mr. Chick.

At trial, Wife testified that she was not cohabitating with Mr. Chick. She broke her ankle in February and was recovering from surgery performed in March. Wife fell three times since and had a blood clot. Therefore, she was staying at Mr. Chick and her son's residence for approximately 50% of the time to assist her. Wife testified that she had requested the post office to hold her mail on numerous occasions since Husband would take her mail out of her mailbox at the prior marital residence. Wife further testified that she pays her own bills and expenses, and Mr. Chick does not assist her in the payments. Her utilities are on at her residence and she is on a payment plan for said utilities. While Wife stayed at Mr. Chick's residence, she did not assist him in the payment of his household expenses. The court asked Wife various questions to assist in clarifying her testimony.

Husband testified that he drives past Wife's house every three to four weeks and has never seen notices posted at her residence in regards to unpaid utilities. At times, Husband observed no one at Wife's residence, but at other times, he saw Wife, child and grandchildren at Wife's residence. No evidence was presented that Wife and

Mr. Chick were sharing expenses. Husband's adult daughter was tracking the parties' daughter's cell phone and testified that the daughter was at Mr. Chick's residence at all times of the day from the end of April, through June, but she was no longer tracking the daughter. The court found that Wife and Mr. Chick did not share expenses and were not cohabitating. On October 22, 2020, the court issued a judgment denying Husband's request to terminate spousal support. Husband appealed.

Husband argued the court erred when it failed to terminate his spousal support obligation. Appellate court is not the trier of fact as the trial court. Its role is to determine whether there is competent and credible evidence to support the trial court's judgment. Whether a relationship rises to the level of cohabitation is a question of fact for the trial court. The burden of whether Wife was cohabitating is on Husband, which he failed to establish. Cohabitation is an issue of lifestyle, not a "housing arrangement." The court considers the following three factors when determining if a party is cohabitating: 1) an actual living together; 2) of a sustained duration, and 3) sharing finances and day-to-day expenses. Wife was staying with Mr. Chick 50% of the time due to her injury and the blood clot, which is not a sustained duration. Wife maintained her own residence and paid her own expenses. Mr. Chick paid his own expenses. Husband failed to prove that Wife and Mr. Chick were sharing expenses. Therefore, Husband failed to meet his burden of proof.

Husband further contended that the court impermissibly assisted Wife in proving her case with its questioning. However, Evidence Rule 614(B) provides that a court may interrogate witnesses in an impartial manner. This is especially true during a bench trial since the court would not prejudice a jury with its questions. The trial court's questioning was fair and impartial with no signs of bias or prejudice. Judgment affirmed.

STEP-PARENT ADOPTION

Matter of Adoption of O.K.M.

Citation: *Matter of Adoption of O.K.M.*, 2021-Ohio-2330, 2021 WL 2879506 (Ohio Ct. App. 2d Dist. Greene County 2021)

Headnote: Consent for Step-Parent Adoption—R.C. 3107. 07(A)—Justifiable Cause for Lack of Communication

Summary: Stepmother-Appellant appealed from the trial court's ruling that she needed consent from the biological mother of her stepson before she could proceed with an adoption.

O.K.M. was born in August 2016. He is the biological son of Mother and Father, who were never married. Their relationship ended in 2017. Mother had a substance abuse problem. Father was awarded legal custody of O.K.M. by the Greene County Juvenile Court. Mother was granted supervised visitation via a visitation center.

Mother incurred legal problems which caused her to be incarcerated in 2018 and subsequently in 2019. Mother successfully completed a treatment program upon her release and then contacted the visitation center to schedule visitation with O.K.M. The visitation center informed Mother that her case had been closed because they were unable to contact her while she was incarcerated. A staff member indicated that

she would contact Father about visitation. Father denied the request for visitation.

Mother's family members reached out to Father to request a visitation with the child. Mother's stepmother indicated that Mother would like to visit over the holidays. She reported to Father that Mother had obtained a job and was doing well.

In December 2019, Mother went to Father's residence to deliver Christmas presents for the child. She did not attempt to contact the child during the delivery.

Mother contacted Father again in June 2020 via Instagram. She asked Father for her son's sizes so that she could buy him presents for his birthday. Father did not respond to Mother's request and he blocked her on Instagram. Mother purchased and dropped off birthday presents for the child despite Father's lack of response.

In September 2020, Stepmother filed a petition for the adoption of O.K.M. She alleged that Mother's consent was not required because Mother had failed to support or communicate with the child for one year preceding the filing of the petition.

At the hearing, Stepmother voluntarily dismissed her claim that Mother failed to support the child. She proceeded on the claim that Mother failed to communicate with the child. The trial court heard the testimony of three witnesses. The trial court held that Stepmother failed to disprove Mother's claim of justifiable cause for her lack of communication during the one-year period preceding the filing of the petition for adoption and therefore, Mother's consent was required.

Stepmother claimed the trial court erred in finding that Mother had justifiable cause for her failure to communicate with the child during the one-year period. The appellate court noted that R.C. 3107.07(A) provides that consent to an adoption is not required when a court finds by clear and convincing evidence that the parent has failed, without justifiable cause, to have more than de minimus contact with the child or provide maintenance and support for the child in the one-year period immediately proceeding the filing of the adoption petition.

The appellate court noted that the party filing the petition for adoption has the burden to prove, by clear and convincing evidence, that one of the consent exceptions is applicable. Once the petitioner has established clear and convincing evidence that the biological parent has failed to have more than de minimus contact with or provide support for the child, the burden shifts to the biological parent to show some facially justifiable cause for the failure.

The appellate court stated that there was no dispute that Mother had no contact with the child in the year preceding the filing of the adoption petition. The issue was whether the trial court reasonably found that Stepmother had failed to prove by clear and convincing evidence that Mother did not have justifiable cause for her failure to have such contact.

The evidence demonstrated that Mother contacted the visitation center the day after she was released from her treatment program. Father did not respond to the visitation center's inquiry for almost two months. The record also demonstrated that Mother's stepmother, acting on Mother's behalf, attempted to contact Father to schedule visitation between Mother and the child. Father failed to respond to the

communication and blocked Mother from his phone and social media accounts.

The appellate court held that it could not conclude that the probate court's finding that Mother's consent was required before the adoption action could proceed was against the manifest weight of the evidence. Accordingly, the judgment of the probate court was affirmed.

