GARY JAY GOTTFRIED
ATTORNEY AT LAW
608 Office Parkway, Suite B
Westerville, Ohio 43082
614-297-1211
614-297-6387 (FAX)
E-mail: Gary@Gottfriedlaw.com

2019-2020 CASE LAW UPDATE

A. ATTORNEY MATTERS

1. DISCIPLINARY MATTERS:

Disciplinary Counsel v Skolnick Slip Opinion No 2018-Ohio 2990

FACTS: Paralegal for Attorney records conversations with Attorney wherein Attorney berates employee as to her physical appearance and dress and calling her a " ho", dirtbag and other obscenities. The Attorney's explanation for his behavior was that he learned the lingo from rappers and hip hop artists he represents as an entertainment lawyer and that he thought that he was being funny. Supreme Court suspends Attorney for 1 year with 6 months stayed. The suspension was necessary to not only protect the public and the dignity of the legal system but also to deter future misconduct of this nature by the Attorney Skolnick and other attorneys licensed to practice law.

.

2. ATTORNEY FEES

a. **D.L.M v D.J.M**, 8th District, Case No. 107992 (November 2019)

FACTS: Husband files to terminate the parties shared parenting plan on the basis of alleged sexual abuse allegation against his former wife even though the Police Department and Children Services Agency had determined that the allegations were not credible. Eventually the Husband's motion was dismissed. Wife then files a Rule 11 motion for sanctions and fees against the Husband's attorney alleging that the Father and his counsel did not consult with either the detective assigned to the case or children's services. Trial Court dismisses the motion without a hearing . Wife appeals, Reversed.

DECISION: In reversing the trial court's decision the Court of Appeals first noted that a motion for sanctions under Rule 11 creates a proceeding ancillary to and independent of the underlying case. Rule 11 sanctions are collateral to the underlying matter and a court may consider such sanctions after an action is no longer pending. If there is an arguable basis for an award of sanctions the trial court must hold a hearing on the issue.

.

b. **<u>Caparella-Kraemer & Associates v Grayson</u>,** 12 District, Case No. 19-11-184 (6/2019)

FACTS: Law firm sues former divorce client for $ 2,600.00 in unpaid fees. Attorney who represented client testified as to his billing practices. Law firm also called the office manager who managed the firm and handled the firms billing. Client challenged the bills both as to its accuracy and the amount which was billed for a particular service. Trial Court grants judgement in favor of the law firm finding that the burden of proof was on the client to prove by the preponderance of the evidence that the charges were improper . Client appeals, Reversed.

DECISION: An attorney has a professional duty not to charge a " clearly excessive fee". Where an attorney and client enter into a fee agreement but the agreement fails to provide for the number of hours to be expended by the attorney, the Attorney has the burden of proof to show that the time charged was fairly and properly used and the burden of proof of reasonableness of work hours devoted to the case rests on the attorney.

Factors which a court can consider in determining whether a fee is reasonable are:

1. Time and labor required
2. The novelty and difficulty of the questions involved.
3. Skill required to perform the legal service properly
4. The likelihood, if apparent to the client that the acceptance of the particular employment will preclude other employment by the lawyer
5. The fee customarily charged in the locality for similar legal services
6. The amount involved and the results obtained
7. The time limitations imposed by the client or the circumstances
8. The nature and length of the professional relationship with the client
9. The experience, reputation, and ability of the lawyer or lawyers performing the services
10. Whether the fee is fixed or contingent.

Generally, merely submitting an attorney's itemized bill is insufficient to establish the reasonableness of the amount of work billed. Expert testimony or testimony from other individuals may be offered to corroborate an attorney's self serving testimony that the fee requested is reasonable.

.

3. MISCELLANEOUS

a. **Kemp v Kemp:** 5 th District Case No. 18 CAF 08 0063 (April 2019)

FACTS: On October 30. 2017 and prior to the commencement of trial the Wife discharges her attorney. Case is set for trial on January 23, 2018. Trial Court grants the motion and allows Counsel to withdraw On January 17, 2018 Wife files for a continuance because her Counsel had not delivered to the wife her file. Trial Court calls discharged counsel and directs that the file be delivered to the wife. Thereafter the trial court denies the request for a continuance. Trial court conducts a 3 day trial where wife represents herself. Wife appeals the decision of the trial court denying her request for a continuance. Affirmed.

DECISION: In determining whether a trial court abused its discretion in denying a motion for a continuance an appellate court should consider the following factors; (1) length of the delay requested;(2) whether other continuances have been requested and received;(3) the inconvenience to the witnesses, opposing counsel and the court;(4) whether there is a legitimate reason for the continuance;(5) whether the defendant contributed to the circumstances giving rise to the need for the continuance (6) other relevant factors.

In affirming the trial courts decision to deny the continuance the Court of Appeals noted that the Wife had contributed to the circumstances giving rise to the need for a continuance. The Court observed that the Wife had filed her Counsel in October 2017 but had delayed in seeking new counsel or obtaining her file until shortly before the trial date. Further the Wife was aware in July 2017 of the December trial date but waited a week before the rescheduled trial date to request to continue the trial.

b. **Klockner v Klockner** 9th District, Case No 29236 (May 2019)

FACTS: Wife files for divorce. Husband doesn't file an answer. While the case is pending the parties have a discussion regarding a temporary orders. Husband believes that based upon his conversations with his wife that the wife will be dismissing her complaint for divorce and the parties will be proceeding with a dissolution of marriage. Wife doesn't dismiss her complaint for divorce. The case is set for a final hearing. Husband is notified of the final hearing but doesn't show up. Trial Court grants a divorce to the Wife and divides the property and awards spousal support. Husband files a 60 b which is denied. Husband appeals. Affirmed.

DECISION: In order to prevail on a motion for relief pursuant to Civil Rule 60(b) the movant (husband) must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted ;(2) the party is entitled to relief under of the grounds stated in Civ.R 60(b)(1) through 5 and (30 the motion is made within a reasonable time. These

.

requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met.

In affirming the dismissal of the Husband's motion the Court observed the Husband had presented a meritorious defense. The burden of proof is on the movant to allege operative facts with enough specificity to allow the court to decide whether the movant has met that test. A movant's burden is to not only allege a meritorious defense he/she does not have to prove that he/she will prevail on that defense. In this case, the Husband had argued that he had a meritorious defense but did not explain what the defense might be.

b. **Erie-Huron Bar Assn v Bailey and Bailey** Ohio Supreme Court 2020 Ohio-3701 (July 2020)

FACTS: Attorney in a criminal case 4 days before the commencement of the trial requests a continuance of the trial so that he could attend a family wedding. Trial court denies the continuance. On the day scheduled to commence trial in advance of the selection of the jury told the court that he would not be able nor willing to proceed with the trial. The Court held a conference at the bench where counsel restated his position. The court told the attorney on 2 occasions to step and continued to argue his position. The third time when asked to " step back" counsel stated " I may , but I won't". Trial Judge ordered Counsel to participate or be held in contempt. Attorney refuses to participate in the trial, and the trial judge held him in contempt. Fined 250.00 and sentenced to 30 days in jail. The judge then proceeded with the trial. Defendant found guilty and was sentenced to life in prison. Attorney appealed the decision- affirmed.

Bar Association filed a complaint to the Board of Professional Conduct. The 3 member panel heard the case and recommended a 2 year suspension with 1 year stayed. Attorney appealed the decision. Supreme Court found that the attorney's comments " I may but I wont" were undignified, discourteous and degrading to the trial court and that his conduct was extremely disruptive to the administration of justice. .

.

B. BANKRUPTCY

1. **Olson v Olson** : 7th District Case No 15 CO2 (December 2015)

FACTS: Both parties file for Chapter 13 bankruptcy protection and submit a 5 year repayment plan. The plan of both parties is confirmed by the Bankruptcy Court in November 2011. In February 2013 the Parties file for a dissolution of marriage. At the time of the filing of the dissolution of marriage neither Party filed for relief from stay. Dissolution of marriage is granted. Post decree the wife files to set aside the dissolution alleging that the trial court did not have jurisdiction to issue a dissolution of marriage because no relief from stay had been issued. Trial Court denies the motion. Wife Appeals. Affirmed.

DECISION: In affirming the trial court's decision the 7th District Court of Appeals found that 11 USC 1327(b) states that upon confirmation of a plan the confirmation vests all the ownership of all property in the estate of the debtor. Because all of the property being divided in the dissolution of marriage was in the estate of the debtor and not in the bankruptcy estate the parties in the dissolution of marriage (separation agreement) were not seeking to divide property of the bankruptcy estate and therefore there was no violation of the provisions of USC 362(b) which creates the automatic stay against assets of the bankruptcy estate. Thus because the separation agreement only divided the property of the debtors and not the bankruptcy estate there was no need to seek relief from the automatic stay provision of 11 USC 362(b). Because there was no automatic stay provision in force the trial court had jurisdiction to approve the separation agreement and grant the dissolution of marriage.

.

C. CHILD SUPPORT

1. **42 USC 659** (International Collection of Child Support)

Statute wherein the United States consents to the income withholding and garnishment for enforcement of child support and spousal support. 42 USC 659 brings the United States into compliance with the Hague Convention of 11/23/2007 which is an international treaty for the collection of child support and other forms of maintenance.

42 USC 659 creates a class of countries called Foreign Reciprocating Countries (FRC) . FRC are countries which are signatories to the Hague Convention on the international collection of child support and other forms of family maintenance. Presently there are 30 countries which are signatories to the convention and which are considered as being a FRC. The significance of 42 USC 659 is that provides that State VID agencies (i.e CSEA in Ohio)can provide collection services to FRC. In addition under 42 USC 659 a State VI D agency (CSEA) can request collection assistance of an obligor through the " Central Authority " of the country where the obligor resides.

2. S**weeney v Sweeney** 1st District, Case No C-189976 (May 2019)

FACTS: The Parties reach and agreement on shared parenting but can not reach an agreement on the amount of child support to be paid. Trial Court hears the evidence on the issue of child support and finds that Husband is voluntarily underemployed and imputes income to the Husband. Trial Court also imputes 4% interest on the money which the husband had received from the sale of his business and which the husband had placed in a savings account. Husband appeals the decision. Reversed.

DECISION: A voluntary reduction in income is not sufficient in and of itself to establish that potential income should be imputed to the parent. The test is not only whether the change was voluntary, but also whether it was made with due regard to the parent's income-producing abilities and his duty to provide for the continuing needs of the children. The record must demonstrate an objectively reasonable basis for reducing employment income, where " reasonableness is measured by examining the effect of the parents decision on the interest of the child. The goal is to protect and insure that the

best interest of he children and the parent's subjective motivations for being voluntarily unemployed or underemployed play no part in the determination whether protentional income is to be imputed to that parent in calculating his or her support obligation.

The Trial Court committed error when it imputed income to the funds which the Husband has received from the sale of his business and which he placed in a saving account. R.C 3119. 01 (C) (11)(b) does not permit the imputation of income from income-producing assets. Assets deposited into an account earning in interest are in fact income producing" and do not fall with the rubric of income producing assts under former R.C 3119.01.(C) (11)(b).

.

3. **N.W v M.W**:8th District, Case No. 107503 (May 2019)

FACTS: Party's obtained a dissolution of their marriage. As a part of their dissolution the parties agreed to shared parenting. The parties further agreed that the Husband would pay spousal support for 4.5 years at $ 12,500.00 per month and child support of $ 1,200.00 per month. When the spousal support ends the Wife files a motion seeking to modify and increase her child support. At the time of the motion the Husband's income is $ 500,000.00 per year. The wife was self employed and owned a Math Franchise where she tutored after school children in math. Wife expected to break even in 2017. A vocational evaluation was conducted and it was determined that the Wife could earn $ 55,000.00 per year. Trial Court sets child support at $ 7,000.00 per month. Both Husband and Wife appeal. Affirmed.

DECISION: Because the parties income exceeded $ 150,000.00 per year R.C 3119.04 does not require the court to extrapolate to determine the proper amount of support. Rather, R.C 3119.04 requires the trial court to determine the child support amount on a " case by case" basis considering the " needs and the standard of living of the children who are the subject of the child support order and of the parents" citing R.C 3119.04.

For purposes of R.C 3119.04 the children's " needs" include food, clothing, shelter, medical care and education. The lifestyle of a child, on the other hand goes beyond mere needs; it reflects the level of comfort that the child would have enjoyed beyond basic necessaries had the parents remained living together. It is sometimes referred to as the child's " qualitative " needs.

Citing the Phelps case out of the 8th District the Court of Appeals stated that a qualitative analysis focuses on observation and descriptions of a child's lifestyle. Although the word " qualitative does not necessarily provide for precise determinations, its use recognizes that circumstances between the children can vary based on their parents income, and the court has discretion to fashion a support order accordingly and on a case by case basis.

5. **Crandall v Crandall** 11th District, Case No. 2019 -G-0202

FACTS: Parties are divorce. Post decree Wife files to modify child support. At trial the evidence was that the Husband earned 1.8 million dollars per year. At trial the Wife argued that the trial court should extrapolate child support due to the husband's income. Trial Court declines to extrapolate in determining child support and awards the wife $ 1,450.00 per month in child support. Wife appeals. Affirmed.

DECISION: The extrapolation method " takes the applicable percentage under the child support schedule for couples with combined incomes of $ 150,000 and applies it directly to what income the parents make. In affirming the trial court's decision not to extrapolate income the Court of Appeals for the 11th District relied upon the Longo decision out of the 8th District Court of Appeals. In the Lango decision the Court of Appeals suggested that extrapolation would be helpful in those cases where the combined income of the

.

parties only marginally exceeds $ 150,000.00 and expressed doubt whether the Court fulfills it's statutory duty to determine child support on a case by case analysis as required by R.C 3119.04(B) when it by rote extrapolates a percentage of income to determine child support and concluded " as the combined income of the parents rise sharply, mere extrapolation can lead to large and possibly unrealistic child support amounts. In affirming the trial court's decision not to use extrapolation to determine child support, the Court of Appeals for the 11th District found that since the Husband's income far exceeded the $ 150,000.00 threshold, it is likely that pure extrapolation would have the effect of income equalization or de facto spousal support as opposed to ensuring that the children enjoy the same standard of living as if the parties had remained married.

6. **McRae v Salazar;** 10th District, Case No. 18AP-749 (November 2019)

FACTS: Mother files a motion to modify child support. Trial Court after hearing the evidence modifies and increases Husband's child support from $ 1,800.00 to $ 3,300.00 per month for the support of two children. In the hearing the Wife testified that she could not meet the children's needs and standard of living compared to the life style that the Husband was able to provide. Husband appeals, Affirmed

DECISION: In affirming the trial court's decision the Court of appeals found that the evidence as presented indicated that the wife was not able to meet the needs and standard of living of the children when compared to the life style of the Husband. Ohio Revised Code 3119. 04(B) contemplates a " conjunctive analysis where the court considers not only the qualitative needs of the children but also the standard of living of the children and parents.

7. **Thomas v Lewis,** 9th District, Case No 29164 (September 25, 2019)

FACTS: Trial Court Orders Husband to pay in addition to child support the sum of $ 14,750.00 per year to cover part of the cost of his daughter's extracurricular activities and tuition for one of the children at a private out of state dance academy. Husband appeals, Reversed.

DECISION: A domestic relations court has authority to order a parent to pay for private school tuition as a form of child support only if it determines the following: 1) that it is in the children's best interest to have private school education; 2) the payor(s) can afford to pay the tuition; 3) the child has been in private schooling and 4) private schooling would have continued if not for the termination of the marriage.

In this case, the trial court failed to consider the 4 factors necessary to order the payment of private school tuition. While the children had attended private school and were involved in dance while the parties lived together the cost was almost double to send the children to an out of state private school. In addition there was no evidence that whether the Husband could afford to pay the tuition nor was there evidence that schooling would have continued had the marriage continued.

.

8. **Grover v Dourson**. 12th District, Case No CA 2019-07-007 (September 2020)

FACTS: Trial Court orders husband to secure his child support obligation with life insurance. The original order was appealed and reversed. In Grover 1 the Court of Appeals reversed the trial court's decision stating that in securing a child support order the order should be structured in such a manner that the child will only receive that portion of the insurance proceeds equal to the amount of the child support the child would have received if the parent remained alive. Case remained. Trial Court issues an post appellate decision which conditioned Father's ability to name his trust as the beneficiary of his private insurance upon his designation that the children receive all of the income from the policies as Mother deems acceptable to provide for their general welfare. Father appeals, Reversed.

DECISION: Trial Court abused it's discretion by ordering Father to designate the children as beneficiaries on Father's life insurance where the children would receive more from the life insurance benefits if father dies than the amount of support they would have received if Father remained alive.

In reversing the trial court's decision the Court of Appeals also found that the trial court failed to consider Father's social security benefits would be greater than his total child support obligation. Father was eligible to receive social security benefits which could provide for the children's general welfare in the event of his death. These benefits would provide security for Father's child support obligation in the vent he dies before the obligation terminates. By failing to consider social security benefits the trial court inappropriately subjected Father's trust to more than his total support obligation and ordered Father to pay for more than what the children are entitled to during their minority.

.

D. PROPERTY DIVISION CASES

1. **Hoffman v Hoffman**, 9th District Case No. 28799/29104 (June 2019)

FACTS: Trial Court finds that there was a de facto termination of marriage of December 2011. Trial Court values wife's pension as of January 2014. Trial Court doesn't award any growth to the Husband in his share of wife's retirement. QDRO is filed with no passive growth. Husband files 60(b). 60(b) denied. Husband appeals. Affirmed.

DECISION: The Court of Appeals acknowledged that the husband was correct that the QDRO valuation date was January 2014 and not the de facto termination date of December 31, 2011. However, the husband failed to show that he was entitled to any passive growth during this period of time. Nor was there any language in the divorce decree which addressed the issue of the division of appreciation. There is no controlling legal authority directing that any appreciation or depreciation in an account value between the date of judgement and the date of disbursement be shared equally between the spouses or alternatively directing that the benefit or loss go exclusively to account holder spouse. Rather the issue is left to the discretion of the trial court.

2. **Buck v. Buck** 6th District Case No F-17-102

FACTS: Husband during the marriage was injured in a work related accident. Husband settles for $ 600,000.00 of all claims including loss of consortium. In the settlement documents there is no allocation of the settlement funds between the various claims (i.e pain and suffering, loss of consortium) Both the Husband and the Wife sign the settlement documents. The settlement funds are then put into a joint account at Morgan Stanley. During the marriage the wife's mother vies the parties $ 3,000.00 per month. These funds are also put into the Morgan Stanley joint account. The money in the Morgan Stanley account is then withdrawn and used to pay the parties living expenses. At trial the Husband claims that all of the funds in the Morgan Stanley account are his separate property. Trial Court rejects that claim and awards 65% of the funds to the Husband and 35% of the remaining funds to the Wife. Husband appeals. Affirmed.

DECISION: In affirming the decision of the Trial Court the Court of Appeals found that the husband had failed to over come the presumption that the funds in the account were marital in nature. The Court finds that the settlement funds were marital in nature because the parties had both signed the settlement documents, the settlement was paid in a lump sum with no allocation between claims and was deposited into a joint account. The Morgan Stanley account was a joint account and both parties had agreed that the balance in the account would be subject to a right of survivorship. The Court also found that the funds in the account were commingled and not traceable as the husband's separate property

In affirming the division of 65/35 the Court Appeals held that while the division was not equal it was equitable taking into consideration the fact that there was no way in which to

.

determine the husband's separate property but recognizing that the majority of the funds came from the Husband's injuries and also taking into consideration that the Husband would not likely be able to return to work while the wife who was a nurse would be able to return to work.

3. **Hornbeck v Hornbeck** 2nd District, Case No. 2018-CA-75 (May 2019)

FACTS: The parties lived together form May 2000 to April 2003 when they married. Wife during the marriage was a " stay at home" mother taking care of the Husband's daughter. Husband during the marriage worked at a trucking company and the Wife did at home babysitting. Prior to the parties " ceremonial marriage" the Husband had purchased a home which the parties occupied as well as a rental property. At the divorce the Wife files a motion asking that the Court consider May 2000 as the "date of marriage" for valuation purposes. Trial Court denies the Motion. Wife appeals. Reversed.

DECISION: In reversing the trial court's decision not to use an date earlier than the marriage date for valuation purposes, the Court of Appeals noted that the majority of appellate districts in Ohio. Citing it's decision in Drumm v Drumm, the Court of Appeals found that R. C 3105.171(A)(2)(b) establishes no standard or other criteria to guide the court in determining whether and when use of the dates specified in Division A(2) would be inequitable. The section appears to reiterate the general grant of " full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters, conferred on the courts if common pleas by R.C 3105. 011. In applying R.C 3105.171(A)(2)(b) to employ a date for valuation of assets prior to other than and in addition to the interests that are created by marriage. R.C 3105.171(A)(2)(b) reasonable requires that one spouse acquired a substantial interest in the property of the other even before the marriage commenced. That finding must be based on some evidence of an investment or contribution by one spouse creating that form of interest in the property of the other.

In this case, the Court of Appeals in reversing the trial court the Court of Appeals noted that the wife was employed before the marriage and had substantial savings and a 401(K). When they moved in together they were engaged and planned to marriage. After moving into together the parties pooled their finances, and the Wife contributed to the improvements in both homes. In addition the evidence was that the Wife was by agreement a stay at home mother and performed parental duties for the Husband's daughter. Finally, the evidence was that the wife from her separate property contributed to improvements to the home, paid the husband's credit cards, paid insurance on the home and life insurance property tax payments and utilities.

4. **Cook v Cook** 5th District, Case No 18CAF 09 0072 (May 2019)

FACTS: Wife sells her pre marital home and the proceeds from the sale of that home to her Husband. The amount of the proceeds was $ 203,000.00. Husband uses the $ 203,000.00 as a down payment of a home that he purchases. Husband argues that the

.

$ 203,000.00 was a gift to him by the wife. Trial Court finds that the $ 203,000.00 was the Wife's separate property. Husband appeals. Affirmed.

DECISION: In affirming the trial court's decision the Court of Appeals rejected the Husband's argument that the trial court did not properly apply the 'family gift presumption". The family gift presumption is defined as when a transaction is made that benefits a family member there is a presumption that the transaction was intended as a gift. According to the Court of Appeals the family gift presumption has not been applied in domestic relations matters. Instead according the Court in a domestic relations matter the done spouse has the burden of proving by clear and convincing evidence that the donor spouse made an inter vivos gift. In the case the wife testified that it was never her intent to make a gift of the $ 203,000. The wife testified that the husband didn't have money for a down payment and she didn't have credit. So the parties agreed that the Wife would provide the down payment and he would provide the credit to obtain a mortgage. Husband argued that the funds were a gift to him. The Magistrate found the wife's testimony to be more creditable.

5. **Adams v Adams;** 12th District Case No CA2019-07-122 (June 2020)

FACTS: Parties attend marital counseling. During the counseling, Husband informs wife that the " marriage is over". Husband within 30 minutes of counseling session ending, begins to transfer money from joint account to a separate account- then writes checks to his family members alleging that the funds were being paid for rent, purchase carpeting and a down payment for the benefit of his brother. Husband also charges on joint credit card account. Wife files for divorce. Trial Court finds Husband committed financial misconduct in transferring funds. Husband appeals. Affirmed

DECISION: In affirming the trial court's decision, the court stated that according to R.C 3105.171(E) (4) financial misconduct includes but is not limited to the " dissipation, destruction, concealment, non disclosure or fraudulent disposition of assets." Financial misconduct implies some type of wrongdoing such as the interference with the other spouse's property rights. The trial court found and the Court of Appeals affirmed the finding that the husband's testimony lacked credibility regarding the reasons for writing checks to his family members and his need to make purchases on the credit card after the counseling sessions had ended.

6. Pletcher v Pletcher, 5th District, Case No. CT2019-0002 (September 2019)

FACTS: Husband and Wife during their marriage purchase a home and rent the home to the Wife's parents. To purchase the home, the Husband and Wife took out a mortgage on the home, no marital funds were used as a down payment nor were any marital funds used to pay the monthly mortgage payment. The rent paid by the parents went to pay the monthly mortgage payment. Trial Court finds that the home is the Wife's separate property. Husband appeals. Reversed,

.

DECISION: In affirming the trial court's decision the court found that the fact that the mortgage payments came from the wife's parents rent makes no difference. Whether the parties had rented the home to a 3rd party or to a family member makes no difference because the used the rent was a form of marital income to pay the mortgage and was used to reduce mortgage on the property thus increasing the value of the marital asset.

7. **Kramer v Kramer**, 10th District, Case No. 18AP-933 (November 2019)

FACTS: Trial Court finds that there was a de facto termination of marriage as of the date of the divorce was filed. Trial Court then orders the real estate to be sold as part of the Court's Order of divorce and the proceeds divided evenly between the parties. Husband appeals. Reversed.

FACTS: The Court of Appeals found that the Trial Court abused it's discretion when it determined that the value of the real estate would be established by the sale price rather than on the de facto termination of marriage date. A trial court may choose a different date for valuation purposes so long as the Court explains it's reasons. However, a trial court abuses its discretion when it chooses a division date that occurs after the end of the marriage.

8. **Lewis v Lewis** 9th District, Case No. 29164 (September 25, 2019)

FACTS: Parties agree to a de facto termination of marriage and agrees to the de facto termination date to be the date the Wife files for divorce. Trial Court in it's decision found that the Husband committed financial misconduct because the Husband hadn't filed income taxes for several years (2002-2012_. Husband appeals, Reversed.

DECISION: Ohio Revised Code 3105. 1717 (E)(4) the trial court may compensate one spouse with a distributive award or a greater share of the marital property if it finds that the other spousal " has engaged in financial misconduct, including but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets. The burden of proof to prove financial misconduct rests with the complaining party. However, several appellate districts including the 9th District have held that irresponsible financial decisions, and even dishonest financial behavior in and of themselves do not constitute " financial misconduct". For the Court to find financial misconduct the Court must engage in a two pronged analysis. The trial court must find (1) a wrongdoing by one spouse that interferes with the other spouses' property rights and (2) that the wrongdoing results in profit to the wrongdoer or stems from a intentional act meant to defeat the other spouses' distribution of assets.

In reversing the trial court's decision, the Court of Appeals found that the trial court failed to use the proper test to determine financial misconduct. The record was undisputed that the Husband did not file returns for several years and that as a result of his failure to file interest and penalties were assessed against the parties. However, there was no evidence to show that the Husband profited from his wrongdoing (the second prong) and therefore the Court of Appeals reversed the trial court's decision.

.

9. **Toki v Toki** 5th District, Case No. 19CA-0009 (January 2020)

FACTS: In 1994 The Wife was awarded $ 53,000.00 from the Husband's OPERS to be paid when the Husband retires. Husband retires in 2002. In 2002 Husband pays the wife $ 20,000.00 on this obligation but does not pay any else on this obligation. In 2017 Wife files a contempt action against the Husband for nonpayment on the balance of the obligation of $ 53,000.00 . Husband advances the argument of Laches as a defense to nonpayment. Trial Court find Husband's argument of laches has merit and denies the motion for contempt. Wife Appeals. Reversed.

DECISION: In reversing the trial court's decision denying the motion for contempt the Court of Appeals held that a delay in asserting a right (i.e to receive the balance of the funds) does not without more establish laches. Rather, the person invoking the doctrine must show the delay caused material prejudice. A party asserting financial prejudice does not as a matter of law demonstrate "material prejudice". The mere inconvenience of having to meet an existing obligation imposed by a court order at time later than specified by the Order cannot be called material prejudice. To establish "material prejudice " a party must show either 1) a loss of evidence helpful to the case or 2) a change of position which not have occurred if the right had been promptly asserted.

10. **Woyt v Woyt** 8th District, Case No. 107312,107321,107322 (September 2019)

FACTS: Four years prior to the parties marriage the husband purchased a home and as a part of the purchase made a down payment of $ 44,000.00. Husband then finances the balance of the purchase price. Husband then marries . At the time of divorce the trial court found that the husband had a separate property interest of $ 44,000.00. Wife appeals, Reversed in part.

DECISION: In reversing the trial court's decision the Court of Appeals found that although the Husband may have met his burden of establishing that he had a separate property interest in the home the husband failed to show that there was any equity in the home prior to the parties getting married. The Court of Appeals held that the relevant question was not only whether the husband had traced his pre-marital equity in the home but rather also what equity if any existed in the home at the time of marriage.

It was undisputed that the husband had purchased the home prior to the party's marriage for $ 303,000.00 and that the he had paid $ 44,219.00 in cash at closing. The fact that the husband may have had $ 44,291.00 in equity at some point in time prior to the marriage does not conclusively establish that the Husband had that amount of equity at the time marriage.

.

E. RETIREMENT BENEFITS

1 **Taylor v Taylor** 10th District Case No. 17AP-763 (June 2018)

FACTS: Parties are divorced on June 29. 2016 and as a part of its decision the Court retained jurisdiction to sign a DOPO/QDRO to divide Husband's military pension. On October 2, 2107 the trial court signs a Military Retired Pay Division Order dividing the Husband's retirement and providing for survivor benefits to the wife. Husband appeals that order. Affirmed.

DECISION: Wife argued that the Husband had not timely filed his notice of appeal and therefore the Court of Appeals did not have subject matter jurisdiction to hear the appeal. In finding that the appeal had been filed timely the Court of Appeals find that since the divorce decree contemplated issuing a QDRO in the future it did not resolve the division of retirement accounts including the division of military benefits and therefore the divorce decree was not a final appealable order. The Military Retired Pay Division Order filed on October 2, 2017 is a final appeal order as it resolves the final issue of the division of retirement benefits. Therefore the Husband's notice of appeal if timely.

2. **Estate of Jon Parkins v Valerie Parkins** 3rd District, Case No. 1-18-50 (May 2019)

FACTS: Parties enter into divorce agreement wherein to equalize the marital estate. the Wife agrees to transfer to the Husband$ 87,000.00 by way of a " PLOP" (partial lump sum option payment) from the Wife's OPERS account upon her retirement from employment with the State of Ohio. A DOPO is prepared and sent to OPERS. OPERS rejects the DOPO because of errors in the drafting of the DOPO. 10 days after OPERS rejects the DOPO the Husband dies. Wife takes the position that pursuant to R.C 3105.86 the alternate payee's rights under an approved DOPO terminate on the death of the alternate payee. Estate of the Husband files a declaratory judgment against the Wife seeking payment of the $87,000.00. Trial Court grants the declaratory judgment and orders the Wife to pay the $ 87,000.00. Wife appeals that decision. Affirmed.

DECISION: Although the husband's death may have terminated the right to use a DOPO to collect money from Valeri the husband's death did not affect the viability of the underlying property settlement. A divorce decree is an actual order which divides property whereas a QDRO or DOPO is merely a tool used to execute the divorce decree. The denial of the implementation of a DOPO does not alter the provisions of a divorce decree and the reference to a PLOP or DOPO does not extinguish the underlying obligation. The Wife's underlying obligation to the Husband remains valid even if the vehicle for carrying out the division of property may have to be changed.

3. **Hoffman v Hoffman** 9th District, Case No. 28799/29104 (June 26, 2019)

FACTS: Trial Court finds that there is a de facto termination of marriage as of December 2001. Trial Court values Wife's pension as of January 2014. Trial Court in dividing the

.

Wife's pension does not award to the Husband growth on his share of the Wife's pension. QDRO is filed and does not contain any language providing growth. Husband files 60(b) challenging the QDRO signed by the Court which doesn't contain a provision awarding growth on the Husband's share of the Wife's pension. Husband appeals. Affirmed

4. **Grisafo v Hollinshead** 8th District Case No. 107802 (September 2019)

FACTS: Parties obtain a dissolution of marriage in 2004. At the time of their dissolution of marriage the parties separation agreement provided that the Wife would receive 50% of the Husband's retirement benefits through Ohio Police and Firemen's Pension Fund (OPF). A DOPO was prepared and filed which awarded to the Wife 50% of Husband's age and service benefit as the benefit she would receive upon the Husband's retirement. No other benefit box was checked on the DOPO. Husband was eligible to retire under an age and service benefit in 2020. In 2017 Husband was granted total disability and commences to receive disability payments from OPF. Wife then files a 60(b) to amend DOPO so that she can begin to receive 50% of the Husband's disability payments. Wife argues that she was entitled to receive a portion of her former husband disability benefits because the Husband is receiving them in lieu of retirement benefits. Trial Court denies the motion. Wife Appeals. Affirmed.

DECISION: In affirming the trial court decision, the Court of Appeals held that generally disability payments do not constitute a marital asset because disability benefits " are a form of wage continuation designed to compensate the recipient for wages the he/she would other wise receive but for the disability. However disability benefits can be considered marital property when they are " taken in lieu of a service or retirement pension". The non participant spouse has the burden of proof to establish that the disability benefit was being received in lieu of retirement benefits or that the retirement benefits the participant spouse would otherwise be entitled to receive are being reduced by the receipt of disability benefit. On the date that the a spouse becomes eligible for retirement the disability benefits being received, though not marital property per se, begin to represent retirement benefits to the extent that they equal the retirement benefit the spouse would have received but for his disability. In this case, the Court of Appeals found that the Wife would not be entitled to receive any benefits unless and until the Husband begins to receive disability payments in lieu of his age and service retirement benefits which cannot occur until September 2020.

5. **Ouellette v Ouellette** 6th District Case No. E-19-017 (February 28, 2020)

FACTS: Parties agree that the Wife will by way of a DOPO transfer to the Husband the sum of $ 110,000.00 from her OPERS account. Subsequent to entering into their agreement to transfer retirement funds it was determined tat the Wife could not transfer the agreed upon funds. Husband files a 60(b) seeking to either modify or vacate the Order. Trial Court grants the 60(B) and order that the $ 110,000.00 be distributed within 6 months. Wife appeals, Reversed in part.

.

DECISION: In reversing the trial court's decision the Court of Appeals relied upon Morris v Morris 148, Ohio State 3d 138 a decision issued by the Ohio Supreme Court. In Morris which dealt with the issue of spousal support the Supreme Court of Ohio held that 60b could not be used to modify a spousal support award where there was no reservation of jurisdiction. The Court of Appeals held that the same principle applied to the use of 60(b) to modify a property division where there is no reservation of jurisdiction. Because R.C 3105. 171 (I) does not permit modification absent the consent of both parties, Civ R. 60(B) cannot provide a workaround where there is no reservation of jurisdiction or consent to modify a property settlement.

6. **Tustin v Tustin** 9th District, Case No 28799/29104 (August 2019)

FACTS: The Trial Court finds a defacto termination of marriage occurred in December 2011. Trial Court then determines the value of the Wife's pension as of trial date which was December 2014 and awards the Husband 50% of the Wife's pension as of December 2011 but does not award to the Husband and growth on his share of the Wife's pension from 2011 (de facto date) to December 2014 (trial date). Wife's files a QDRO which does not contain any language awarding Husband growth/losses on his share of the Wife's pension. Trial Court signs QDRO. Husband files 60(B) seeking to set aside the QDRO. Trial Court denies the motion. Husband appeals. Affirmed.

DECISION: In affirming the decision of the trial court the Court of Appeals held that there is no legal authority which requires a trial court to allocate/award the appreciation or depreciation in a retirement account between the date of judgment (in this case the defacto date) and the date of the distribution of the benefit. The decision whether to award appreciation and/or depreciation is left to the discretion of the trial court.

.

F. PARENTAL RIGHTS

1. **Nemitz v Nemitz** 2nd District, Case No 28040 (February 2019)

FACTS: Pursuant to the parties divorce they had shared parenting of their children. In February 2017 Wife files to terminate the shared parenting plan. A GAL is appointed and following the GAL investigation the GAL makes a recommendation regarding the pending motion. The GAL recommends that the shared parenting plan remain but be modified so that the Husband would have parenting time on alternate weekends from Friday to Tuesday. The parties generally agree to the recommendation of the GAL. Trial Court after hearing the evidence doesn't terminate the shared parenting plan but modifies the shared parenting plan and awards to the Husband parenting time on alternate weeks from Thursday to Tuesday. Husband appeals, Affirmed

DECISION; Husband argued that under R.C 3109.04 (E) (1)(a) a shared parenting plan to be modified requires a threshold finding that a change of circumstance has occurred. However, according to the Court of Appeals a shared parenting plan can also be modified pursuant to the provisions of R. C 3109.04 (E)(1)(b), R.C 3109.04(E)(2)(a) and R. C 3109.04 (E)(2)(b). R.C 3109.04 (E)(2)(b) allows a trial court to make a modification of a shared parenting plan if the court determines that the modification is in the children's best interest. A modification under R. C 3109.04(E)(2)(a) does not require that the Court find that there has been a change of circumstance only that the modification is in the children's best interest.

2. **In Re G.B:** 2nd District, Case No 27992 (January 2019)

FACTS: Post decree the wife files a contempt against her husband for not allowing visitation. Husband files a motion to modify child support. Trial Court in lieu of a hearing directs that each party file memoranda in support of their respective motions (and responses to the other party's motion). Each party files a memoranda regarding the pending issues. Trial Court without a hearing denies the Wife's motion for contempt and orders wife to pay child support. Wife appeals. Reversed.

DECISION: It is within the trial court's decision whether to provide a litigant seeking a contempt finding an evidentiary hearing. A court abuses its discretion when a judgement is unreasonable, arbitrary or unconscionable. Most often a trial court's judgement constitutes an abuse of discretion because it is unreasonable with an unreasonable judgement being one where there is " no reasoning process supporting the judgement. A trial court assuming factual issues exist, abuses its discretion by denying a contempt motion without conducting an evidentiary hearing. Conversely a trial court does not abuse its discretion by overruling a contempt motion without conducting an evidentiary hearing when the record, in the absence of a hearing allows such a determination. Based upon the circumstances of this case, over ruling the Wife's contempt motion was over

.

ruling and was an abuse of discretion because the judgement does not articulate the court's rationale in denying the motions.

3. **Gregory v Gregory** 1st District Case No. C-180444 (December 2019)

FACTS: Court appoints a parenting coordinator to address parenting issues. Parenting Coordinator issues a decision on parenting issues. Pursuant to the local rule a parenting coordinator decision becomes immediately effective upon filing. Husband files objection to the decision of the parenting coordinator. Trial Court denies Husband's objection. Husband appeals. Reversed.

DECISION: In reversing the trial court's decision denying the Husband's objection the Court of Appeals held that the local rule making the parenting coordinator's decision effective upon filing was a denial of the Husband's right of due process. Due process requires a meaningful and independent judicial review of a parenting coordinator's decision. The lack of an independent review of the parenting coordinator's factual findings and the fact that the parenting coordinator's decision was immediately effective and not stayed by the filing of the Husband's objection combined to deprive the Husband of a meaningful and independent judicial review.

4. **In Re K.C.M** 5th District Case No. 2019 CA 0008 (December 2019)

FACTS: Parties not married have a child together. Mother's maiden name is listed on the child's birth certificate. Mother marries a person other the child's father. Mother then seeks to change the child's last name to be the same of the mother's married name. Probate Court grants the name change. Father appeals. Affirmed.
DECISION: R.C 2717.01 grants to the Probate Court to make name changes on behalf of the minor child. The standard for deciding whether to permit a name change is proof that the facts set forth in the name change application show reasonable and proper cause for changing the child's name. In determining whether a reasonable and proper cause for a name change has been established a court must consider the best interest of the child.

In determining the best interest of the child the trial court should consider the following factors:

1. The effect of the name change on the preservation and development of the child's relationship with each parent
2. The identification of the child as a part of the family unit
3. The length of time that the child has been using the surname
4. The preference of the child if the child is of sufficient maturity to express a meaningful preference
5. Whether the child's surname is different from the surname of the child's residential parent
6. The embarrassment, discomfort that may result when a child bears a surname different from the residential parent
7. Parental failure to maintain contact or support the child
8. Any other relevant factor

.

5. **Staver v Staver** 5th District Case No. 2019 CA 00057 (October 2019)

FACTS: In 2014 Mother is named as the residential parent for the parties children. At the time of the termination of the parties marriage the parties lived 150 miles apart. In order to maintain a relationship between the Father and the children the Father has parenting time every weekend. Pursuant to the provisions of the shared parenting plan the parents meet half way to exchange the children.

Post decree the children are enrolled by the Mother in an extracurricular activity (dance). Due to the distance Father doesn't take the children to all of the extracurricular activities held on Father's weekend. Mother files a motion to modify the shared parenting so as to limit Father's parenting time so that the children can attend their extracurricular activity on Father's weekend.

GAL is appointed and after his/her investigation recommends that there be no change in the parenting plan schedule. GAL finds that the children are adjusted to the schedule and lie the schedule which allows them to see father every weekend. Trial Court denies Mother's motion. Mother appeals, Affirmed.

DECISION: In determining whether to modify a parenting schedule the trial court must determine whether the proposed modification is in in the children's best interests utilizing the factors set forth in R.C 3109.051(D). In this case the Court found that the children liked the schedule and they didn't want the schedule to change. The Court in denying the Mother's motion to modify adopted the GAL's finding that it was not an appropriate use of Father's parenting time to require the children to trave 6-7 hours in a car in order to attend an extracurricular activity.

.

G. SPOUSAL SUPPORT

1. **Hague v Estate of Hague** 11th District Case No. 2018-A-0060 (2019)

FACTS: Pursuant to the Parties Separation Agreement the Husband agreed effective June 2016 to pay spousal support until the Wife dies, remarriage of the Wife or Wife cohabitates. In January 2018 Husband dies. Wife files a claim against Husband's estate alleging that the Husband's estate is liable for the payment of spousal support. Estate rejects the claim. Wife files an action against the estate arguing that the termination events only apply to her death, remarriage or cohabitation. Wife argues that because there was no express language that provided for the termination of spousal support on the Husband's death that the provisions of 3115. 18(B) (and which holds that spousal support terminates upon the death of either party unless the order expressly provides to the together. Trial Court rules that the Husband's obligation to pay spousal support ended upon the Husband's death and the Husband's estate is not liable for the payment of on going spousal support. Wife appeals the decision. Affirmed.

DECISION: In affirming the trial court's decision the Court of Appeals acknowledged that there is a split of decision on this issue. In the Forbes case (6th District) WD-04-056 where the divorce decree did not include the husband's death as a terminating factor " the court clearly expressed it's intent for spousal support to continue after the Husband's death".

However, other Courts are in conflict with Forbes such as Woodrome (12th District) and Budd (9th Distr). In finding the decision in Forbes to be " unpersuasive" the Court of Appeals for the 11th District held that the provisions of 3115. 18(B) (and which holds that spousal support terminates upon the death of either party unless the order expressly provides to the to contrary) can only be avoided when the terms of the decree expressly state that the payment is to extend beyond the payor's death. In the absence of express language, the duty to pay spousal support ends when the payor dies. In affirming the decision of the trial court, the Court found that the language of the divorce decree does not expressly provide that the husband's obligation to pay spousal support continues after his death.

2. **Fuller v Fuller**: 9th District Case No. 28891 (December 2018)

FACTS: Parties executed a separation agreement wherein the Husband agreed to pay spousal support of $ 8,500.00 per month. The agreement further provided that the Court retained jurisdiction to modify the support order based upon a change of circumstance of either party or terminate the support obligation upon the occurrence to the wife's death, husband's death, wife's remarriage). In December 2016 shortly before Husband's 69th birthday husband files to terminate his spousal support obligation due to a substantial change of circumstance. Trial Court doesn't terminate but reduces husband's spousal support to zero dollars. Wife' appeals that decision. Reversed.

.

DECISION: In affirming the decision of the trial court the Court of Appeals recognized that there is a distinction between the termination of support based upon a change of circumstance of the parties (and to which a R.C 3105. 18(E) would apply) and those cases based upon the occurrence of a specific condition subsequent.

In reversing the trial court's decision, the Court of Appeals noted that the divorce decree under review set out distinct provisions regarding the modification and termination of spousal support. The divorce decree expressly retained jurisdiction to modify the amount of spousal support, based upon a change of circumstances. The divorce decree sets forth only 3 conditions subsequent as grounds for a termination of the award (death husband, death of wife or wife's remarriage).

In this case, the trial court issued a hybrid order which purportedly granted the husband's motion to terminate spousal support by reducing the obligation to zero dollars. Accordingly, the trial court's judgment effectively ordered a modification rather than a termination of support. Husband did not seek a modification of his support obligation but rather sought a termination of his support. Because the trial court ordered a modification it exceeded the scope of the relief sought by the Husband.

3. **Friedenberg v Friedenberg** 11th District, Case No. 2017-L-149

FACTS: Plaintiff filed a divorce action wherein Wife sought both child support and spousal support. Husband through his counsel issued a subpoena to the wife's mental health professionals relating to the treatment of the Wife. Wife files to quash the subpoena and a protective order alleging that her medical records were protected by the physician patient privilege. Trial court ordered that the records of the wife be released to Counsel for the husband pursuant to a protective order. Wife appeals the decision. Affirmed.

DECISION: Generally a person's medical records are privileged and not subject to discovery. However when parents seek custody of their children they waive the physician patient privilege with respect to their medical records. That waiver applies to a personal mental health records. The Court of Appeals found that the same waiver applies to person seeking spousal support. R. C 3105.18(C) requires that a court consider the mental condition of the parties in determining whether spousal support is appropriate and reasonable. Raising a claim for spousal support warranted, at the very least the disclosure of the Wife's medical records to the court for a review.

UPDATE: The Supreme Court of Ohio in a decision issued on June 18, 2020 (slip opinion 2018-0416 affirmed the decision of the Court of Appeals decision. The Supreme Court held that although communications between a physician and patient are generally privileged under R.C 2317.02(B)(1) the wife's filing a divorce action, with claims for child support and spousal support, triggered the exception found in R.C 2317.02(B)(1)(a)(iii) which provides for an exception to the privilege for communications that relate causally or historically to physical or mental injuries relevant

.

to issues in the divorce action. By statute, the wife's mental and physical conditions are mandatory considerations for the trial court's determination of her claims for custody and spousal support. The trial court appropriately examined in camera the submitted mental health records to determine their relevance before ordering their release, subject to a protective order

4. **Stafford v Stafford** 10th District Case No 19AP-50 (September 2019)

FACTS: Parties are married for 23 years at the time that the Wife for divorce. At trial the Court finds that the wife during the marriage mis spent money and during the divorce did follow court orders regarding the payment of credit card debts. At the time of the divorce the Husband earned $ 74,000.00 per year while the Wife earns $ 35,000.00 per year. Trial Court orders the Husband to pay $ 800.00 per month for 8 years. Wife appeals. Affirmed.

DECISION: In affirming the trial court's decision the Court of Appeals rejected the Wife's argument that due to the length of the parties marriage that she was entitled to an award of indefinite spousal support. In commenting on the Wife's argument that she was entitled to indefinite support the Court stated that the Supreme Court in the Kunkle case does not mandate that spousal support be for an indefinite period of time simply because a marriage has been lengthy.

The Court of Appeals also found that the Trial Court did not abuse it's discretion when it awarded spousal support of $ 800.00 per month. The Court of Appeals commented on the fact that the trial court was not willing to accommodate the Wife's budgeting for expenditures for restaurants, entertainment, and hobbies. While spousal support was appropriate in this case the amount must be commensurate with the actual need. The Court also noted that it would be inequitable to assign to a party an amount of spousal support that prohibits them from maintaining the same standard of living as the recipient of the payment.

5. **Murphy v Murphy** 5th District, Case No 2018 CA 00161 (August 2019)

FACTS: Husband per divorce decree on 2/2017 is ordered to pay $ 4,000.00 per month. In January 2018 Husband files to modify his spousal support alleging that his income has declined. Matter is set for a hearing on 4/2018. Case is continued to August 2018 due to Husband's failure to provide discovery. Hearing is conducted and decision is issued October 2018. Trial Court in it's decision reduces the Husband's spousal support to $ 2,400.00 per month effective October 2018 and not retroactive to April 2018 (and which was the first court date). Husband appeals. Affirmed.

DECISION: Absent some special circumstances an order of a trial court terminating spousal support should generally be retroactive to the date such modification was first request. This ability to make an order retroactive is to address the delay that it takes for a trial court to dispose of motions to modify. However, a trial court has the discretion to make the modification of its order effective on a date other than the date the motion was filed. In setting the effective date a trial court must be careful in making a reduction of

.

spousal support retroactive and abuses its discretion when it fails to consider the retroactive reduction of spousal support and the recipient's reliance upon or expectation of receiving support. In this case the delay in hearing the case was due to the Husband's failure to provide documents which caused the case to be continued.

6. **Pekarik v Otto** 9th District, Case No 18CA 0068-M (March 2020)

FACTS: Husband files to terminate his spousal support obligation on the basis that his former wife was cohabitating with an unrelated adult male. The evidence at the hearing on the motion was that the former wife and the unrelated adult male was that they had lived together for approximately 18 months, and that during that period of time the unrelated adult male occasionally gave the former wife money and that they shared some living expenses. Trial Court denies the motion. Husband appeals. Affirmed

DECISION: Cohabitation is defined as a condition for the termination of spousal support is designed to preclude an ex spouse from eluding termination of spousal support as a consequence of remarriage, while obtaining the financial benefits thereof by refusing to sanctify a meretricious relationship through a marriage ceremony. When considering the issue of cohabitation, the trial court should look to 3 principal factors: 1) an actual living together 2) of a sustained duration and 3) with shared expenses with respect to financing of day to day incidental expenses. Without a showing of financial support, merely living with an unrelated member of the opposite sex is insufficient in and of its self to require the termination of spousal support. A finding of cohabitation requires more than evidence that the former spouse is living with another person with whom she has sexual relations.

In this case there was no dispute that the former wife lived with another person for a period in excess of 18 months. The issue was whether the former wife had shared expenses with her " friend". In affirming the trial court's decision the Court of Appeals found that the Husband had failed to show that the former wife had " shared expenses" with respect to financing and day to day incident expenses. The husband further had failed to prove that the " friend" had assumed the obligations equivalent to those arising from ceremonial marriage. Simply because the " friend" had occasionally given the former wife money for her expenses does not mean that there is a finding of cohabitation.

7. **Manley v Manley** 7th District, Case No. 19CO 0023 (March 2020)

FACTS: Husband ordered to pay spousal support. Husband files 2 times to modify his spousal support and on each occasion trial court denies the motion. Husband files the 3rd time to modify spousal support. In his 3rd effort to terminate spousal support the Husband argues that he has reached retirement age and that he was receiving social security benefits and therefore his spousal support should be terminated. Trial Court denies the motion. Husband appeals. Affirmed.

DECISION: Early retirement can be considered an involuntary decrease income/ salary if the payor demonstrates that it was economically sound, but if he retires with the intent

.

to defeat a spousal support obligation then the retirement can be a considered voluntary underemployment and the payor's pre-retirement income can be attributed to him.

In this case the trial court rejected the husband's argument that age 64 was the Husband's full retirement age and imposed a finding that age 66 was full retirement age. In affirming the trial court's decision, the Court of Appeals noted that that there was division in how Courts have addressed this issue. Some cases have considered the age at which unreduced benefits can be claimed under social security in determining the normal retirement age. Other cases have disregarded the age that at which an obligor attains an age where the obligor can receive full social security benefits because that age is not a statutory factor for spousal support. In affirming the trial court's decision, the Court of Appeals stated that a trial court should not be prohibited from using a social security retirement date depending on the circumstances of the case. The issue is one to be determined on a case by case basis.

H. **MISCELLANEOUS**

1. **Tatsing v Tatsing** 10th District Case No. 16AP-827 (November 2017) .

FACTS: In January 2002 the Parties ostensibly married in Cameroon. At the time of the marriage the Husband lived in Ohio and the Wife lived in the Ivory Coast. They then moved to the United States. Wife files for divorce in Ohio in January 2015. While the case is pending in Ohio the wife in November 2015 Wife files in Cameroon High Court to nullify the marriage. The High Court granted the request to nullify the marriage based on the failure of the parties to comply with Cameroon Law. The High Court found that because neither party was born in or lived in Cameroon at the time of the marriage ceremony.

Husband moves to dismiss on the basis of jurisdiction. Trial Court grants motion because evidence was presented by the Husband to establish that the High Court of Cameroon had found the marriage to be invalid. The Court found that because the High Court of Cameroon had found the marriage to be invalid the marriage in Ohio was also invalid and therefore the Court lacked subject matter jurisdiction over the matter. Wife appeals. Affirmed.

DECISION: A trial court lacks subject matter jurisdiction over a divorce proceeding if the marriage between the parties was invalid. Subject matter jurisdiction cannot be waived and can be raised at any time. The failure of a party to raise subject matter jurisdiction cannot be used in effect to bestow jurisdiction on a court where there is no subject matter jurisdiction.

Citing as authority for it's decision the Lee case out of the 11th District (2006-T-0098) the Court of Appeals for the 10th District stated that the validity of the marriage is determined by the law of the country/state where the marriage is conducted (lex loci contractus). Because as in both Lee and the present case the parties had failed to comply with the law of country where the marriage was performed (Lee-South Korea Tatsing – Cameroon) that the marriage was invalid under both Korean/Cameroon and Ohio law and the trial court had no jurisdiction over the matter.

4. **State of Ohio v Caslin** 10th District Case No 17AP 613(December 2018)

FACTS: Defendant is charged with rape. Analyst from the Columbus Police Department took screen shot of face book posts linking Defendant to the crime. State introduces face book posts linking the Defendant to the crime. Defendant objects to the introduction of the face book posts. Trial Court allows the face book posts. Defendant is convicted of rape. Defendant appeals, Affirmed.

DECISION: In affirming the trial court's decision to allow the screen shots of the posts, the Court of Appeals stated that Evidence Rule 901(B)(1) provides that authentication of a document can be satisfied by the testimony of a witness with

knowledge that the matter is what it is claimed to be. In the absence of evidence of evidence or contemporaneous objections that would support an inference that the screen shot photographs were contrived or altered the evidence presented was admissible and sufficient testimony by the criminal analyst was presented that the witness had knowledge that the screenshot of the Facebook page was what it purported to be.

5. **Kilbarger v Kilberger** 4th District Case No 18CA 14 (January 2019)

FACTS: Parties were divorced on May 7, 2018. Husband filed for a new trial which was denied on August 6, 2018. On September 5, 2018 the Husband fax files his notice of appeal. September 5, 2018 was the deadline for filing a notice of appeal. Clerk of Courts accepts the notice of appeal and time stamps the notice of appeal as being received on September 5, 201. Wife files to dismiss the Husband's appeal on the grounds that a notice of appeal could not be fax filed and therefore the notice of appeal was not timely. Husband argues that the rules of court allow for a fax filing. Motion granted and appeal dismissed as not being filed timely.

DECISION: The Court of Appeals in dismissing the Husband's appeal acknowledged that Hocking County Local Rule 37 allows pleadings and other papers may be filed with the Clerk of Court by fax. However, the Supreme Court of Ohio has held that unless a local rule of the appellate court expressly permits the filing of a notice of appeal by electronic means a party appealing a trial court order must file a paper copy of the notice of appeal with the clerk of the trial court pursuant to App.R. 3. The 4th Appellate District had not adopted a local rule allowing for electronic filing of a notice of appeal.

The Court of Appeals also rejected the Husband's argument that because the Clerk of Courts had accepted the notice of appeal and filed stamped the notice that the notice of appeal was filed. The Court of Appeals held that an appeal is not filed if it is presented to the clerk of courts electronically rather than manually with a paper copy unless authorized by local appellate rules.

6. **Bey v Rasawehr** Ohio Supreme Court Case No. 2020-Ohio-3301 (June 2020)

FACTS: Appellant posts on social medial that sister law contributed to death of Appellant's brother. Sisterlaw seeks a Civil Protection Order prohibiting the Appellant from posting on social media statements accusing sister in law of contributing to the death of the brother. Trial Court issues a Civil Protection Order and as a part of the order prohibits the Appellant from posts on social media. Appeals Court affirms decision of trial court. Appellant appeals to the Ohio Supreme Court. Reversed.

DECISION: In reversing the decision of the Court of Appeals and Trial Court the Supreme Court held that the Order of the Court prohibiting postings on social

media imposes an unconstitutional prior restraint on protected speech in violation of the First Amendment to the United States Constitution.

7. **Hussain v Hussain,** 12th District, Case No. CA2019-01-024 (February 2020)

FACTS: Husband takes a voluntary separation from employment. Husband receives a one time severance bonus. Husband files to reduce child support. CSEA reduces child support. Wife objects to the decision. At the time that the wife files the objection the Husband was living in India. Wife serves the objection via regular mail on Husband in India. Trial Court sustains wife's objection and reimposes child support. Husband appeals in part of grounds that the Wife did not comply with the provisions of the Hague Convention on Service. Affirmed.

DECISION: Court of Appeals finds that the service of motions, objections and judicial decision upon a person in a foreign country is governed by Civ R 5 and not Civil R 4.5. Civil Rule 4.5 sets for the rules for service of an individual in a foreign country. If the foreign county is a signatory to the Hague Convention on Service C.R 4.5 requires that service be made in compliance with the Convention. C.R 4.5 only applies to service of the summons and complaint. The Hague Convention on Service only applies to the initial service of process, namely the summons and original complaint. Following service of the summons and complaint the parties must serve future pleadings and papers including motions and objections under the less stringent standards of Civ. R. 5.

The Court of Appeals also observed that C.R 5 allows service of pleadings and other papers subsequent to the original complaint by mailing the document to the persons last know address by U.S Mail and by " sending it by electronic means to a facsimile number or email address provide by the party to be served (C.R 5(B)(2)(c)(f)