Spring, 2014 • Volume 9, Issue 2

Lorain County Bar Association

The Lorain County Bar Foundation proudly honored its first time award recipients at the Charity Ball on March 22, 2014.

Allen S. Spike Mindi Kuebler Tom Theado

Allen S. Spike • Lifetime Achievement Award

(Noteworthy contributions during a legal career of at least 25 years; commitment to professional growth; service as a role model or mentor promoting advancement of the law in the community.)

Allen Spike is in his 50th year of practice, receiving his JD from Case Western University Law School in 1964, and is one of the most well-regarded domestic relations attorneys in this area. Allen literally wrote the book on domestic law for the State of Ohio. Allen is well-known, respected and liked by attorneys throughout Ohio. He has upheld the highest standards of ethics and professionalism throughout his career. He has served on many committees both at the state and local level, including LCBA President and a member of the OSBA Board of Governors. He has served as the Chief Editor of the four-volume 'Ohio Family Law and Practice.' He has devoted his life to his clients and to the legal profession.

Tom Theado • Member of the Year Award

(Exemplary service to the LCBA during the past year)

Tom Theado was an exemplary member of the LCBA's Executive Committee for 14 years. Those that served with Tom on the Committee know how dedicated he is. He came to each and every meeting fully prepared and his insights and contributions aided in furthering the mission of the association. He was instrumental in pushing the Bar into the next century and over time has devoted hundreds, if not thousands, of volunteer hours to make the LCBA a better association for its members. He continues to chair the Mentor Committee and never misses the opportunity to encourage members to join that committee. He sends a welcome letter to every new member which includes an invitation to join the Mentor Committee. He attends every social event that he is able to attend. Tom is the epitome of a good active member of our bar association.

Mindi Kuebler • Courage Award

(Any resident of Lorain County who has shown exemplary courage in aiding and supporting its citizens.)

Mindi has served as the Director of the Human Trafficking Collaborative of Lorain County since 2009, and is a Nurse Supervisor with Ohio Guidestone. Mindi has made it her life's mission to help victims of human trafficking. She has worked tirelessly with survivors of sexual abuse and human trafficking. She puts herself in dangerous situations to help victims never thinking twice about it. She worked with the Attorney General's Commission on Human Trafficking to start the Human Trafficking Collaborative of Lorain County. She has used her own time and resources to speak with thousands of people to educate them on human trafficking and sexual assault. Throughout this time, Mindi was going back to school to earn her MSN, MBA and is a SANE-A and SANE-P. Mindi Keubler is the quintessential person of courage.

President's Message • Barbara Aquilla Butler

WHAT'S BEEN BLOOMING THIS SPRING AT THE BAR ASSOCIATION?

OSBA DISTRICT 10 ANNUAL MEETING: Lorain County Bar Association hosted the Annual Meeting at the Spitzer Conference Center on April 3, 2014. For those who attended the CLE portion: 'Penn State Scandal: Ethics Lessons from the Cover-Up' the video replay of James D. Robenalt's coverage of the factual and ethical issues involved was fascinating with some great take-aways on conflicts of interest, representing entities, and reporting up that were very applicable to everyday practice. OSBA President Jonathan Hollingsworth addressed the attendees during lunch, providing an update on what is going on at the State Bar, and fielded some tough questions from the crowd. Congratulations to Kevin Donovan for election to Board of Governors and to our newly elected Council of Delegates, which included our own Gowri Hampole. Award winners Allen Spike and John Siegenthaler were recognized for 50 years of practice and Henry E. Young of Norwalk was recognized for 65 years of practice. Also, congratulations to Angela A. Wu of Oberlin who received the Community Service Award for Attorneys 40 and Under. After the meeting, Vice President, Kurt Anderson, Jeannie Motylewski, and I met with the OSBA President and OSBA staff to discuss how the State Bar can better assist and support LCBA Members. We hope that these continuing discussions will allow the two Bars to better work together in the future to increase member benefits, and to strengthen our members' voices in Columbus when the OSBA is working with the Supreme Court and the Legislature.

COMMUNITY OUTREACH: Thank you to all who participated on March 23-24 in the LCBA community outreach program by donating their time, money, food, toiletries, and diapers to St. Mary's Pantry Lorain. For those of you who are interested, but could not make it, St. Mary's holds its Food Pantry on the 4th Sunday of every month (11:30-1:00ish), volunteers assist with stocking the shelves of the pantry with all of the donations. The following Monday from 4-7, residents are able to come in and obtain food and toiletries from the pantry at no cost to them. You can either volunteer for Sunday set-up, Monday distribution, or make a monetary or product donation. The Committee is busy planning its next and last outreach program during my term, so stay tuned for details.

FUN/FOUNDATION: The 2014 Charity Ball & Award Ceremony was a great success and well attended. Congratulations to our award winners: Allen Spike, Lifetime Achievement; Tom Theado, Member of the Year; and Mindi Kuebler, Courage Award. It was a great honor to present the winners with their awards this year and I hope that we continue the program in years to come. Thank you to the Board and Jeannie and Tammie for all you did to make the awards a reality, and for putting together the best ball yet. The Foundation also owes me a big 'Thank You' for my generous donation at the Craps Table again this year. Good Times!

SPECIAL THANKS: Thank you to Judge Ewers for working with the Lorain County Bar Association to make it possible to bring back Big City Swing Band to the event. The music and vocals were fantastic and it is so great to see our members get out there and dance. Thank you to the Gaming Company Jackpot Gaming and to D.J. Brandon Stone for pulling it all together.

NETWORKING: Thank you to Judge Janik for your participation in our Off the Record Breakfast Series which took place on April 4, 2014. It was a great open and relaxed dialogue with the Judge, his Magistrates and staff. Thanks to all those who attended and provided comment, ideas, and more tough questions. Judge Bennett will hold his Off the Record on June 6th at Elyria Municipal Court. Please mark your calendars.

NEW BUSINESS OPPORTUNITIES/MARKETING: Please check out our website to learn more or to join our Lawyer Referral Service and Modest Means panels. The Modest Means program for Domestic Relations is referring at least one case out to its Attorney panel every day.

Less than two months to go, but who's counting.

NAVIGATION OF THE JUVENILE JUSTICE SYSTEM

Michael J. Towne, Esq.

Welcome to the world of 'Juvenile.' The representation of juvenile clients presents challenges and requires approaches that are different from those found or used in adult court practice. Two of the main differences between juvenile and adult practices are the terminology used in the juvenile system and the way a juvenile matter flows through the justice system. This short orientation on the juvenile system has been prepared to provide you with an overview of the juvenile system through the lens of a practitioner who has years of experience in both systems. It will not make you an expert or instant juvenile law guru. It is simply intended to start you in the right direction.

Like in the adult system, a juvenile matter starts when an alleged crime occurs. The police create a report and send that report to intake at the County prosecutor's office, where it is determined whether or not to charge the juvenile. The charging document is known as a 'complaint.' The complaint is filed with the County clerk. If the Juvenile is in the Detention Home (DH), the juvenile is arraigned by a specially assigned DH Magistrate. This hearing must be held within 72 hours from the time the juvenile is admitted it the DH. The DH Magistrate schedules a pretrial before one of three designated juvenile Magistrates. A juvenile is NOT entitled to bail. Determination of release is decided by weighing multiple factors, none of which is the juvenile's ability to post bond. Often times, the juvenile is not placed in the DH by the arresting officer. In these instances, the juvenile and parent/guardian are summoned into court after the filing of the complaint. Whether in the DH or not, at his/her 'arraignment,' a juvenile is read the charges, read applicable rights, and questioned whether or not they require representation by an attorney. A juvenile is always entitled to court-appointed counsel, and the local courts err on the side of caution in appointing attorneys to juveniles if requested, whether the charges are minor misdemeanors, misdemeanor, and/or felonies.

After the juvenile's arraignment, the matter is set for a pretrial conference. It is permissible for a juvenile to 'admit' at the arraignment, but it is not too common. Pretrial conferences in the juvenile system are very similar to pretrials in the adult system, where attorneys meet to exchange information regarding the matter and set future dates. If the juvenile is in the DH, a release hearing can be had whenever requested (as long as the court is available). One main difference between the juvenile and adult system, however, is that a juvenile can be remanded to the DH for a variety of factors not ordinarily taken into account in the adult system.

If a juvenile is in the DH, he/she must be 'adjudicated' within fifteen (15) days unless time is waived or extended for good cause. An 'adjudication' is a determination as to whether or not the allegations are true. An adjudication generally happens in one of two ways. The first is by 'admission.' An admission is like a 'guilty' plea in adult court. The second way a matter is adjudicated is by 'trial.' The trial afforded to the juvenile is a 'Court' trial, whether by Magistrate or Judge. The same rules of evidence apply as in adult court. However, juveniles are not afforded the right to a trial by jury.

When the juvenile is adjudicated, they are adjudged to be a 'delinquent' child. The matter then proceeds to 'disposition.' Disposition is similar to sentencing in adult court. Disposition may occur the same day as the admission or may be continued for a later date. Dispositions that occur the same day as the admission are generally reserved for less serious matters and/or for those juveniles that do

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not have much history of delinquency in the juvenile court. Some juveniles are referred to the probation department so that a report may be prepared with a recommendations for services. This report, prepared by the probation department's 'Investigation and Referral' team (I&R), contains information about the juvenile's background, the circumstances surrounding the crime, and recommendations for disposition.

Regardless of any recommendations made by the probation department, it should always be remembered that the disposition is completely up to the discretion of the Magistrate and/or Judge the juvenile delinquent is appearing in front of. Everyone will get their say, the prosecutor, probation department, attorney(s), juvenile, parent(s), family members, service provider(s), etc., but the fate of the juvenile rests in the hands of that particular Bench Officer.

One of the main differences between juvenile and adult court, is the variety of dispositional alternatives available in juvenile court that are not available in the criminal justice system. This is also where an attorney, as an advocate for their client, can probably make the most difference in a positive way for their client.

At times, the approach to the representation of a juvenile client can be very similar to the representation of an adult client. However, in many ways, the juvenile justice system is the last bastion of 'rehabilitation' in the criminal justice system. It is my belief, it is where we, as advocates, can make the most lasting 'positive' impact for our clients. It is my hope this overview has made the waters of the juvenile justice system a little less muddy and put you a little more at ease with the juvenile court process.

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Spencer Ryan is your Lorain County Bar Association's 'Authorized Agent' for Lawyer's Malpractice Insurance. Before entering the insurance field, Spencer was licensed and practiced law in Lorain County, making him uniquely qualified to organize the complex coverage plans necessary in professional fields. For expert guidance in creating your next malpractice insurance plan, call Spencer Ryan at Ryan-St. Marie Insurance today. 440-322-3200 • spencerryan@windstream.net

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Courts Must Expressly Consider Youth as Mitigating Factor Before Imposing Life-Without-Parole Sentence on Juvenile

by Kathleen Maloney

A trial court must reconsider the life-without-parole sentence of a juvenile convicted of two 2009 murders in Cincinnati, the Ohio Supreme Court ruled. In an opinion authored by Justice Judith Ann Lanzinger, the court held that the record must show that a trial court separately considered the youth of a juvenile offender as a mitigating factor (a circumstance that may lessen the punishment) before it sentences a juvenile to life in prison without parole. The 5-2 decision reverses the judgment of the First District Court of Appeals.

In a joint jury trial, Eric Long and his two adult codefendants were found guilty of aggravated murder, felonious assault, and multiple firearms charges following separate shootings in a Cincinnati neighborhood and on Interstate 75 north of the city. Long was 17 years old when the alleged offenses were committed.

In a single sentencing hearing, Long and his codefendants were sentenced to consecutive terms of life imprisonment without parole for the two aggravated murders. Long received an additional 19 years for the remaining charges.

Long argued in his appeal to the First District that the trial court did not specifically consider his youth as a mitigating factor and that life without parole for a teenager was cruel and unusual punishment. The appellate court upheld the trial court's decision.

Long then filed an appeal in the Ohio Supreme Court, which agreed to hear the case.

In the majority opinion, Justice Lanzinger noted that the U.S. Supreme Court in Miller v. Alabama recently determined that imposition of a mandatory sentence of life without parole on a juvenile is cruel and unusual punishment, a violation of a juvenile's constitutional rights. The relevant Ohio sentencing statute in this case, however, is not mandatory, but instead allows a trial court to choose from four possible sentences when imposing a sentence for aggravated murder, she explained.

She wrote that Miller requires a trial court to consider the defendant's youth and accompanying characteristics when deciding a juvenile's sentence. She quoted Miller, which stated, "Although we do not foreclose a sentencer's ability to make that judgment [to impose life without parole] in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

Justice Lanzinger wrote: '[The Ohio Supreme Court] expressly hold[s] that youth is a mitigating factor for a court to consider when sentencing a juvenile. But this does not mean that a juvenile may be sentenced only to the minimum term. The offender's youth at the time of the offense must still be weighed against any statutory consideration that might make an offense more serious or an offender more likely to recidivate. Yet because a life-without-parole sentence implies that rehabilitation is impossible, when the court selects this most serious sanction, its reasoning for the choice ought to be clear on the record.'

While Long's attorney raised Long's age as a mitigating factor, the state seemed to suggest that youth was not a mitigating factor in this case, she continued. 'Because the trial court did not separately mention that Long was a juvenile when he committed the offense, we cannot be sure how the trial court applied this factor,' she wrote. 'Although Miller does not require that specific findings be made on the record, it does mandate that a trial court consider as mitigating the offender's youth and attendant characteristics before imposing a sentence of life without parole. For juveniles, like Long, a sentence of life without parole is the equivalent of a death penalty. As such, it is not to be imposed lightly, for as the juvenile matures into adulthood and may become amenable to rehabilitation, the sentence completely forecloses that possibility.'

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'The record shows a group sentencing of three that included one defendant who was a juvenile at the time of the crime,' she added. 'Eric Long was situated differently but might not have been given the benefit of the consideration of youth as a mitigating factor. Therefore, his sentence did not comport with the newly announced procedural strictures of Miller v. Alabama.'

Justice Lanzinger's opinion was joined by Chief Justice Maureen O'Connor and Justices Paul E. Pfeifer, Judith L. French, and William M. O'Neill. Chief Justice O'Connor also wrote a concurring opinion. Justice Terrence O'Donnell dissented in an opinion joined by Sharon L. Kennedy.

In her concurrence, the chief justice noted that all members of the Ohio Supreme Court agree that trial courts must consider the youth of the offender as a mitigating factor when sentencing a juvenile and that courts have broad discretion when deciding how much weight to give that factor.

'Today, we reaffirm that discretion, but we add to the sentencing calculus by holding that an offender's youth must be an articulated consideration in the sentencing analysis, at least in cases in which life without parole is a potential sanction,' she wrote.

'But in joining [the majority], I caution that our law requires only that youth be considered as a factor,' she continued. 'It does not mandate any particular result from that consideration. In remanding this cause, we do not opine on the merits of Long's sentence. We simply ensure that whatever sentence the judge imposes, even if the sentence remains the same, is imposed according to all protections the law affords the offender. Reasonable minds will certainly differ as to which sentence is most fitting for Eric Long. But whether we believe that the juvenile justice system failed Long, or that Long failed the system, the result is the same: dead young men, wounded young men, incarcerated-for-life young men. None of us should take much solace in that.'

In his dissent, Justice O'Donnell wrote that nothing in Miller prescribes how much weight a court must give to youth as a mitigating factor when sentencing a juvenile, nor does the decision require the court to 'explicitly state' that it has considered a specific mitigating circumstance.

'Contrary to the majority's assertion, the trial court's failure to -separately mention that Long was a juvenile when he committed the offense' does not mean that -we cannot be sure how the trial court applied this factor' or otherwise conduct an effective review of the sentence,' Justice O'Donnell added. 'No one disputed that Long was a juvenile, and in any case, the Supreme Court recognized in Clemons v. Mississippi [(1990)] that the sentencer need not make written findings concerning mitigating circumstances in order for an appellate court to perform an effective review.'

'[H]ere, Long was only three months shy of his 18th birthday, and he presented no concrete information about his personal background or family history that would have allowed the court to evaluate his mental condition and development, maturity, and relative culpability for his crimes,' Justice O'Donnell continued. 'Long cannot fail to present specific mitigating evidence and then fault the trial court for not considering it.'

'[I]t is manifest that whatever significance the trial court attributed to Long's youth, it did not outweigh his -violent history and record,' his lack of remorse and likelihood to kill again,' and the seriousness of his crimes, which involved firing assault-type weapons into an occupied dwelling and at occupants of a speeding vehicle, killing two persons and seriously injuring two others,' he wrote. 'In my view, the trial court carefully followed the law in this area and properly exercised its discretion in concluding that a sentence of life without the possibility of parole was appropriate in this case.'

2012-1410. State v. Long, Slip Opinion No. 2014-Ohio-849.

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How to Pick Out a Practice Management System

Accellis Technology Group

A Practice Management System (PMS) is one of the most important tools in any law firm. But nobody wants to invest time and money into a program that quickly falls short of their expectations a year down the road. During the selection process, you'll probably use a number of resources to help you determine which program is right for you. Here are just a few tips for you when shopping for Practice Management Software.

Google it!

Nowadays, the internet is the first place you probably go to learn about a Practice Management System. It's the most efficient way to find reviews, check pricing and watch a quick demonstration before buying. But for more specific information, such as customization and integration options, you're going to need to speak to an actual person.

Call the software vendor

The software vendor can give you a thorough demonstration of the product and answer any questions you have about pricing and technical support. However, the sales person is not obligated or even qualified to analyze your network and determine whether your hardware is sufficient in the context of everything else you run. If you're going to make a decision based on what the vendor says, make sure you fully understand the technical requirements. Also, remember whose side of the fence they're on. Their job is to sell you their software - even if it's not the best option for your law firm.

Ask a colleague or friend

Many attorneys prefer to buy the Practice Management System that a buddy from law school uses, or whatever they used in the last firm they were with. The upside is that you get an honest perspective from someone who has used the software in the real world, and you may already know how to use it. Just remember, there are a ton of great Practice Management Systems on the market, all of which have vastly different features. Figure out which features are most important to your firm before purchasing. Do you require mobile access? What kind of reports do you want to run? Is the PMS customizable to the type of law you practice?

Talk to an Independent Consultant

There are a growing number of independent legal technology consultants these days. Many of them have worked in a law firm and have years of experience installing PMS in law firms of all practice areas and sizes. Independent consultants are required to attend annual training by the software manufacturer and pass rigorous exams in order to support their product. A truly independent consultant should not have an allegiance to a specific brand of software - their focus is on finding which one is best for your firm. While consultants often make a margin on the sale of a PMS, they're usually pretty small. And sometimes they will pass the discounts on to you, making it less expensive than purchasing from the vendor directly. Consultants make their money by performing the labor in installation and customization work, not by selling products. An independent consultant will often give you a decent amount of time (for free) to help you investigate the program they represent. Your best option is to find a consultant with knowledge of multiple programs, so that you can get a side-by-side comparison.

Law firms come in all shapes and sizes, but so do Practice Management Systems. There are a ton of resources you can look to when selecting a PMS, so do your research before purchasing.

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Property Appraisal Amount Trumps Remote Sale Price When Setting Property Tax Values

by Kathleen Maloney

When a property has been sold more than 24 months before the lien date in a reappraisal year, and the reappraisal does not use that sale price as the property value, the sale should not be presumed 'recent' when determining the property's value for that year, the Supreme Court of Ohio ruled. In Ohio, the tax value of real estate is determined as of January 1 of the tax year (the lien date), and county auditors are required to perform a reappraisal every six years.

Justice Paul E. Pfeifer, who authored the court's opinion, wrote that this new 24-month rule will prevent a remote sale from overriding a more recent appraisal when determining a property's value for taxes, and also clarifies the potentially conflicting statutory duties that county auditors and fiscal officers have. Justice Pfeifer added that the party favoring a sale price as the property's value may then offer evidence to try to show that market conditions or the property's character have not changed the property's value, as indicated by the appraisal, between the sale and lien dates.

The 6-1 decision reverses the ruling of the Board of Tax Appeals (BTA) in a case involving the property value of an Akron-area Arby's restaurant for tax year 2008. The case will be sent back to the BTA so the Akron City School District Board of Education has the opportunity to present additional evidence in light of this opinion.

In August 2005, the Arby's restaurant was sold for $1.4 million. For tax year 2008, the Summit County fiscal officer reappraised the property as required by state law every six years. The fiscal officer assessed the property's true value at $902,320.

The Akron school board filed a complaint with the Summit County Board of Revision contending that the 2005 sale price was the appropriate value for 2008 property taxes. The board of revision disagreed and kept the fiscal officer's lower valuation. On appeal, though, the BTA reversed, adopting the $1.4 million sale price as the property's value. The BTA relied on the relevant statute, former R.C. 5713.03, and case law from the Ohio Supreme Court in applying a legal presumption that the sale of the property was recent and should be used for the property's tax value unless it is rebutted with evidence.

Quoting the statute, Justice Pfeifer wrote that a sale price can be used for a property's value if the sale occurs 'within a reasonable length of time' of the tax lien date, but the statute does not state whether a sale should be presumed to be recent. He noted the presumption of recency was instead judicially created to put the statute into effect.

Justice Pfeifer reasoned that nothing in the Supreme Court's case law compels the court to automatically presume that a sale is recent when the sale takes place more than 24 months before the lien date. With today's decision, the court has created a bright line (a legal rule that resolves issues simply and straightforwardly) to indicate when a sale is close enough to the tax lien date to be considered recent for determining the property's value, he wrote.

'The rule that we adopt today prevents a remote sale from controlling over a more recent appraisal, and in doing so it harmonizes the fiscal officer's duties under former R.C. 5713.03, which stressed the primacy of the sale price, with R.C. 5713.01(B), which calls for a reappraisal every six years,' he concluded.' we to impose a presumption of recency that had no boundaries, the fiscal officer's duty to conduct an accurate reappraisal every six years would be impaired by sales too remote to be relevant. A sale as old as five or even ten years could potentially cast a deep shadow over the tax assessor's performance of his legal duty to adopt and maintain a current valuation of the property. The safeguard in this instance is to remove the recency presumption from a sale that occurred more than 24 months before the lien date.'

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Joining the majority were Chief Justice Maureen O'Connor and Justices Terrence O'Donnell, Judith Ann Lanzinger, Sharon L. Kennedy, and William M. O'Neill. Justice Kennedy also wrote a separate concurring opinion. Justice Judith L. French dissented.

In her dissent, Justice French wrote that the court has recognized for decades that a sale price is presumed to reflect the property's true value, unless rebutted. A bright-line rule has not been created by the court before because the concept of a recent sale involves more factors than a specific timeframe between the sale and a lien date, she continued. 'It is illogical to restrict our recency presumption based solely on temporal proximity when we do not base recency itself solely on temporal proximity,' she wrote.

Justice French maintained that the court and the BTA have decided cases in which they used sales prices more than 24 months from the tax lien date to set a property's value.

'The majority overreaches today by creating - unprompted - an arbitrary 24-month-rule for determining when a sale is presumed to be recent,' she concluded. 'This rule contradicts case law from this court and from the BTA. In accordance with our legal precedent, and in deference to the BTA's discretion in weighing evidence, I would apply the presumption in this case and uphold the BTA's decision.'

Justice Kennedy concurred fully with the majority's decision but wrote a separate opinion to explain why she thinks the dissent is mistaken. She stated that the Supreme Court case cited in the dissent did not involve the presumption of a recent sale, and the sale occurred long after the lien date.

'Like the majority, I am concerned that if there is no limit, a recent reappraisal may always be challenged with a relatively stale sale price, and the burden would then be unduly thrown on those who support the reappraisal valuation,' she wrote.

'As I understand the majority opinion, the 24-month rule is very limited: it applies to a reappraisal year in which the assessor was aware of, but did not adopt, an earlier sale price,' she continued. 'The reason for having a 24-month rule in such a case is that the earlier sale was already taken into account, but found not to be probative because of a perceived change in the market. Accordingly, the 24-month rule does not necessarily apply to a sale that occurs after the lien date of the reappraisal year, because a sale that occurs many months after the reappraisal and the lien date cannot have been taken into account in the reappraisal. Arguably, a later sale constitutes brand new evidence that might call for reconsidering the question of value for the past year.'

2012-1542. Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision, Slip Opinion No. 2014-Ohio-1588.

Unvested Military Retirement Benefits Earned During Marriage Qualify as Marital Asset

by Kathleen Maloney

A trial court must take the value of unvested military retirement benefits into account when dividing marital assets in a divorce, the Ohio Supreme Court ruled.

The 4-3 decision reverses the judgment of the Third District Court of Appeals and returns the case to the trial court for additional proceedings.

Christen Daniel and Sean Daniel married in 1995 and had three children. Just before the marriage, Mr. Daniel enlisted in the National Guard. After two separations, the couple divorced in 2011. At the time of the divorce hearing, Mr. Daniel had served for 16 years in the Guard and had reenlisted for six more years. He will be eligible for military retirement benefits when he reaches 20 years of credit.

At the Daniels' divorce trial, the magistrate determined that Ohio law does not allow retirement benefits that have not yet vested to be divided in a divorce, and the trial court agreed. On appeal, the Third District affirmed, stating that insufficient evidence was presented at trial to require division of the asset. Ms. Daniel appealed to the Ohio Supreme Court.

Writing for the court's majority, Justice William M. O'Neill explained that 'marital property,' as defined by statute, includes '[a]ll interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage.' He noted that the statute does not distinguish between vested and unvested benefits.

In Hoyt v. Hoyt (1990), the Ohio Supreme Court held that pension benefits that have vested are marital property. Quoting Hoyt, Justice O'Neill wrote that when dividing pension assets, trial courts must balance '-resolv[ing] the issues between the parties so as to disassociate the parties from one another or at least minimize their economic partnership" and '-obtain[ing] a result which will preserve the asset so that each party can procure the most benefit."

'Hoyt recognizes that while it is desirable to bring finality to the parties' marriage by dividing assets once and for all, doing so is not possible in all cases, because it sometimes leads to an inequitable result,' Justice O'Neill continued.

He concluded that an exact current value of the retirement benefits and the date of vesting are not required to resolve this matter, because Ms. Daniel's percentage share of the benefit can be calculated based on the couple's years of marriage and other information the trial court had.

'The fact that [the asset's] precise value will not become fixed, if it ever does, until some future date is irrelevant,' he wrote. 'The trial court had enough information in this case to make an equitable division of the benefits.'

Joining the majority were Justices Paul E. Pfeifer, Sharon L. Kennedy, and Judith L. French. Justice Terrence O'Donnell dissented. Justice Judith Ann Lanzinger also dissented in an opinion joined by Chief Justice Maureen O'Connor.

In his dissent, Justice O'Donnell wrote that the majority has ignored the use of the word 'currently' in the statute's definition of marital property.

'[F]uture interests in property that might possibly vest, if at all, after the termination of a marriage have not been acquired during the marriage, are not currently owned by either or both spouses, and a spouse currently has no interest in such benefits,' Justice O'Donnell wrote. 'Therefore, they are not marital property subject to equitable division by a trial court.'

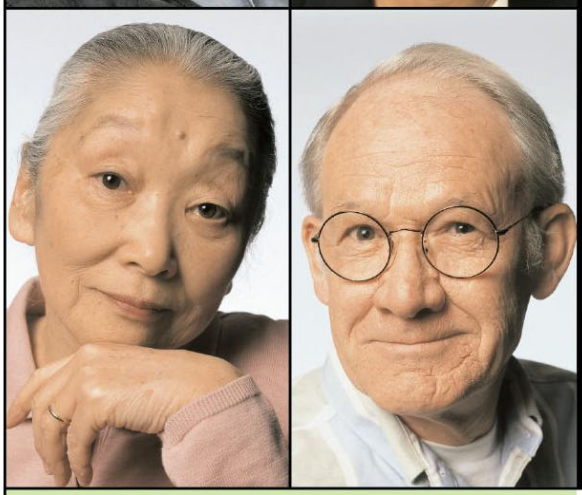
He concluded: 'In this case, at the time of the divorce, Sean Daniel did not currently own any right to military retirement benefits from the National Guard, because he had not accumulated 20 years of service credit. Nor did he currently have an interest in those benefits, because that interest had not vested and could only vest into an enforceable right to payment in the future - only after termination of the marriage.'

In a separate dissent, Justice Lanzinger noted that only Ms. Daniel filed a brief in this case and was heard at oral argument. Justice Lanzinger would hold that the court should not have accepted the case at all.

She wrote that unvested retirement benefits are not marital property because neither spouse has a current property interest that the statute requires. She noted that vesting is a contingency and that benefits do not exist or accumulate until they vest.

'The statute does not have the expansive meaning the majority gives it,' she concluded. 'It may well be that that this court should adopt a rule that unvested military retirement benefits accrued during the marriage constitute marital property subject to division even while those benefits remain unvested. However, such a change in precedent should not occur without robust adversarial presentation. This issue is too important in its ramifications to be decided with half of the argument unpresented and unheard.'

2012-2113. Daniel v. Daniel, Slip Opinion No. 2014-Ohio-1161.



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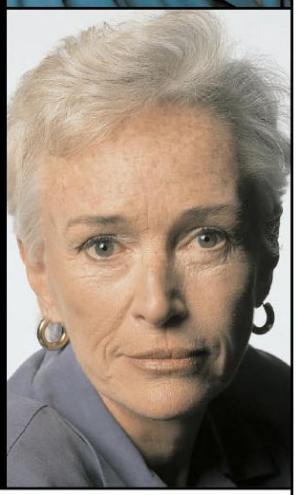

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OSBA District 10 Meeting

The Ohio State Bar Association held its annual meeting for District 10 (which includes Ashland, Erie, Holmes, Lorain, Medina, Richland, Huron and Wayne Counties) on April 3, 2013, at the Spitzer Conference Center. The Lorain County Bar Association was the honorary host of the event with President Barbara Butler providing the welcoming address and LCBA and OSBA Board of Governors' member Chris Cook moderating the luncheon. Our own Allen Spike was celebrated at the luncheon as a 50-year practitioner! Congratulations to Allen!

Congratulations are also in order for:

Attorney Angela Wu was presented with the Award for the OSBA's 2014 Community Service Award for Attorneys 40 and Under. This award is presented to attorneys, 40 years of age or younger, who contribute substantial time and effort in service to a local social service, or a local civic, artistic, or cultural organization. The service must be outside the recipients' practice of law and must be given without compensation. Emphasis is placed on current service.

Kevin Donovan of the Fauver, Keyse-Walker & Donovan firm. Kevin was elected to a three-year term on the OSBA's Board of Governors. The Board of Governors manages the Association's business affairs, sets policy, reviews pending legislation and conducts other business on behalf of the 25,000 Ohio lawyers and 4,000 legal assistants and law students who are OSBA members.

LCBA Member Gowri Hampole was elected as a District 10 representative on the OSBA Council of Delegates. Members of the Council of Delegates are elected representatives of OSBA members. While the Council of Delegates has many responsibilities, it is at the Council of Delegate meetings where consideration of legislative proposals from OSBA committees and sections are debated and adopted. Only after adoption of a proposal by the Council of Delegates does it become part of the OSBA legislative program and, thus, an OSBA-endorsed and sponsored bill. Other LCBA Members that serve on the Council of Delegates are Joseph Cirigliano and Richard Mellott.

The LCBA would like to offer a special thank you to Chris Cook for his work as a member of the OSBA's Board of Governors. Chris Cook's term on the Board of Governors will end on June 30, 2013. Even with Chris' busy schedule as a part-time magistrate, part-time prosecutor, full-time private practitioner, he made time to serve on this Board a priority and was a wonderful advocate for the Lorain County legal community.

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Dinner is at 5:30 p.m.

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This is a Four-Person Scramble. The winning team will be the foursome with the lowest score.

At least two golfers on each team must be members of the Lorain County Bar Association for the team to compete for the 1st Place prizes. All golfers are eligible for individual awards.

Cross Examining the Computer Expert Witness

by Greg Kelley, Vestige Digital Investigations

'Who brings a knife to a gunfight?' Those words were uttered by Sean Connery in The Untouchables. A knock at the door and upon opening he is met with a hit man attempting to take him out with a knife. Of course, Sean has a gun and quickly dispatches of the hit man.It is a phrase, or a derivation thereof, that I like to use with clients. You need to meet your opponent with the same weapons that are being brought to bear against you. Sure, one can get away without their own expert to assist with reviewing reports and testimony and helping with cross examination, but doing so is like walking a slippery slope.

For the attorneys reading this blog post, I know that I'm preaching to the choir. Before cross examining any expert, you need to read and understand their report(s), you need to depose the expert and understand their opinion. Most importantly, though, you need to understand what they are saying. More often than not, when I'm dealing with clients or their counsel, I hear the phrase 'I know absolutely nothing about computers'. Well, if you know nothing about computers, why are you trying to interrogate someone about computers?

For the business owners, and ultimate end clients, reading this blog, I can't stress to you enough that if counsel suggests that you consider hiring an expert that you consider it. Every decision is a business decision weighing the costs with the potential benefit and comparing that with the possible downside if you didn't move forward. That said, in scrutinizing an opposing expert, or merely just understanding what they are trying to convey you often need to have your own expert. Your expert will help with the cross examination of the opposing expert.

I've been involved in cases wherein I didn't testify but just served as a consultant. In one criminal case, which was rather high profile, I recall just being in the courtroom. I had access to various data on my laptop and a few pads of paper. As my client's counsel cross examined the expert witness, I furiously scribbled notes and questions on pieces of paper and passed them up. Questions were asked and testimony was concentrated, limited or turned around. While I never had the chance to quiz the judge or jury about the importance of the questions I submitted, I did receive compliments from counsel as he felt that those questions helped him keep the expert under control.

Having your own expert to guide you will prevent you from asking questions that you think are correct but in reality are going to allow the expert on the stand to put forth their opinion again. In a matter involving a former employee leaving for a competing company, I was quizzed numerous times about the use of a wiping application (a wiping application is one that will delete files or other relevant artifacts in such a way that the information is unrecoverable). Somehow through my testimony, opposing counsel on cross examination came to the belief that nothing bad had happened. He asked, 'So if I am understanding your testimony, my client did nothing nefarious'. To which I replied, 'other than installing this data destruction application one week before he tendered his resignation and then running it multiple times destroying files he had accessed and other data left on his computer, no'. Clearly opposing counsel was unprepared for my testimony and did not understand my opinion nor the facts upon which I based that opinion.

Review the expert's Curriculm Vitae ahead of time. Do they have any relevant certifications, training or testimony experience regarding computer forensics? Just being in IT often isn't good enough. I like to analogize the IT world with that of the medical world. In the medical world,

(continued on following page)

, there are general practitioners, orthopedists, coroners, oncologists, etc. While doctors in the various fields have some knowledge of the particulars in fields that they do not specialize, they typically only practice where they have the most knowledge. The same holds true for those in the IT world. A programmer has some knowledge on security, but you would not ask them to fortify your firewall. You would also not ask an IT administrator to testify regarding forensic issues.

I witnessed once an individual who was in IT attempt to testify to a matter that involved metadata on documents that he had preserved. I'm sure that most of you reading this understand the importance of preserving documents in such a way that the metadata is not altered. In this case the metadata was altered but the IT person had no idea how that occurred, he was oblivious to the fact. Counsel for my client did a good job of bringing that out but soon enough the judge hearing the case was getting lost as the situation involved an IT person who was not an expert on the topic being questioned by an attorney who would be the first to admit that he was in the same boat. Which brings me to my next point-

Rely on your expert to assist with the cross examination where possible. And when you receive that advice, listen and act on it. Your expert should be able to provide you questions to use in cross examination. More importantly, your expert should be able to provide what will be the likely answers to the questions and provide guidance based on what the actual answer is. Your expert should also be able to provide you analogies so that in asking your questions, you can word them in such a way that the judge and jury will understand the question and hopefully the answer.

Another thing to observe is whether or not the computer forensic expert is stepping out of their realm of expertise or testifying outside of their realm of analysis. In one case in which I testified, the crux of my testimony was in regards to spoliation. The opposing party had withheld USB devices and had deleted data on those USB devices. The opposing party had their own expert. Instead of analyzing my claims of deletion and other devices, they had him instead scrutinize the search we performed on the data and whether or not the results all conformed to the request. Upon hearing the analysis that the opposing expert conducted, counsel for my client immediately requested that the court limit his testimony to just those areas that he had analyzed. The court agreed and immediately there was no rebuttal to my analysis that data was destroyed and devices were left behind.

Another point to make in your questioning, especially in criminal matters, is to interrogate as to what evidence exists that puts the custodian of the computer at the keyboard during the time of the alleged activity. Is the custodian the only person with physical access to the computer? Is the computer password protected and are there user accounts that can be matched up to the custodian? Was there other activity occurring at the same time that can provide circumstantial evidence indicating that the custodian was the one at the keyboard during the key points in time?

To circle back around for those of you who remember the movie The Untouchables. After Sean Connery chases off the knife wielding hit man he immediately finds himself in the alley face to face with a second hit man, only this one is holding a gun. That hit man, properly armed, was able to take care of the job. You too, properly armed, can perform your job properly when it comes to cross examining an expert witness.

If you have any questions about this article, please feel free to contact Greg Kelley at Vestige Digital Investigations at 800-314-4357.

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To LCBA colleagues:

I would like to offer sincere thanks to the Lorain County Bar Association for honoring me as the first recipient of the Lifetime Achievement Award. It is most gratifying to be recognized for the many years of dedication to my legal career.

I feel recognition is also due to my law partner, Steve Meckler. His collaborative assistance permitted me to devote time to a variety of endeavors, which included committee service, editing, and volunteering.

My wife, Fran, has provided support, encouragement, and patience with my often hectic schedule. She also presented me with three sons, Matthew, Brian, and my oldest, Neil, who has followed in my legal footsteps at our firm.

The Mardi Gras Charity Ball Committee created a festive, fun-filled evening with stunning decor. They carried out the theme of Mardi Gras with detailed attention to music, dessert, favors...more than I ever could imagine.

I extend my appreciation to all who contributed to a wonderful honor and a memorable evening.

Sincerely,

Allen S. Spike

Thank you to those that volunteered for the St. Mary's Food Pantry on Sunday and Monday, March 23 and 24th and to those that donated items for the pantry! St. Mary's was so pleased to have the extra help and all of the donations! If anyone is interested in helping out, St. Mary's can always use the extra hands and donations. Help is needed stocking the pantry on the fourth Sunday of each month around 11:00 a.m. and again when the pantry opens on the following Monday at 4 p.m. St. Mary's is located at 309 7th Street in Lorain. Can't help out at the pantry but want to make a donation? You can make a monetary or product donation. The pantry can always use staples of mac & cheese, peanut butter, Chef Boy R D, cereal, granola bars, etc. Toiletries they need are soap, shampoo, razors, deodorant, tooth paste and tooth brushes.

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Seventh Annual Charity Ball

On March 22, 2014, the Lorain County Bar Association Foundation hosted the 7th Annual Charity Ball (formerly the Valentine's Day Ball) at Fountain Bleau in Avon Lake. 140 guests attended the event and everyone had a great time. Our guests were treated to fantastic entertainment by the Big City Swing Band, featuring LCBA's Ray Ewers. That band is amazing! Guests tried their hands at a little gambling to win raffle tickets for amazing prizes. Congratulations to all of the winners! If you have not attended the Charity Ball, you are seriously missing out on a really terrific evening of fun and entertainment.

Thank You!

The Lorain County Bar Association Foundation's Charity Ball would not be possible without the continued support of our corporate partners and the incredible generosity of our members. We would like to thank the following for always saying 'yes' when called upon. We truly appreciate your kindness.

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Attention Domestic & Juvenile Law Practitioners Save the date: Wednesday, September 10, 2014.

The LCBA will hold a seminar at Kalahari Resorts on Wednesday, September 10, 2014. The morning session will focus on domestic relations law and the afternoon session will be juvenile law. All three Lorain County Domestic Relations Judges will be there presenting different topics -- each with two of their magistrates. We have secured a block of rooms at a discounted rate for both Tuesday, September 9 and Wednesday, September 10. Stay one or both nights. Watch your mail/email for further information.

Save the Date for the LCBA's 1st Annual Rockin' Race Shootout: September 20th, 2014.

We asked you for your input and you gave it to us - LOUD and clear. You want the LCBA's 1st Annual Rockin' Race Shootout so we are going to hold it on September 20, 2014. The event will be several different components - a shooting competition, a longest drive competition, and a cookout followed by a party with music and car racing at the Lorain County Speedway. Attend one or all! Get ready for a day to remember! More information will be made available soon.

Announcements

Piazza, Cook-Szczepanski are pleased to announce that they have relocated their offices to 164 Cleveland Street, Elyria, Ohio 44035. Their phone number remains the same (440-365-8388). You can reach them by email at attorney@pcsohiolaw.com.

The law firm of Smith, Illner & Gemelas is pleased and honored to announce the association of Michael W. Fine with their firm. Mr. Fine joined the first on February 1, 2014, and will be handling cases from both the Elyria office (424 Middle Avenue, Elyria, Ohio), and also their satellite office (5050 Waterford Dr., Sheffield Village, Ohio).

The LCBA would like to welcome the following new members: Anthony Cox, Thomas DeRoma, Scott Jancura, Margo Moore, John Powers, Anthony Stevenson. Laura Wellen.

Office Sharing Available

Office sharing available at Lorain National Bank 124 Middle Avenue, 6th Floor, Elyria, Ohio 44035. Very convenient to Elyria Municipal Court and the Lorain County Court of Common Pleas . Private offices furnished with desk and bookshelf; 1) approximately 15' by 15' - $350/month; 2) approximately 9' by 9' - $250/month. Price includes sharing reception area and kitchen as well as off street parking. Additional arrangements can be made for conference room. Contract Attorney Randolph Roth at 440-284-3896.

Office Sharing Available at the Executive Building, 300 4th Street, Elyria. Share conference room, reception area and kitchen. Arrangements can be made to share copy machine, fax, DSL and whatever additional cooperation you can think of. $100/month for conference room privileges; $175/month cubicle; $300/month small office; $400/month larger office. The prices include off street parking for you and your clients. If needed, there is space for your staff. Contact Jim Deery at 440-323-9500.

Have an announcement you want to share with the members of the LCBA? Contact the office with the information.

If you have a change in your contact information, please let the LCBA know so that we may keep your information current.