

IN THE SUPREME COURT OF OHIO

06-1250

Linnette Davis,	:	On Appeal from the Geauga County
	:	Court of Appeals,
Appellant,	:	Eleventh Appellate District
	:	
v.	:	Court of Appeals
	:	Case No. 2005-G-2646
Gary Davis,	:	
	:	
Appellee.	:	

MERIT BRIEF
OF APPELLANT LINNETTE DAVIS

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INTRODUCTION

This appeal concerns a decision which, if allowed to stand, will subject thousands of families to unlimited, retroactive loss of child support. The Eleventh District Court of Appeals has construed Ohio Rev. Code §3103.03(B), to mean that a child must be enrolled in a school accredited by the State of Ohio in order to receive child support after the age of 18. Thus, families who have relocated to other states after the issuance of an Ohio child support order must apply to the State of Ohio for accreditation or approval of the child's new school system, even if the system is already accredited by the new home state. Since few people would even think to do this, it must be assumed that countless families are at risk of a retroactive loss of child support as a result of this decision.

By its decision, the Eleventh District has ignored the plain and ordinary meaning of the language of the Ohio Rev. Code §3103.03(B), which allows for the continuation of support so long as the child attends "any" accredited high school. Further, this ruling constitutes judicial legislation whose draconian effect will open the floodgates of unjust claims against parents whose children attend out-of-state schools. Finally, the decision negatively impacts important constitutional rights.

The decision cannot be allowed to stand.

STATEMENT OF THE CASE AND FACTS

This case arises from a post-decree action filed by appellee Gary Davis against his former spouse, appellant Linnette Davis. Mr. Davis demanded reimbursement for child support payments he made for his eighteen-year old child, who was attending a high school program accredited by the State of Illinois at the time payments were made. The action was premised on the theory that the child did not attend a high school accredited by Ohio as required by Ohio Rev. Code §3103.03(B).

The uncontroverted facts are that the child attended American School, which is accredited by the Illinois Board of Education. (Ct. of App. Opinion at page 3). The Magistrate found that §3103.03(B) requires the school be accredited or approved by the State of Ohio, and therefore, Ms. Davis was not entitled to receive child support. The Magistrate found Ms. Davis in contempt of court and ordered her to repay \$2,763.00 in child support she received while her daughter was attending American School. Ms. Davis can ill-afford this repayment.

Ms. Davis objected to Geauga County Common Pleas Court. The Trial Court overruled the objection and an appeal to the Geauga County Court of Appeals ensued. The court of appeals, in a two-to-one decision, affirmed the judgment of the court of common pleas. The court of appeals held that in order to comply with §3103.03(B), the American School had to be accredited or approved by the State of Ohio and that accreditation by the State of Illinois was insufficient.

Ms. Davis filed her notice of appeal to the Supreme Court of Ohio on July 5, 2006. (Appx. 1). On October 6, 2006, the Supreme Court granted jurisdiction to her the case and allowed the appeal.

ARGUMENT

PROPOSITION OF LAW NO. 1

Because the language of Ohio Rec. Code §3103.03(B) is clear and unambiguous, the statutory language requiring the continuation of child support if the child attends “any” accredited high school must be applied without interpretation.

Ohio Rev. Code §3103.03(B) provides that child support shall continue beyond majority “as long as the child continuously attends...any recognized and accredited high school.” (Emphasis added). In this case, the court of appeals affirmed the trial court’s finding that “in order for a school to be ‘recognized and accredited’ as set out in Ohio Revised Code 3103.03(B), the school must be approved by the [S]tate of Ohio.” Geauga Country C.P. Op. at 1. The court of appeals construed §3103.03(B) to mean that schools accredited by other states must also be accredited or approved by the State of Ohio in order to comply with § 3103.03(B). This holding ignores the plain meaning of the statute and improperly broadens its unambiguous language. The interpretation of a statute is a matter of law and is reviewed under a *de novo* standard. *State v. Werner*, 112 Ohio App.3d 100, 103 (1996).

This Court has held that when a phrase is clear and unambiguous, the court must apply the phrase without interpretation. *Wingate v. Hordge*, 60 Ohio St.2d at 55, 58 (1979). As noted by Appellate Judge O’Toole in her dissent, “the phrase ‘recognized and accredited high school’ is clear and unambiguous and must be applied without interpretation.” Ct. of App. Op. at 12. Section 3103.03(B) allows attendance at “any recognized and accredited high school” (emphasis added); this language is clear and unambiguous and must be applied without interpretation. The court of appeals, however,

interpreted the word "any" to mean the State of Ohio, thereby rendering void the accreditation processes of all other states. Section 3103.03(B) contains no language which supports this construction.

Under the rules of statutory construction, "words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Ohio Rev. Code §1.42. Nothing in the statute indicates a legislative intention to require accreditation only by Ohio.

For this reason, the decisions of the Courts below must be reversed.

PROPOSITION OF LAW NO. 2

Ohio Rev. Code § 3103.03(B) requires the continuation of child support beyond the age of majority as long as the high school attended is recognized and accredited by any State in the Union.

Application of the foregoing rules of statutory construction to §3103(B) can lead to only one conclusion: a child can attend any accredited high school, not just those approved by the State of Ohio, and still receive child support. Unfortunately, the court of appeals misconstrued the holdings in *Gatchel v. Gatchel*, 824 N.E.2d 576 (Ohio Ct. App. 2005) and *Brown v. Brown*, (Dec. 27, 1995), 7th Dist. No. 94 C.A. 172, 1995 Ohio App. LEXIS 6049, at 6* in order to reach this ill-conceived decision.

Both *Gatchel* and *Brown* used the broadest possible reading of §3103.03(B) to **PROTECT** a child's right to receive child support while attending Ohio-based **home schooling** programs. Here the courts below used an unlawfully **narrow** reading of

§3103.03(B) to DESTROY a child's right to receive child support while attending a state accredited high school program.

The courts below completely ignored the logic of *Gatchel* and *Brown* in construing §3103.03(B). As noted in *Gatchel*:

The General Assembly's purpose in enacting this provision was "to ensure that parents support their child as long as the child is working to obtain a basic level of training and education, as provided by a high school program, with the ultimate goal of enabling the child to become self-sufficient." (Citation omitted).

Attendance at a school accredited by any state serves same purpose of ensuring a child receives a quality education.

Further, a state accredited program is most certainly subject to greater governmental scrutiny than the private home schooling programs approved in *Gatchel* and *Brown*. Pursuant to the opinion in *Brown*, penalizing a child in a program accredited by a state other than Ohio is "unfair and a 'balance of interests' would be in favor of permitting [the out-of-state accredited program] to qualify for the exception in R.C. 3103.03(B)." *Brown* at *6. If the purpose of §3103.03(B) is to ensure that minimum standards of education are satisfied, that purpose is met when a child attends a high school program accredited by any State in the Union.

PROPOSITION OF LAW NO. 3

A construction of Ohio Rev. Code §3103.03(B) which causes a termination of child support for a child attending a school accredited by another state renders the statute unconstitutional.

As correctly noted in Judge O'Toole's dissent, "Ohio maintains compacts with her sister states, to facilitate interstate travel, as well as other matters, including federally

guaranteed right to a free public education.” Ct. App. Op. at 13 (Judge O’Toole *dissenting*). The Court of Appeals has established a dangerous and unjust precedent that misinterprets Ohio statutory law. The holding inherently impairs the right to travel.

The right to travel throughout the United States has long been recognized as a basic constitutional right. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901 (1986). It is clear that the freedom to travel includes the freedom to enter and abide in any State in the Union. *Id.* at 902. Strict scrutiny applies to laws which burden the exercise of fundamental rights, such as the right to travel. *State v. Werfel*, 2003 Ohio 6958 at *p48. (Ohio Ct. App., Lake County 2003).

Whenever a state law infringes upon a constitutionally protected right, the court will undertake intensified equal protection scrutiny of that law. *Attorney Gen. of New York*, 476 U.S. at 904. Laws which burden a constitutional right must be necessary to further a compelling state interest. *Id.* In *Shapiro v. Thompson*, the Supreme Court specifically addressed situations where state action penalized travel and created a different class of people. 405 U.S. at 340; and 394 U.S. 618, 634 (1969). The Court emphasized the importance of statutes burdening constitutional rights as minimally as possible when it noted that statutes affecting constitutional rights must be drawn with precision and tailored to serve their legitimate objectives. *Id.* at 343. If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. *Id.* If it acts at all, it must choose less drastic means. *Id.*

Here, the decisions of the Courts below have imposed a rule which is completely unnecessary and unreasonably drastic for the legitimate state interest in ensuring a quality

education for children receiving child support. As previously noted, Ohio's interest is already served by the sister state's accreditation process; it is not "necessary" to the furtherance of Ohio's interest to impose an additional layer of Ohio accreditation.

A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification that penalizes the exercise of that right. *Attorney Gen. of New York*, 476 U.S. at 901.

In the present case, the Ohio Court of Appeals' holding that the phrase "any" accredited high school only includes high schools accredited by the state of Ohio implicates the right to travel as it both deters and penalizes travel. If this interpretation is upheld, families who intend to relocate to another state after the issuance of an Ohio child support order will be deterred from doing so, as they face the penalty of losing their child support as a result. This renders the interpretation of the Courts below unconstitutional.

CONCLUSION

The court of appeals' decision does not protect the educational environment of child but instead requires parents to employ unknown, arcane procedures with the State of Ohio after they have already decided to relocate. Further, the decision burdens our own state by requiring accreditation of already accredited out-of-state schools. This additional layer of accreditation serves no useful purpose. The decision of the court of appeals penalizes children in legitimate, out-of-state school programs and places an unreasonable burden on former residents of Ohio.

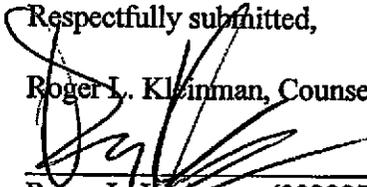
Finally, this ruling places families in a potentially unresolvable conflict if an accredited, out-of-state public school is refused approval by the State of Ohio; in this

scenario, a parent and child would be unjustly deprived of child support with no remedy, short of moving to a new school district. This Court must correct this injustice.

For these reasons, the decision of the Courts below must be reversed and an order issue from this Court that the Appellate Linnette Davis may properly retain the child support she received while her daughter attended the American School.

Respectfully submitted,

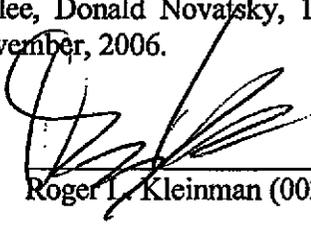
Roger L. Kleinman, Counsel of Record



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LINNETTE DAVIS

Certificate of Service

I certify that a copy of this Merit Brief of Appellant Linnette Davis was sent by ordinary U.S. mail to counsel for appellee, Donald Novatsky, 100 Seventh Avenue, Chardon, Ohio 44024 this 27th day of November, 2006.



Roger L. Kleinman (0022272)

COUNSEL FOR APPELLANT,
LINNETTE DAVIS

APPENDIX A

IN THE SUPREME COURT OF OHIO

06-1250

Linnette Davis,	:	
	:	
Appellant,	:	On Appeal from the Geauga County
	:	Court of Appeals,
	:	Eleventh Appellate District
v.	:	
	:	
Gary Davis,	:	Court of Appeals
	:	Case No. 2005-G-2646
	:	
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT LINNETTE DAVIS

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 JUN 29 2006
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 SUPREME COURT OF OHIO

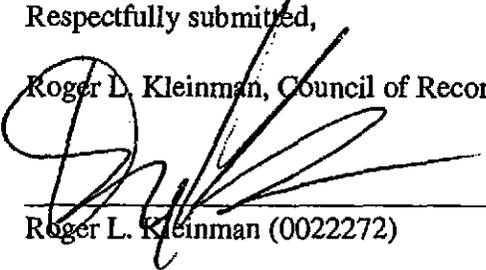
Notice of Appeal of Appellant Linnette Davis

Appellant Linnette Davis hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals case No. 2005-G-2646 on May 15, 2006.

This case invokes the discretionary jurisdiction of the Supreme Court as it involves a question of great or general interest.

Respectfully submitted,

Roger L. Kleinman, Council of Record



Roger L. Kleinman (0022272)

COUNCIL FOR APPELLANT,
LINNETTE DAVIS

APPENDIX B

FILED
IN COURT OF APPEALS

MAY 15 2006

STATE OF OHIO
COUNTY OF GEAUGA

) DENISE M. KAMINSKI
) CLERK OF COURTS
) SS. GEAUGA COUNTY
) IN THE COURT OF APPEALS
ELEVENTH DISTRICT

LINETTE DAVIS,

Plaintiff-Appellant,

- vs -

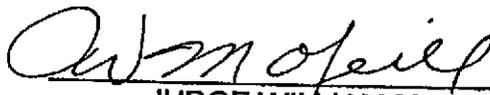
GARY DAVIS,

Defendant-Appellee.

JUDGMENT ENTRY

CASE NO. 2005-G-2646

For the reasons stated in the opinion of this court, appellant's assignment of error is without merit. It is the judgment and order of this court that the judgment of the trial court is hereby affirmed.


JUDGE WILLIAM M. O'NEILL

DONALD R. FORD, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

11/684

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS
MAY 15 2006
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

LINETTE DAVIS, : OPINION
Plaintiff-Appellant, :
- vs - : CASE NO. 2005-G-2646
GARY DAVIS, :
Defendant-Appellee. :

Civil Appeal from the Court of Common Pleas, Case No. 87 D 854.

Judgment: Affirmed.

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Donald Navatsyk, 100 Seventh Avenue, Suite 150, Chardon, OH 44024 (For Defendant-Appellee).

WILLIAM M. O'NEILL, J.

{1} Appellant, Linnette Davis ("Davis"), appeals from the judgment entry of the Geauga County Common Pleas Court finding her in contempt for failure to notify the Geauga County Child Support Enforcement Division ("CSED") of changes of status to her children's schooling. On review, we affirm the judgment of the trial court.

{2} Davis and her ex-husband, Gary Davis, were divorced in 1988. At that time, their three children were age fifteen, ten, and four. Davis was awarded custody of the three children. Gary Davis was ordered to pay child support for the three children

"until a respective child dies, marries, becomes emancipated or reaches the age of eighteen (18) years (provided that they have completed high school), whichever first occurs."

{13} Davis was further ordered to advise CSED of any changes for which the child support order shall terminate:

{14} "IT IS FURTHER ORDERED that [Davis] shall immediately notify the CSEA [sic, CSED] of any reason for which the support order shall terminate, including but not limited to death, marriage, emancipation, incarceration, enlistments in the Armed Service, deportation, or change of legal or physical custody of the children."

{15} In 2003, Gary Davis filed a motion to have Davis held in contempt for failing to abide by the notice requirements for termination of child support.

{16} In his motion for contempt, Gary Davis asserted that Davis had defrauded the court by submitting false documents to the court and CSED with respect to the dates their two youngest children had withdrawn from school.

{17} Melanie is the middle child. She turned eighteen years of age on July 31, 1996, though she withdrew from the high school she was attending on November 1, 1995. Davis advised the court that her actual withdrawal date was June 11, 1997.

{18} Christina is the parties' youngest child. She turned eighteen years of age on December 27, 2001. Davis signed an affidavit with the child support agency that she had withdrawn from school as of April 15, 2002, when in fact she had withdrawn on October 17, 2000.

{19} In addition to a finding of contempt, Gary Davis was seeking repayment for child support payments he had made for the periods of time Melanie and Christina were not actually enrolled in high school.

{10} The matter was heard by a magistrate in 2004. The magistrate issued a decision that found that Melanie had enrolled in the American School on November 1, 1995 and that Christina enrolled for GED classes after withdrawing from high school, but that she was not enrolled in school as of December 27, 2001, her eighteenth birthday. The American School was an organization that creates instructional materials for home-schooled students and long-distance learning and is accredited by the state of Illinois. The magistrate further found that the American School was not an accredited high school for purposes of R.C. 3103.03(B); and that Gary Davis was entitled to have \$2,763 returned to him as overpayments of child support for Melanie and Christina.

{11} Davis filed objections to the magistrate's decision, without filing a transcript of the proceedings before the magistrate. She asserted that Melanie's program of home-school instruction in the American School should be recognized as one that qualifies under R.C. 3103.03. On April 5, 2004, the trial court overruled Davis' objections and upheld the finding of contempt, stating, in pertinent part:

{12} "This court finds that in order for a school to be 'recognized and accredited' as set out in Ohio Revised Code 3103.03(B), the school must be approved by the state of Ohio. The fact that the American School is accredited by the State of Illinois Board of Education does not make it recognized and accredited by the State of Ohio."

{¶13} Davis was ordered to serve five days in jail unless she purged the contempt by paying Gary Davis the full amount of his overpayments of child support plus processing fees. Davis appealed the trial court's order to this court.

{¶14} This court raised the issue that the order being appealed from was not a final order, because a contempt judgment is not a final, appealable order as long as Davis, the contemnor, has an opportunity to purge herself of contempt. Relying on this court's decision in *Bd. of Trustees of Chester Twp. v. Baumgardner*, this court dismissed Davis' appeal on August 23, 2004.¹

{¶15} Thereafter, Gary Davis filed a motion to impose the jail sentence in the trial court, which the trial court granted and ordered her to jail; provided that, execution of that sentence could be stayed upon Davis posting sufficient surety and paying Gary Davis part of his overpayment. This order was dated May 19, 2005. Davis did so, and the trial court granted a stay of execution of her sentence pending appeal. Davis filed another notice of appeal to this court on June 13, 2005.

{¶16} Following this second appeal to this court, Davis filed a motion to stay the appeal and remand the matter for the purpose of allowing the trial court to consider the merits of a motion for relief from judgment. Davis represented to this court that she was contemplating filing a motion for relief from judgment in order to bring to the attention of the trial court the fact that the American School is accredited by the Ohio Department of Education. On October 17, 2005, this court overruled the motion to stay appeal and remand, because Davis had not yet actually filed a motion for relief from judgment in the trial court.

1. *Davis v. Davis*, 11th Dist. No. 2004-G-2572, 2004-Ohio-4390, at ¶6, citing *Bd. of Trustees of Chester Twp. v. Baumgardner*, 11th Dist. No. 2002-G-2430, 2003-Ohio-4361, at ¶12.

{¶17} Davis filed in the trial court a motion for relief from judgment or order on October 24, 2005.

{¶18} On March 15, 2006, this court remanded this matter to the trial court for the purpose of the trial court ruling on Davis' motion for relief from judgment or order. The trial court denied the motion for relief from judgment or order as untimely on March 17, 2006.

{¶19} Davis has raised a single assignment of error, as follows:

{¶20} "The trial court erred as a matter of law when it ruled the phrase 'any recognized and accredited high school' found in Ohio Rev. Code Ann. § 3103.03(B) does not include the American School, accredited by the Illinois State Board of Education."

{¶21} "The primary interest involved in a contempt proceeding is the authority and proper functioning of the court.' *** Absent an abuse of discretion, a trial court's decision in a contempt proceeding will not be reversed."²

{¶22} Davis was adjudged guilty of contempt by the trial court on April 5, 2004. In this court's memorandum opinion of August 23, 2004, we held that "a contempt citation is not a final appealable order if it only imposes a conditional punishment coupled with an opportunity to purge the contempt. *** Until the opportunity to purge has been removed, there is no final appealable order."³ Davis asserts in her notice of appeal that the order of April 5, 2004 became a final order as of May 19, 2005, when the opportunity to purge herself of contempt was removed. We agree that the contempt

2. (Citations omitted.) *Slagle v. Slagle*, 11th Dist. No. 2004-L-119, 2005-Ohio-4330, at ¶10.

3. (Citation omitted.) *Davis v. Davis*, supra, at ¶6.

order of April 5, 2004 became a final order on May 19, 2005. Therefore, we find that Davis' filing of a notice of appeal on June 13, 2005 was timely.

{¶23} The trial court's basis for adjudging Davis to be in contempt was her failure to notify CSED of events in her children's lives that would terminate Gary Davis' obligation to pay child support. Referring to the 1988 judgment entry of the trial court, Davis was to notify CSED of "any reason for which the support order shall terminate."

{¶24} Gary Davis argued in his motion for contempt that events giving rise to termination of child support occurred no later than July 31, 1996 for Melanie, since that was her eighteenth birthday and she was not enrolled in an accredited school; and no later than December 27, 2001 for Christina, since that was her eighteenth birthday and she was no longer enrolled in an accredited school.

{¶25} In her decision, the magistrate agreed with Gary Davis that the two girls were not enrolled in high school on the dates of their eighteenth birthdays. She further found that Davis had submitted false documents to the court and CSED, in that Davis asserted that the two girls were both enrolled in school beyond their eighteenth birthdays. Finally, she found that enrollment in the American School did not qualify as enrollment in an accredited school, because it was not accredited for purposes of R.C. 3103.03(B). That statute provides as follows:

{¶26} "Notwithstanding section 3109.01 of the Revised Code and to the extent provided in section 3319.86 of the Revised Code, the parental duty of support to children shall continue beyond the age of majority as long as the child continuously attends on a full-time basis any recognized and accredited high school."

{¶27} Davis objected to the magistrate's decision, without filing a transcript of the proceedings before the magistrate. Her objection was based on the assertion that the American School was accredited by the Illinois Board of Education; and that this credential should satisfy the requirements of R.C. 3103.03(B). She cited the case of *Brown v. Brown* to the effect that a home-education program qualified as a "recognized and accredited high school" for purposes of that statute.⁴ In its judgment entry approving the magistrate's decision, the trial court, in effect, tracked the holding of the *Brown* case when it said in its judgment entry that "in order for a school to be 'recognized and accredited' as set out in the Ohio Revised Code 3103.03(B), the school must be approved by the state of Ohio."

{¶28} The problem that Davis has in this appeal is that the record of the hearing before the magistrate is devoid of evidence that the home-school programs pursued by her daughters were approved by the state of Ohio. Davis' principal argument in this court is that "accreditation" by one state should be self-executing in another state. That is, if the American School is accredited in Illinois, it should also be accredited in Ohio, argues Davis. However, the decided cases in this area do not stress the aspect of accreditation so much as they do approval of the home-school program by the state of Ohio. Therefore, Davis is encumbered by the fact she did not demonstrate at the magistrate hearing that the American School was approved by the state of Ohio. This point may be illustrated by two other cases decided in Ohio.

{¶29} The first case is that of *Gatchel v. Gatchel*, where the father-obligor for child support contended that he should not be obligated to continue to pay child support

4. *Brown v. Brown* (Dec. 27, 1995), 7th Dist. No. 94 C.A. 172, 1995 Ohio App. LEXIS 6049, at *6.

where his eighteen-year-old son was enrolled in a home-school program, and not enrolled in an accredited high school.⁵ The Third Appellate District analyzed the situation thusly:

{¶30} "Generally, a parent's duty of support to a child ends when the child reaches the age of majority. R.C. 3103.03. Pursuant to R.C. 3109.01, a child reaches the age of majority at age 18. Statutory law, however, also provides that child support orders should remain in effect after a child's 18th birthday when the child 'continuously attends on a full-time basis any recognized and accredited high school.' R.C. 3119.86."⁶

{¶31} That court went on to review the extensive requirements to excuse a student from compulsory school attendance under a home-schooling program. Under Ohio law, compulsory school attendance is required for children under eighteen years of age.⁷ The court observed that:

{¶32} "Parents in Ohio who desire to educate their children at home rather than in a public or private school must submit extensive information about the proposed home-education program to the superintendent of their local school district prior to excusal from school attendance."⁸

{¶33} The court then cited with approval the language from the second case used here for illustration, that of *Brown v. Brown* from the Seventh Appellate District,

5. *Gatchel v. Gatchel*, 159 Ohio App.3d 519, 2005-Ohio-148.

6. *Id.* at ¶7.

7. R.C. 3321.01.

8. *Gatchel v. Gatchel*, *supra*, at ¶12, citing R.C. 3321.04 and Ohio Adm.Code 3301-34-03.

which held that "'recognized and accredited' as set out in R.C. 3103.03(B) means 'as approved by the state.'"⁹

{¶34} The court in *Gatchel* finally observed that "an adequate education through home-schooling" that is approved by the state will satisfy the requirement to attend a "recognized and accredited" school for purposes of R.C. 3119.86:

{¶35} "[I]t is clear that the legislature has demonstrated a purpose to excuse a child from compulsory attendance at the school district where the parents of the child reside when an adequate education through home-schooling is available[.] *** [W]e determine that an *approved* home-education program becomes the legal equivalent of attending a public, private, or parochial school for purposes of a child-support obligation under R.C. 3119.86."¹⁰

{¶36} A review of the *Gatchel* and *Brown* cases indicates that the critical element in deciding whether child support should continue for a child who is being home-schooled is not whether the home school program is "recognized and accredited," but whether "it is approved by the state." The court in *Brown*, for example, pointed out the difference between chartered high schools that were accredited and those that were sanctioned by the state. Only one-third of such schools were accredited by a reputable accrediting agency, while all of them were approved by the state.¹¹ Lacking a statutory definition of the terms "recognized and accredited," the court in *Brown* opted not to tie the decision as to whether child support should continue for one enrolled in a home-

9. *Id.* at ¶17, citing *Brown v. Brown*, *supra*.

10. (Emphasis added.) *Id.* at ¶19.

11. *Brown v. Brown*, *supra*, at *4-5.

school program to the decision of an outside agency, but chose instead to construe that phrase to mean that the program had obtained state approval.¹²

{¶37} Notably, the parent in the *Brown* case “received acknowledgment from the appropriate agency that the program complied with the standards of Ohio Adm.Code 3301-34.”¹³ In the *Gatchel* case, the court found that “evidence was presented that [the appellee] had requested [the child] be home-schooled for the 2003-2004 school year and that Bluffton Exempted Village Schools had granted the request.”¹⁴ In the instant case, nothing in the record reflects that Davis sought approval for her daughters’ American School programs, or that such was ever received. In the absence of such evidence, we must presume the regularity of the proceedings in the trial court.¹⁵

{¶38} In the trial court, Davis argued two positions that were juxtaposed. In her objections to the magistrate’s decision, she argued that the rationale of the *Brown* case should be extended to her situation so as to recognize that the American School, being accredited in Illinois, is an “accredited” school for purposes of R.C. 3103.03(B).

{¶39} In a subsequent filing of a motion for relief from judgment, to which were attached materials from the Ohio Superintendent of Instruction, Davis argued that the American School was accredited by the state of Ohio. The materials do not indicate that the American School was an accredited institution on July 31, 1996, when Melanie was enrolled there and turned eighteen years of age, or on December 27, 2001, when Christina was taking GED classes and turned eighteen years of age. Moreover, the materials enclosed with the motion do not show that the American School was

12. *Id.* at *6.

13. *Id.* at *2.

14. *Gatchel v. Gatchel*, *supra*, at ¶3.

15. *Crites v. Crites* (May 9, 2001), 11th Dist. No. 2000-P-0001, 2001 Ohio App. LEXIS 1135, at *4.

accredited by the state of Ohio, but only accredited by the state of Illinois. Finally, the motion for relief from judgment was ruled to be untimely by the trial court. However, even if we were to give those materials the best reading in favor of Davis, the most that they demonstrate is that the American School program has the approval of the state of Ohio. However, this reading would still not solve the problem that Davis has, which is that the record does not reflect that Davis complied with the statutory and regulatory requirements of R.C. 3321.04 and Ohio Adm.Code 3301-34-3 to get the approval of the superintendent of her local school district to enroll Melanie and Christina in the American School programs. Given that Gary Davis, her ex-husband, did not know that their daughter, Melanie, was disenrolled from high school eight years before he filed his motion for contempt, the more reasonable conclusion is that Davis operated outside the statutory and regulatory framework to get state approval and unilaterally decided to enroll their daughters in the American School, even without state approval.

{¶40} Davis further argues in this assignment of error that the trial court's decision impinges upon the constitutional right to travel freely throughout the United States, citing *State v. Burnett*.¹⁶ In support of this argument, she submits that a parent who relocates to another state would lose child support payments, because the out-of-state school is not accredited by the state of Ohio; or a parent who sends a child to a boarding school out of state would likewise forfeit child support payments. This kind of argument also implicates an equal protection analysis.¹⁷

{¶41} This secondary argument lacks substance because: (1) it assumes that attendance at an out-of-state school is contingent upon accreditation, instead of

16. *State v. Burnett* (2001), 93 Ohio St.3d 419.

17. See *San Antonio Independent School Dist. v. Rodriguez* (1973), 411 U.S. 1.

approval, by the state of Ohio and (2) the argument is hypothetical and not a part of the record in this case. Moreover, the issue was not raised in the trial court, which means that we will not deal with this issue for the first time on appeal.¹⁸

{¶42} For the foregoing reasons, we find that Davis' assignment of error is without merit.

{¶43} The judgment of the trial court is affirmed.

DONALD R. FORD, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶44} I respectfully dissent from the majority.

{¶45} The word "accredit" must be read to mean "to recognize or vouch for as conforming to a standard." *Brown v. Brown* (Dec. 27, 1997), 7th Dist. No. 94 C.A. 172, 1995 Ohio App. LEXIS 6049, at 5.

{¶46} The phrase "recognized and accredited high school" is clear and unambiguous and must be applied without interpretation. *Wingate v. Hordge* (1979), 60 Ohio St.2d 55, 58. Giving the phrase a clear and unambiguous reading, it becomes evident that appellant's child's attendance at the American School, which is authorized and accredited by the state of Illinois, qualifies her for the exception to the rule that child

18. *State ex rel. Specht v. Bd. of Edn.* (1981), 66 Ohio St.2d 178, 182.

{151} Home schooling programs must meet strict criteria and have definite structures. In this case, the child was schooled in such a program, recognized and accredited by Illinois. If the Ohio legislature had wished only Ohio schools to qualify under the child support statute, it could have defined the phrase "recognized and accredited" in appropriate terms. It did not, leaving the phrase undefined. Consequently, under the rules of statutory construction, this court must give the phrase its clear and unambiguous meaning, and apply the phrase to any accredited and recognized school.

{152} I respectfully dissent.

APPENDIX C

2004 APR -5 PM 3:51

IN THE COURT OF COMMON PLEAS

GAUGA COUNTY, OHIO

LENNETTE DAVIS

: CASE NO.: 87D854

Plaintiff

: JUDGE H.F. INDERLIED, JR.

-vs-

: DOROTHY HENRY LEE, MAGISTRATE

GARY DAVIS

: JUDGMENT ENTRY

Defendant

:

R

This matter is before the Court on the Magistrate's Decision filed March 15, 2004. The matter before this Court's Magistrate was Defendant's Motion to Show Cause and for Repayment of Overpaid Child Support and Plaintiff's Motion for Attorney Fees.

In her Decision, the Magistrate recommended to this Court that Plaintiff be adjudged guilty of contempt of Court and that her Motion for fees be denied.

Plaintiff filed timely objections stating that the Magistrate erred in finding the American School not an accredited high school as contemplated by the Ohio R.C. 3103.03(B) because it is accredited by the Illinois Board of Education.

This Court finds that in order for a school to be "recognized and accredited" as set out in Ohio Revised Code 3103.03(B), the school must be approved by the state of Ohio. The fact that the American School is accredited by the State of Illinois Board of Education does not make it recognized and

accredited by the State of Ohio.

Plaintiff's objection(s) are hereby overruled.

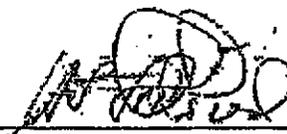
The Court has reviewed the Magistrate's Decision and hereby affirms the findings of fact and conclusions of law contained therein.

Plaintiff is hereby adjudged guilty of contempt of this Court's prior orders.

*Does
mean* *this* → Plaintiff is sentenced to five (5) days in the Geauga County Safety Center. The jail sentence is suspended provided Plaintiff purge herself of contempt by paying to Defendant, on or before July 1, 2004, the sum of \$2,818.26 (\$2,763.00 reimbursement plus \$55.26 processing fees).

Plaintiff shall pay the costs of these proceedings.

Defendant's Motion for Attorney fees is hereby denied.

 4/5/04

H.F. INDERLIED, JR.

cc: Linette Davis, Plaintiff
Gary Davis, Defendant

TO THE CLERK:

Copy upon all parties not in default for failure to appear (per Civil Rule 5-2), notice of this judgment and its date of journalization.

APPENDIX D

Service: Get by LEXSEE®
Citation: 1995 Ohio App. LEXIS 6049,at 6

1995 Ohio App. LEXIS 6049, *

PATRICIA L. BROWN, PLAINTIFF-APPELLANT, VS. JOHN PATRICK BROWN, III, DEFENDANT-APPELLEE.

CASE NO. 94 C.A. 172

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHONING COUNTY

1995 Ohio App. LEXIS 6049

December 27, 1995, Dated

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Domestic Relations Division, Case No. 76DR207.

DISPOSITION: JUDGMENT: Reversed and Remanded

CASE SUMMARY

PROCEDURAL POSTURE: Appellant mother challenged the decision of the Mahoning County Common Pleas Court, Domestic Relations Division (Ohio), which granted appellee father's motion to terminate his child support obligation in accordance with Ohio Rev. Code Ann. § 3103.03(B).

OVERVIEW: The mother withdrew the son from the public high school for the purpose of providing home schooling to him. The child did not finish the 12th grade until he was over 19 years old. The mother requested that child support continue until that time. The trial court adopted the referee's report, which found that a home education program was not a recognized and accredited high school within the meaning of § 3103.03(B) and granted the father's motion to terminate child support. On appeal, the court reversed the judgment. The court held that "recognized and accredited" meant "as approved by the State." To penalize the child in a legitimate home schooling program was unfair. A balancing of interest was in favor of permitting home schooling to qualify for the exception in § 3103.03(B) with any abuses being subject to court review. Home schooling was required to meet strict criteria, and the programs were required to have definite structure. The fact that the child graduated in May when his comparable public school class graduated in June tended to show that the father's arguments of abuse were not justified. Based on the findings, the remaining arguments were moot.

OUTCOME: The court reversed the judgment and remanded the cause.

CORE TERMS: accredited, child support, referee, assignment of error, high school, schooling, terminate, grade, duty of support, high schools, state-sanctioned, schooler, accredit, qualify, child support obligation, age of majority, public school, plaintiff-appellant, acknowledgment, graduated

[Civil Procedure](#) > [Judicial Officers](#) > [Referees](#) > [Appointments](#) 

[Family Law](#) > [Child Support](#) > [General Overview](#) 

[Family Law](#) > [Parental Duties & Rights](#) > [Duties](#) > [Support of Children](#) 

HN1  [Ohio Rev. Code Ann. § 3103.03\(B\)](#) provides in part that: Notwithstanding [Ohio Rev. Code Ann. § 3109.01](#), the parental duty of support to children, including the duty of a parent to pay support pursuant to a child support order, shall continue beyond the age of majority as long as the child continuously attends on a full-time basis any recognized and accredited high school. That duty of support shall continue during seasonal vacation periods. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Education Law](#) > [Administration & Operation](#) > [Homeschooling](#) > [General Overview](#) 

[Education Law](#) > [Departments of Education](#) > [State Departments of Education](#) > [Authority](#) 

HN2  "Recognized and accredited" as set out in [Ohio Rev. Code Ann. § 3103.03\(B\)](#) means "as approved by the State." The State sets the basic standards for education in Ohio and to hold that some other agency must accredit for continued child support would exclude many public schools. The possible abuses that can occur with stretching out home schooling can be checked by the continuing jurisdiction of the domestic court. To penalize a child in a legitimate home schooling program is unfair. A balancing of interest is in favor of permitting home schooling to qualify for the exception in § 3103.03(B) with any abuses being subject to court review. Home schooling must meet strict criteria and the programs have definite structure. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

COUNSEL:

APPEARANCES:

For Plaintiff-Appellant: Robert R. Melnick, 18 North Phelps Street, Suite 300, Youngstown, Ohio 44503. Michael P. Farris, David E. Gordon, Home School Legal, Defense Association, P.O. Box 159, Paeonian Springs, Virginia 22129.

For Defendant-Appellee: Jeffrey R. Davis, James R. Wise, South Bridge West, 755 Boardman-Canfield Road, Suite F-4, Boardman, Ohio 44512.

JUDGES: Hon. Joseph E. O'Neill, Hon. Gene Donofrio, Hon. Edward A. Cox. O'Neill, P. J., concurs. Cox, J., concurs

OPINION BY: Gene Donofrio

OPINION: OPINION

DONOFRIO, J.

Plaintiff-appellant, Patricia L. Brown, appeals from an order of the Mahoning County Domestic Relations Court granting defendant-appellee's, John Patrick Brown, III, motion to terminate his child support obligation.

The parties were granted a final order of divorce in Mahoning County on August 30, 1976. Appellant was named the residential parent for the parties' [*2] son, Christopher, and appellee was ordered to pay child support.

In December 1992, appellant withdrew Christopher from the public high school for the purposes of providing home schooling to him. She received acknowledgment from the appropriate agency that the program complied with the standards of Ohio Adm. Code 3301-34. At the time he was taken out of school, Christopher was in the tenth grade and was three months short of his seventeenth birthday. When Christopher reached the age of majority on March 16, 1994 he was in the eleventh grade. Christopher did not finish the twelfth grade until May 1995 when he was nineteen years and two months old. Appellant requested that child support continue until that time. If Christopher had remained in public school, he would have been scheduled to graduate with his class in June of 1995.

In January of 1994, appellee filed a motion to terminate his child support obligation on the basis that Christopher was no longer attending a "recognized and accredited high school" within the meaning of R.C. 3103.03(B), ^{HNL} which provides that:

"Notwithstanding section 3109.01 of the Revised Code, the parental duty of support to children, including the duty [*3] of a parent to pay support pursuant to a child support order, shall continue beyond the age of majority as long as the child continuously attends on a full-time basis any recognized and accredited high school. That duty of support shall continue during seasonal vacation periods."

The matter was heard by a referee, who issued his report on May 11, 1994. The referee found that the child support statutes in question did not make any reference to home education programs. The referee further noted that the statutes in question had been amended after the statutory provisions were enacted allowing home education programs. Further, the referee found that it must be presumed that the legislature was fully aware of the home education programs when it modified the child support statutes. The referee thus found that a home education program was not a "recognized and accredited high school" within the meaning of the statute and therefore recommended that the motion to terminate child support be granted.

The trial court adopted the referee's report on September 2, 1994. Appellant then filed the instant appeal.

On appeal, appellant lists two assignments of error. In the first, appellant argues [*4] that:

"The trial court erred when it ruled that the phrase 'recognized and accredited high school' in OHIO REV. CODE ANN. § 3103.03(B) does not include the home school of the plaintiff-appellant, Patricia Brown."

Appellant first argues that R.C. 3103.03(B) is a remedial child support statute and should thus be liberally interpreted. Appellant further argues that the terms "recognized" and "accredited" are not defined by the statute and should therefore be given their ordinary and plain meanings, which include state-sanctioned home schools. Appellant argues that it is clear her home school for Christopher is "recognized" in light of her letter of acknowledgment from the Mahoning County School superintendent, contained within the record below. Thus, appellant argues that the case turns on the meaning of "accredited".

In this regard, appellant argues that out of the 1,572 chartered high schools in the state of Ohio, only 500 of them are "accredited" by the North Central Association, a private organization to which schools apply for special distinction. Thus, appellant argues that to read R.C. 3103.03(B) as the referee did would exclude over 1,000 high schools from the definition. [*5] Appellant argues that the word "accredit" must be read to mean "to recognize or vouch for as conforming to a standard". Appellant argues that, with this reading, all high schoolers in Ohio state-sanctioned schools would be eligible for continued child support under R.C. 3103.03(B).

In response, appellee argues that the phrase "recognized and accredited high school" is plain and unambiguous and may only be applied as written, citing Wingate v. Hordge (1979), 60 Ohio St.2d 55, 396 N.E.2d 770. Giving the phrase its plain and unmistakable meaning, appellee argues that it is clear that appellant's home school program does not qualify for the exception to the general rule that child support ceases at the age of eighteen. While appellee apparently acknowledges that appellant's home school is "recognized," appellee argues that the home instruction program does not meet the requirement that it be accredited. Appellee further argues that construing the meaning "accredited" as urged by appellant would make the term "recognized" redundant. In addition, appellee argues that the legislature's omission of any provision for home instruction in R.C. 3103.03, though aware of its practice, clearly [*6] demonstrates the intent that its provisions were not to apply to such a program.

We hold that ^{HN2}"recognized and accredited" as set out in R.C. 3103.03(B) means as approved by the state. The state sets the basic standards for education in Ohio and to hold that some other agency must accredit for continued child support would exclude many public schools. The possible abuses that appellee contends can occur with stretching out home schooling can be checked by the continuing jurisdiction of the domestic court. To penalize a child in a legitimate home schooling program would be unfair. A balancing of interest would be in favor of permitting home schooling to qualify for the exception in 3103.03(B) with any abuses being subject to court review.

Home schooling must meet strict criteria and the programs have definite structure. The fact that Christopher graduated in May when his comparable public school class graduated in June tends to show that appellee's arguments of abuse are not justified.

Appellant's first assignment of error is sustained.

In the second assignment of error, appellant argues that:

"The trial court erred when it interpreted OHIO REV. CODE ANN. § 3103.03(B) to exclude [*7] a home schooler like Christopher Brown because the result is a violation of the Equal protection Clause."

Based on our findings under appellant's first assignment of error, it is unnecessary to reach the equal protection argument in this assignment of error. Thus, appellant's second assignment of error is moot.

The judgment of the trial court is reversed and this cause is remanded for further proceeding according to law and consistent with this opinion.

O'Neill, P. J., concurs
Cox, J., concurs

APPROVED:

Gene Donofrio

Judge

Service: Get by LEXSEE®

Citation: 1995 Ohio App. LEXIS 6049, at 6

View: Full

Date/Time: Sunday, November 26, 2006 - 4:48 PM EST

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APPENDIX E

Service: Get by LEXSEE®
Citation: 2003 Ohio 6958

2003 Ohio 6958, *; 2003 Ohio App. LEXIS 6269, **

STATE OF OHIO, Plaintiff-Appellee, - vs - MATTHEW L. WERFEL, Defendant-Appellant.

CASE NOS. 2002-L-101 and 2002-L-102

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

2003 Ohio 6958; 2003 Ohio App. LEXIS 6269

December 19, 2003, Decided

PRIOR HISTORY: [**1] Criminal Appeal from the Court of Common Pleas, Case Nos. 01 CR 000536 and 02 CR 000132.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from a judgment of the Lake County Court of Common Pleas (Ohio), which convicted him of two counts of menacing by stalking in violation of Ohio Rev. Code Ann. § 2903.211, which were felonies of the fourth degree.

OVERVIEW: Defendant was married and divorced from the victim twice. After their second divorce, defendant sent numerous letters to her which were threatening and he engaged in strange and alarming activities. Despite her requests, defendant did not stop. He violated protective orders, was imprisoned, and upon release, he resumed contact. In his criminal trial, his motion in limine to limit discussions of his prior convictions was overruled. He was convicted and appealed. The court found that there was no double jeopardy violation, nor was evidence of defendant's prior acts wrongfully admitted, as it "tended to show" the existence of "scheme, plan or system" pursuant to Ohio Rev. Code Ann. § 2945.59 and Ohio R. Evid. 404(B), which was a required element of the crime. The trial court gave a limiting instruction to the jury to avoid danger of unfair prejudice. Testimony regarding the underlying facts of his crime, pursuant to Ohio Rev. Code Ann. § 2903.211, was deemed harmless error. There was no constitutional infirmity with Ohio Rev. Code Ann. § 2903.211, and the court's refusal to give defendant's requested instructions was proper. The conviction was supported by the evidence.

OUTCOME: The court affirmed the judgment of the trial court.

CORE TERMS: assignment of error, violence, menacing, stalking, knowingly, physical harm, jury instruction, convicted, mental distress, offender, prior conviction, admissible, strict scrutiny, psychiatric testimony, insanity defense, breadth, prosecuted, violent, educate, statutory definition, specification, indictment, upbringing, domestic violence, rational basis, vagueness, daughter, felony, sufficient evidence, surrounding facts

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[Criminal Law & Procedure](#) > [Double Jeopardy](#) > [Double Jeopardy Protection](#) > [Convictions](#) 

[Governments](#) > [Legislation](#) > [Enactment](#) 

HN1 ↓ The protections of the double jeopardy clauses set forth in the United States and Ohio Constitutions are twofold; specifically, the double jeopardy clause protects a party from prosecution for an offense after having been acquitted, convicted, or punished for that offense. Moreover, the double jeopardy clause prohibits the judicial system from imposing more than one punishment for the same offense. However, the double jeopardy clause does not otherwise restrict the legislature's power to enact statutes defining the elements of a particular offense and the punishment to be imposed for violation of a particular offense. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Sentencing](#) > [Consecutive Sentences](#) 

HN2 ↓ The United States Supreme Court has held that cumulative punishments do not violate the double jeopardy clause, provided the legislature clearly intended to permit such punishments. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Stalking](#) > [General Overview](#) 

HN3 ↓ See [Ohio Rev. Code Ann. § 2903.211](#).

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Stalking](#) > [Elements](#) 

[Evidence](#) > [Relevance](#) > [Prior Acts, Crimes & Wrongs](#) 

HN4 ↓ The language of [Ohio Rev. Code Ann. § 2903.211](#) clearly refers to prior convictions and their intended role in elevating the crime of menacing by stalking from a first degree misdemeanor to a fourth degree felony. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Evidence](#) > [Relevance](#) > [Confusion, Prejudice & Waste of Time](#) 

HN5 ↓ See [Ohio R. Evid. 403\(A\)](#).

[Evidence](#) > [Relevance](#) > [Prior Acts, Crimes & Wrongs](#) 

HN6 ↓ See [Ohio R. Evid. 404\(B\)](#).

[Evidence](#) > [Relevance](#) > [Prior Acts, Crimes & Wrongs](#) 

HN7 ↓ The exceptions set forth in [Ohio R. Evid. 404\(B\)](#) have been codified in [Ohio Rev. Code Ann. 2945.59](#). [More Like This Headnote](#)

[Evidence](#) > [Relevance](#) > [Prior Acts, Crimes & Wrongs](#) 

HN8 ↓ See [Ohio Rev. Code Ann. § 2945.59](#).

[Evidence](#) > [Procedural Considerations](#) > [Exclusion & Preservation by Prosecutor](#) 

[Evidence](#) > [Relevance](#) > [Confusion, Prejudice & Waste of Time](#) 

[Evidence > Relevance > Prior Acts, Crimes & Wrongs](#) 

HN9  Evidence of a person's character is ordinarily excluded because its slight probative value as proof of conduct on a specific occasion is outweighed by the danger of unfair prejudice. However, when evidence of other acts is offered to prove something other than character, it can no longer be said, categorically, that the balancing of probative and prejudicial value tilts towards exclusion. That is, such evidence is admissible, not because it shows that the defendant is crime prone, or even that he has committed an offense similar to the one in question, but in spite of such facts. That said, since there is still some danger that the jury may take the evidence as bearing on character, this evidence must be treated with some care. Hence, the use of [Ohio R. Evid. 404\(B\)](#) and [Ohio Rev. Code Ann. § 2945.59](#) must be strictly construed against the State and conservatively applied. [More Like This Headnote](#)

[Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor](#) 

[Evidence > Relevance > Prior Acts, Crimes & Wrongs](#) 

HN10  "Scheme, plan or system" evidence is relevant in those situations where the "other acts" form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category of "scheme, plan or system" evidence, the "other acts" testimony must concern events which are inextricably related to the alleged criminal act. [More Like This Headnote](#)

[Criminal Law & Procedure > Trials > Entry of Judgments](#) 

[Evidence > Relevance > Prior Acts, Crimes & Wrongs](#) 

HN11  See [Ohio Rev. Code Ann. § 2945.75\(B\)](#).

[Criminal Law & Procedure > Trials > Entry of Judgments](#) 

[Criminal Law & Procedure > Witnesses > Criminal Records](#) 

[Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor](#) 

HN12  The legislature intended evidence regarding past convictions to be admissible as an element of certain offenses and the State must prove the past convictions beyond a reasonable doubt. However, it is not as clear how much evidence is allowed in to establish the past convictions. While submission of a certified judgment entry alone is clearly not sufficient, testimony regarding the underlying facts related to the convictions has been deemed properly admitted provided a limiting jury instruction was issued. [More Like This Headnote](#)

[Criminal Law & Procedure > Witnesses > Criminal Records](#) 

[Criminal Law & Procedure > Appeals > Standards of Review > Harmless & Invited Errors > Evidence](#) 

[Evidence > Procedural Considerations > Exclusion & Preservation by Prosecutor](#) 

HN13  In order to determine whether the admission of testimony on prior convictions is

prejudicial, an appellate court must evaluate the relationship between that evidence and the totality of other evidence properly introduced by the prosecution at trial. If there is other overwhelming evidence of guilt, the admission of the testimony regarding the facts of the past convictions will be deemed harmless error. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Substantive Due Process](#) > [Privacy](#) > [Personal Decisions](#) 

[Constitutional Law](#) > [Substantive Due Process](#) > [Scope of Protection](#) 

HN14  Generally, substantive due process applies to regulations affecting fundamental rights; strict scrutiny applies to laws which burden the exercise of fundamental rights, e.g., the right to vote, the right to travel, the various First Amendment rights, and the penumbra rights to privacy, which include the right to direct the upbringing and education of one's children. [More Like This Headnote](#)

[Constitutional Law](#) > [The Judiciary](#) > [Case or Controversy](#) > [Constitutionality of Legislation](#) > [General Overview](#) 

HN15  All legislative enactments must be afforded a strong presumption of constitutionality. [More Like This Headnote](#)

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[Constitutional Law](#) > [Substantive Due Process](#) > [Scope of Protection](#) 

HN16  All statutes are subject to at least rational basis review which requires that a statutory classification be rationally related to a legitimate government purpose. However, when addressing the alleged violation of a fundamental right, a court must examine the law with strict scrutiny. To survive strict scrutiny, a restriction must be necessary to serve a compelling government interest. [More Like This Headnote](#)

[Constitutional Law](#) > [Substantive Due Process](#) > [Privacy](#) > [General Overview](#) 

HN17  A parent does have a fundamental right to educate and assist in the upbringing of his children. [More Like This Headnote](#)

[Constitutional Law](#) > [Substantive Due Process](#) > [Scope of Protection](#) 

HN18  For strict scrutiny to apply in a substantive due process analysis, a party must demonstrate that the statute in question violates a fundamental right. [More Like This Headnote](#)

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HN19  Ohio Rev. Code Ann. § 2903.211 has a rational basis. On its face, the governmental interest being served by § 2903.211 is protecting society from individuals who knowingly cause another person to believe that the offender will cause him or her physical harm or mental distress. Such a purpose is a legitimate exercise of the State's police power and § 2903.211, as drafted, bears a rational relationship to this interest. [More Like This Headnote](#)

[Evidence](#) > [Procedural Considerations](#) > [Burden of Proof](#) > [Allocation](#) 

[Evidence](#) > [Procedural Considerations](#) > [Burden of Proof](#) > [Proof Beyond Reasonable Doubt](#) 

[Torts](#) > [Intentional Torts](#) > [Intentional Infliction of Emotional Distress](#) > [Elements](#) 

HN20  The definition of mental distress set forth in [Ohio Rev. Code Ann. § 2903.211](#) requires a lower standard of proof than that of the corresponding civil standard for intentional infliction of emotional distress. To be sure, the General Assembly has defined both concepts differently; however, irrespective of the concepts' definition, the State has the burden of proving, beyond a reasonable doubt, the existence of mental distress in a criminal matter. Such a burden is significantly higher than the quantum of proof assigned to a civil plaintiff, i.e., the burden of proving, by a preponderance of the evidence, intentional infliction of emotional distress. Although the concepts are defined differently, the burden of proof in a criminal case is higher than that of a civil case. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Freedoms](#) > [Judicial & Legislative Restraints](#) > [Overbreadth & Vagueness](#) 

[Governments](#) > [Legislation](#) > [Overbreadth](#) 

HN21  To be unconstitutional, a statute's overbreadth must be "substantial" and must appear on the face of the statute. The overbreadth doctrine has no application to criminal statutes outside the First Amendment. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Stalking](#) > [General Overview](#) 

HN22  The conduct referred to by [Ohio Rev. Code Ann. § 2903.211](#) is not protected by the First Amendment. That is, [Ohio Rev. Code Ann. § 2903.211](#) is not, on its face, so vague and indefinite, in form and as interpreted as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech, such that a facial challenge could be brought on the basis that the statute chills constitutionally protected conduct. [More Like This Headnote](#)

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HN23  Although the phrases "history of violence" and "violent acts" as used in [Ohio Rev. Code Ann. § 2903.211](#) are not specifically defined, such phrases have an ordinary meaning that does not include benign, otherwise protected conduct such as corresponding with one's children. The conduct must be of a violent variety; such language is simple and easily understood. Therefore, the language of § 2903.211 is not so broad as to sweep within its prohibitions what may not otherwise be constitutionally punished. [More Like This Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Freedoms](#) > [Judicial & Legislative Restraints](#) > [Overbreadth & Vagueness](#) 

[Governments](#) > [Legislation](#) > [Overbreadth](#) 

[Governments](#) > [Legislation](#) > [Vagueness](#) 

HN24  An unconstitutionally vague statute is one which either forbids or requires the doing of an act in terms so vague that individuals of common intelligence must necessarily guess at its meaning and differ as to its application. The vagueness doctrine requires a statute to give fair notice of offending conduct. Moreover, in order to be declared unconstitutionally vague, the statute must lack explicit standards such that it permits arbitrary and discriminatory enforcement. [More Like This Headnote](#)

[Governments](#) > [Legislation](#) > [Overbreadth](#) 

[Governments](#) > [Legislation](#) > [Vagueness](#) 

HN25  A statute that is vague in some applications can be salvaged by a scienter requirement. The level of intent required by a statute can mitigate any perceived vagueness, both facial and as applied. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Scienter](#) > [Knowledge](#) 

HN26  Ohio Rev. Code Ann. § 2903.211 requires that an offender knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person. "Knowingly" is one of the culpable mental states defined in Ohio Rev. Code Ann. § 2901.22(B). [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Scienter](#) > [Knowledge](#) 

HN27  See Ohio Rev. Code Ann. § 2901.22(B).

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Stalking](#) > [General Overview](#) 

[Governments](#) > [Legislation](#) > [Overbreadth](#) 

[Governments](#) > [Legislation](#) > [Vagueness](#) 

HN28  The scienter requirement of Ohio Rev. Code Ann. § 2903.211 vitiates any claim that the statute's purported vagueness could mislead a person of ordinary intelligence into misunderstanding what is prohibited. Viewing the statute in its entirety, a person of ordinary intelligence would be able to discern what conduct is prohibited. Section 2903.211 criminalizes conduct only when taken with the requisite mental state. Moreover, the statute sets forth sufficient guidelines for its enforcement. Therefore, § 2903.211 is not void for vagueness. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Pretrial Motions](#) > [Motions In Limine](#) 

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) > [General Overview](#) 

HN29 ⚡ Generally, the denial of a motion in limine rests within the sound discretion of a trial court. As a result, an appellate court shall not disturb the trial court's ruling unless there has been an abuse of discretion. An abuse of discretion connotes more than a mere error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Criminal Law & Procedure](#) > [Defenses](#) > [Diminished Capacity](#) 

[Criminal Law & Procedure](#) > [Defenses](#) > [Insanity](#) > [Insanity Defense](#) 

[Evidence](#) > [Testimony](#) > [Experts](#) > [Criminal Trials](#) 

HN30 ⚡ The Supreme Court of Ohio has held that a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime. In so holding, the Supreme Court concluded that the partial defense of diminished capacity is not recognized in Ohio. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Defenses](#) > [Diminished Capacity](#) 

[Criminal Law & Procedure](#) > [Defenses](#) > [Insanity](#) > [Insanity Defense](#) 

HN31 ⚡ In rejecting the defense of diminished capacity, the Supreme Court of Ohio has stated that the diminished capacity defense does serve to ameliorate the limitations of the traditional M'Naghten, right from wrong test for insanity. Moreover, the ameliorative argument loses much of its force, however, in jurisdictions that have abandoned or expanded upon the narrow M'Naghten standard. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Preliminary Proceedings](#) > [Entry of Pleas](#) > [Types](#) > [Not Guilty by Reason of Mental Defect](#) 

[Criminal Law & Procedure](#) > [Defenses](#) > [Insanity](#) > [Insanity Defense](#) 

HN32 ⚡ See [Ohio Rev. Code Ann. § 2901.01\(A\)\(14\)](#).

[Criminal Law & Procedure](#) > [Defenses](#) > [Insanity](#) > [Insanity Defense](#) 

HN33 ⚡ See [Ohio Rev. Code Ann. § 2945.391](#).

[Criminal Law & Procedure](#) > [Defenses](#) > [Diminished Capacity](#) 

[Criminal Law & Procedure](#) > [Defenses](#) > [Intoxication](#) 

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HN34 ⚡ The Wilcox rule is based on a mistrust of the ability of psychiatry to accurately "fine-tune" degrees of capacity among offenders who are sane - i.e., who have the minimal capacity to act voluntarily. To allow psychiatric testimony on specific intent would bring into Ohio law, under another guise, the diminished capacity defense that was rejected in Wilcox. A defendant may not offer expert psychiatric testimony unrelated to the insanity defense to show that, due to mental illness, intoxication, or any other reason, he lacked the mental capacity to form the specific mental state

required for a particular crime or degree of crime. [More Like This Headnote](#)

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[Evidence](#) > [Scientific Evidence](#) > [Psychiatric & Psychological Evidence](#) 

[Governments](#) > [Courts](#) > [Judicial Precedents](#) 

HN35  All federal courts have unanimously held that the exclusion of psychiatric testimony on the issue of mens rea or specific intent does not violate a criminal defendant's constitutional rights to due process or compulsory process. The reasons for these results are twofold. First it is generally recognized that a state may validly find psychiatric testimony to be a useful tool in the determination of insanity, yet not be convinced that the sciences of psychiatry and psychology are advanced enough to "fine-tune" among sane defendants and find whether they possessed the specific intent necessary for commission of a crime. Second, while the Supreme Court of the United States has not dealt with this issue at length, there is binding precedent to support the conclusion that the Supreme Court has considered this issue, and found no valid constitutional claim. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Requests to Charge](#) 

[Criminal Law & Procedure](#) > [Appeals](#) > [Reversible Errors](#) > [General Overview](#) 

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) > [General Overview](#) 

HN36  The Supreme Court of Ohio has held that it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge. However, the Supreme Court has also held that the court may refuse to give an instruction as to a matter which is not applicable to the facts governing the case. A trial court's failure to give a proposed jury instruction is reversible error if the defendant demonstrates that the trial court abused its discretion, and the defendant was prejudiced by the court's refusal to give the proposed instruction. Prejudicial error occurs only if the alleged instructional flaw cripples the entire charge. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Jury Instructions](#) > [Particular Instructions](#) > [General Overview](#) 

HN37  The Supreme Court of Ohio has stated that trial courts should limit definitions where possible to those definitions provided by the legislature in order to avoid unnecessary confusion and needless appellate challenges. [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Crimes Against Persons](#) > [Stalking](#) > [General Overview](#) 

HN38  Ohio Rev. Code Ann. § 2903.211 does not require that the acts which form the basis of the "history of violence" or the harm suffered from said violence occur on or after a specific date. In fact, § 2903.211 simply requires the offender to have a history of violence toward the victim or any other person or other violent acts toward the victim or any other person. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Substantial Evidence](#) 

[Evidence](#) > [Procedural Considerations](#) > [Exclusion & Preservation by Prosecutor](#) 

HN39  An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Evidence](#) > [Procedural Considerations](#) > [Weight & Sufficiency](#) 

HN40  When reviewing the weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. The discretionary power to grant a new trial should be exercised only in exceptional cases wherein the evidence weighs heavily against the conviction. [More Like This Headnote](#)

COUNSEL: Charles E. Coulson, Lake County Prosecutor and Amy E. Cheatham, Assistant Prosecutor, Painesville, OH (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender and Vanessa R. Clapp, Assistant Public Defender, Painesville, OH (For Defendant-Appellant).

JUDGES: CYNTHIA WESTCOTT RICE, J. WILLIAM M. O'NEILL, J., DIANE V. GRENDALL, J., concur.

OPINION BY: CYNTHIA WESTCOTT RICE

OPINION:

CYNTHIA WESTCOTT RICE, J.

[*P1] Matthew L. Werfel ("Appellant"), appeals his conviction on two counts of menacing by stalking, felonies of the fourth degree.

[*P2] Appellant and Vicky Robertson ("Robertson") were married and divorced twice. During the time between their first and second marriage, they had two children. Between their second divorce, in 1998, and March of 2000, appellant sent some thirty-two letters to either Robertson's house or place of business. The letters were variously addressed to either Robertson, her children (two of which were fathered by appellant), or her brother, Dave Robertson. n1 Although the letters were many times cryptic and non-sensical, they also contained language *****2** which made Robertson feel threatened. In conjunction with the letters, appellant engaged in a series of strange and, sometimes, alarming activities which contributed to the charges underlying the current appeal.

----- Footnotes -----

n1 During the period in question, neither of the children could read and Robertson had not

been in contact with her brother for some five years.

----- End Footnotes-----

[*P3] On one occasion, Robertson was getting ready for work and found appellant in her closet, hiding under her clothes; further, on more than one occasion, appellant would sneak into Robertson's house late at night and climb in bed with Robertson and their daughter; appellant also stopped at Robertson's place of employment on several occasions to tape letters to her van or otherwise speak with her; moreover, appellant would park his car on the street near her residence and wait for her to return. Robertson was bothered by appellant's conduct and asked him to stop. Despite her request, appellant continued harassing her.

[*P4] On July 22, 1998, Robertson **[**3]** filed a motion for a protective order. The motion was granted and appellant was ordered not to have any contact with Robertson, whether by mail, e-mail, telephone, or going to her place of employment or home. After violating the order, appellant was prosecuted and convicted of menacing by stalking. While in jail, appellant did not contact Robertson. However, after his release, the contact resumed.

[*P5] The most salient incident occurred on October 2, 1999. On that date, Robertson dropped their children off with appellant. Appellant subsequently called Robertson and questioned her about her boyfriend. When Robertson told appellant she was in love with her boyfriend, appellant demanded she retrieve the children. When she arrived at appellant's house, appellant was very angry. As appellant became more irritated with Robertson, he pulled her hair, picked her up, and threw her to the ground. Robertson left appellant's house and called the police. On November 30, 1999, appellant was convicted of domestic violence arising out of this altercation. Robertson sought and was granted another protective order.

[*P6] Throughout January, February, and March of 2000, Robertson continued **[**4]** to receive odd and sometimes disconcerting letters from appellant while he was in jail. Although these letters were addressed to Dave Robertson, Robertson's brother, she received them at her residence. In March of 2000, Robertson received three more letters, two of which were sent to their daughters. Finally, in October of 2001, appellant sent two letters, written on September 18, 2001, which contained messages that Robertson characterized as threatening.

[*P7] On November 30, 2001, appellant was indicted on one count of menacing by stalking, a fourth-degree felony, in violation of R.C. 2903.211. This indictment was based upon an incident occurring on or about September 18, 2001. On December 7, 2001, appellant waived his right to be present at his arraignment and the trial court entered a plea of not guilty on his behalf.

[*P8] On December 19, 2001, appellant was granted leave to plead not guilty by reason of insanity. Appellant ultimately withdrew this plea. On March 15, 2002, appellant was secretly indicted on two additional counts of menacing by stalking, both fourth degree felonies in violation of R.C. 2903.211, **[**5]** for incidents occurring between January 1, 1998 and October 18, 2001. Count one of this indictment included a designation of a prior conviction for menacing by stalking and count two included a specification of a "history of violence." The charges from both cases involved the same alleged victim, Vicky Robertson.

[*P9] The cases were consolidated. At trial, counts one and two of the March 15, 2002 indictment were renumbered as counts two and three respectively with the charge from the November 30, 2001, indictment remaining as count one. Appellant entered a plea of not guilty to the two new charges on March 19, 2002.

[*P10] On March 14, 2002, appellant filed a motion in limine requesting the trial court to

limit discussions in the presence of the jury regarding his prior convictions as he had stipulated to his prior convictions. The trial court overruled the motion. During trial, appellant maintained a running objection to all evidence presented regarding prior acts committed from January 1, 1998 to October 19, 2001. The court overruled the continuing objection.

[*P11] On March 19, 2001, appellant filed a motion to dismiss the charges for vagueness and overbreadth **[**6]** In violation of his right to due process and principles of double jeopardy. The motion to dismiss was denied on April 16, 2001. Appellant's request for jury instructions was also overruled. Ultimately, appellant was convicted of renumbered counts two and three and acquitted of count one. Appellant was sentenced to seventeen months in prison.

[*P12] Appellant assigns seven errors for this court's review.

[*P13] In his first assignment of error, appellant contends that the trial court erred to his prejudice when it allowed the state to introduce evidence of past incidents of conduct to prove the "pattern of conduct" element of his menacing by stalking charges. First, appellant contends that the use of past incidents of conduct violates principles of double jeopardy. Second, appellant argues that the past acts evidence was inadmissible pursuant to Evid.R. 403 and 404(B).

HN1 **[*P14]** The protections of the Double Jeopardy Clauses set forth in the United States and Ohio constitutions are twofold; specifically, the Double Jeopardy Clause protects a party from prosecution for an offense after having been acquitted, convicted, or punished for that offense. Moreover, the double jeopardy clause **[**7]** prohibits the judicial system from imposing more than one punishment for the same offense. State v. Moissis, 11th Dist. No. 2000-L-187, 2002 Ohio 4955, P23, citing, Albernaz v. United States (1981), 450 U.S. 333, 344, 67 L. Ed. 2d 275, 101 S. Ct. 1137. However, the double jeopardy clause does not otherwise restrict the legislature's power to enact statutes defining the elements of a particular offense and the punishment to be imposed for violation of a particular offense. Moissis, supra, at P23, citing, Brown v. Ohio (1977), 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221; State v. Thompkins (1996), 75 Ohio St.3d 558, 560, 1996 Ohio 264, 664 N.E.2d 926.

[*P15] In the case sub judice, the state admitted 19 letters written by appellant post marked in 1998, 4 letters postmarked in 1999, 5 letters from 2000, and two letters postmarked September 18, 2001. The letters from September 18, 2001 formed the basis for the charges in the instant case. Moreover, the state introduced underlying evidence of past domestic violence and menacing by stalking convictions to which stipulations had previously been entered. Appellant contends that because he had been criminally **[**8]** charged based upon the prior letters, their introduction violates the Double Jeopardy Clause. We disagree.

[*P16] First of all, appellant is not being charged a second time for the same conduct for which he was previously charged, convicted, and punished. Although the past acts utilized to prove the "pattern of conduct" requirement of R.C. 2903.211 assuredly contain the same elements, the acts themselves are not being re-prosecuted. Without separate charges based upon those acts for which appellant was already convicted, we cannot conclude that appellant was subjected to successive prosecutions on those past convictions.

[*P17] Moreover, **HN2** the United States Supreme Court has held that cumulative punishments do not violate the Double Jeopardy Clause, provided the legislature clearly intended to permit such punishments. Moissis, supra, at P25, citing, Missouri v. Hunter (1983), 459 U.S. 359, 74 L. Ed. 2d 535, 103 S. Ct. 673. R.C. 2903.211 reads:

[*P18] "(A) ^{HN3}No person by engaging in a pattern of conduct shall knowingly cause another to believe that the offender will cause physical harm to the other person or **[**9]** cause mental distress to the other person.

[*P19] "(B) Whoever violates this section is guilty of menacing by stalking.

[*P20] "(1) Except as otherwise provided in divisions (B)(2) and (3) of this section, menacing by stalking is a misdemeanor of the first degree.

[*P21] "(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

[*P22] "(a) The offender previously has been convicted of or pleaded guilty to a violation of this section or a violation of section 2911.211 of the Revised Code.

[*P23] ****

[*P24] "(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person."

[*P25] Accordingly, ^{HN4}the language of R.C. 2903.211 clearly refers to prior convictions and their intended role in elevating the crime of menacing by stalking from a first degree misdemeanor to a fourth degree felony. Thus, appellant's claim that the use of his past convictions constituted of double jeopardy is without merit.

[*P26] Next, appellant contends that the trial court's admission of **[**10]** the other acts evidence to prove a "pattern of conduct" violated Evid.R. 403(A) and 404(B).

[*P27] Evid. R. 403(A) states that, ^{HN5}evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 404(B) provides:

[*P28] ^{HN6}"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity, or absence of mistake or accident."

^{HN7}**[*P29]** The exceptions set forth in Evid.R. 404(B) have been codified in R.C. 2945.59.
n2

----- Footnotes -----

n2 R.C. 2945.59 states: ^{HN8}"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in

doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

----- End Footnotes----- **[**11]**

HN9 **[*P30]** Evidence of a person's character is ordinarily excluded because its slight probative value as proof of conduct on a specific occasion is outweighed by the danger of unfair prejudice. However, when evidence of other acts is offered to prove something other than character, we can no longer say, categorically, that the balancing of probative and prejudicial value tilts towards exclusion. That is, such evidence is admissible, not because it shows that the defendant is crime prone, or even that he has committed an offense similar to the one in question, but in spite of such facts. State v. DeMarco (1987), 31 Ohio St.3d 191, 194, 31 Ohio B. 390, 509 N.E.2d 1256, citing State v. Burson (1974), 38 Ohio St.2d 157, 311 N.E.2d 526.

[*P31] That said, since there is still some danger that the jury may take the evidence as bearing on character, this evidence must be treated with some care. Hence, the use of Evid.R. 404(B) and R.C. 2945.59 must be strictly construed against the state and conservatively applied. DeMarco, supra, at 194.

[*P32] As discussed above, the state introduced a host of letters that were written between 1998 and 2001. The **[**12]** court admitted the evidence over objections from defense counsel. However, appellant argues that none of the "exceptions" delineated in either Evid.R. 404(B) or R.C. 2945.59 existed. Thus, appellant concludes the other acts evidence was inadmissible and its introduction allowed the jury to convict appellant solely on his "propensity" to commit the crime charged. We disagree.

[*P33] The past evidence in question "tends to show" the existence of "scheme, plan or system." See, R.C. 2945.59.

HN10 **[*P34]** "'Scheme, plan or system' evidence is relevant *** in those situations [where] the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment. In such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category of 'scheme, plan or system' evidence, the 'other acts' testimony must concern events which are inextricably related to the alleged criminal act." State v. Curry (1975), 43 Ohio St.2d 66, 73, 330 N.E.2d 720.

[13]** **[*P35]** As indicated above, R.C. 2903.211 prohibits one from "engaging in a pattern of conduct [through which one] *** knowingly causes another to believe that [one] will cause physical harm to the other person." The evidence at issue in the current matter was admissible pursuant to Evid.R. 404(B) and R.C. 2945.59 because it tends to demonstrate a scheme, plan, or system, and, as such, establishes a "pattern of conduct" required by R.C. 2903.211.

[*P36] We are mindful that, despite the purpose of admission, a jury may nevertheless utilize other acts evidence for the "forbidden purpose" of inferring propensity. Anticipating this problem, the court provided a limiting jury instruction:

[*P37] "Now ladies and gentlemen, evidence was presented of prior acts of the defendant except for the instruction I've just given to you as to your findings as to the history of the defendant and his relationship to the victim in this case you may use that information that you are given regarding the history and in making that determination other than that the prior bad acts may not be used to find that **[**14]** the defendant because he committed prior similar acts in the past that he committed the acts that he is charged for here in this case. You may take into consideration however that the prior acts may show a pattern of activity, plan, scheme or design, mode of operating or absence of mistake you may take the prior acts into consideration for those purposes."

[*P38] Thus, any prejudice that appellant may have experienced from the admission of his prior acts was palliated by the jury instruction limiting the purpose of the evidence. Appellant's first assignment of error lacks merit.

[*P39] In his second assignment of error, appellant contends that the trial court erred to his prejudice when it allowed the state to present testimony regarding the underlying facts of his past convictions. Appellant argues that the scope of the state's evidence should have been limited to proving the existence of the prior offense, not its details; admitting surrounding facts, appellant maintains, unduly emphasizes his prior conduct.

[*P40] R.C. 2945.75(B) governs the introduction of prior convictions as an element of an offense. The statute states: *HN11* "Whenever in any case it is necessary **[**15]** to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction."

[*P41] It is clear that *HN12* the legislature intended evidence regarding past convictions to be admissible as an element of the offenses and that the state must prove the past convictions beyond a reasonable doubt. However, as we noted in *Moissis, supra*:

[*P42] "it is not as clear how much evidence is allowed in to establish the past convictions. While submission of a certified judgment entry alone is clearly not sufficient [*State v. McCoy* (1993), 89 Ohio App.3d 479, 624 N.E.2d 1102, testimony regarding the underlying facts related to the convictions has been deemed properly admitted provided a limiting jury instruction was issued. [*State v. Rivera* (1994), 99 Ohio App. 3d 325, 331, 650 N.E.2d 906.]" *Id.*, at P40.

[*P43] However, even if we were to find the "surrounding facts" evidence inadmissible, the error was harmless. *HN13* In order to determine whether the admission of testimony on the prior convictions **[**16]** is prejudicial, we must evaluate the relationship between that evidence and the totality of other evidence properly introduced by the prosecution at trial. *Moissis, supra*, at P46. If there is other overwhelming evidence of guilt, the admission of the testimony regarding the facts of the past convictions will be deemed harmless error. *State v. Henton* (1997), 121 Ohio App. 3d 501, 508, 700 N.E.2d 371.

[*P44] The record reveals that the state presented sufficient evidence to prove, beyond a reasonable doubt, that appellant violated R.C. 2903.211. Specifically, the state presented

evidence that appellant engaged in a pattern of conduct in which he knowingly caused the victim to believe that he would cause her physical harm or mental distress. Further, the state presented sufficient evidence to demonstrate that, notwithstanding the allegedly tainted "surrounding facts" evidence, appellant was (1) previously convicted of menacing by stalking and (2) convicted of domestic violence against the victim. As such, criteria necessary for the statutory enhancements were present notwithstanding the "surrounding facts" evidence to which appellant assigns error. **[**17]**

[*P45] Moreover, the lower court provided the requisite limiting jury instruction to caution the jury regarding the purpose for which the past acts were admitted. Even if the evidence to which appellant assigns error were inadmissible, any error resulting therefrom was harmless. Appellant's second assignment of error lacks merit.

[*P46] Under his third assignment of error, appellant contends that the trial court erred by overruling his motion to dismiss because R.C. 2903.211 runs afoul of substantive due process as guaranteed by the constitution. Under this assignment, appellant makes several arguments.

[*P47] First, appellant claims that the menacing by stalking statute violates principles of substantive due process when subjected to both strict scrutiny as well as rational basis review.

HN14 **[*P48]** Generally, substantive due process applies to regulations affecting fundamental rights; strict scrutiny applies to laws which burden the exercise of fundamental rights, e.g., the right to vote, the right to travel, the various first amendment rights, and the penumbra rights to privacy, which include the right to direct the upbringing and education **[**18]** of one's children. Lewis v. Lewis (Jan. 31, 2001), 7th Dist. No. 99-JE-6, 2001 Ohio 3167, 2001 Ohio App. LEXIS 381, at *23, citing, Pierce v. Society of Sisters (1925), 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571. In the current matter, appellant contends that the right to direct the upbringing and education of his children includes the right to correspond with them. Therefore, appellant argues that R.C. 2903.211 violates principles of substantive due process by infringing upon his fundamental rights to correspond with his children.

[*P49] At the outset, we must note that **HN15** all legislative enactments must be afforded a strong presumption of constitutionality. State v. Collier (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552. That said, **HN16** all statutes are subject to at least rational basis review which requires that a statutory classification be rationally related to a legitimate government purpose. State v. Thompson, 95 Ohio St. 3d 264, 2002 Ohio 2124, at P26, 767 N.E.2d 251. However, when addressing the alleged violation of a fundamental right, we must examine the law with strict scrutiny. To survive strict scrutiny, a restriction **[**19]** must be necessary to serve a compelling government interest. Appellant alleges that R.C. 2903.211 fails both tests.

[*P50] Although appellant **HN17** does have a fundamental right to educate and assist in the upbringing of his children, n3 it is unclear how appellant's correspondence implicates the exercise of this right. While various letters were addressed to appellant's daughters, neither daughter was able to read at the time the letters were sent. n4 It is evident from the record that appellant's lengthy letters, replete with bizarre, sententious ramblings, were not sent to his children to educate them or assist them in their upbringing. Moreover, appellant was not prosecuted for attempting to educate or rear his children nor was he prosecuted for merely corresponding with his children. Rather, appellant was prosecuted for knowingly engaging in a patter of conduct that caused Vicky Robertson to believe that he would cause her physical harm or mental distress.

----- Footnotes -----

n3 Moreover, we would be remiss to conclude that the right to educate and assist in the upbringing of one's children does not implicate a right to communicate and/or correspond with these children. **[**20]**

n4 The record reflects that appellant has two daughters: Mariah and Cortney. Although some letters were sent to Mariah, she could only read certain words and, the record indicates that she was unable to read the multi-page letters that appellant sent. Moreover, Cortney is severely handicapped. As such, she was unable to read.

----- End Footnotes-----

~~HN18~~ **[*P51]** For strict scrutiny to apply a party must demonstrate that the statute in question violated a fundamental right. To the extent that appellant has failed to assert a violation of his fundamental rights to educate, rear, or otherwise correspond with his children, we need not address the constitutionality of R.C. 2903.211 under strict scrutiny review. However, appellant contends that even if strict scrutiny does not apply, R.C. 2903.211 fails rational basis review. We disagree.

[*P52] Appellant states that R.C. 2903.211, "is unreasonable in that it interferes in the rights of individuals to have a say in child rearing and allows for arbitrary prosecutions." However, this claim **[**21]** does not demonstrate that the statute fails to have a rational basis. In fact, as we indicated above, the statute as written and applied does not implicate the right on which appellant bases his assignment of error. As such, appellant fails to demonstrate the statute is not rationally related to a legitimate state interest. n5

----- Footnotes -----

n5 However, were we to perform the analysis, R.C. 2903.211 ~~HN19~~ has a rational basis. On its face, the governmental interest being served by R.C. 2903.211 is protecting society from individuals who knowingly cause another person to believe that the offender will cause him or her physical harm or mental distress. Such a purpose is a legitimate exercise of the state's police power and the statute, as drafted, bears a rational relationship to this interest.

----- End Footnotes-----

[*P53] Appellant further argues that ~~HN20~~ the definition of mental distress set forth in R.C. 2903.211 requires a lower standard of proof than that of the corresponding **[**22]** civil standard for intentional infliction of emotional distress thereby violating his right to due process. Appellant's argument is misplaced. To be sure, the general assembly has defined both concepts differently; however, irrespective of the concepts' definition, the state has the burden of proving, beyond a reasonable doubt, the existence of mental distress in a criminal matter. Such a burden is significantly higher than the quantum of proof assigned to a civil plaintiff, i.e., the burden of proving, by a preponderance of the evidence, intentional infliction of emotional distress. Although the concepts are defined differently, the burden of proof in a criminal case is higher than that of a civil case. Thus, appellant has suffered no due process violation.

[*P54] Next, appellant argues that R.C. 2903.211 is unconstitutionally overbroad and vague. ^{HN21} To be unconstitutional, a statute's over breadth must be "substantial" and must appear on the face of the statute. City of Logan v. Russell (June 29, 2000), 4th Dist. No. 99CA7, 2000 Ohio App. LEXIS 3068, at *9, citing Akron v. Rowland (1993), 67 Ohio St.3d 374, 1993 Ohio 222, 618 N.E.2d 138. However, with **[**23]** respect to the argument that R.C. 2903.211 is overbroad, we note that the over breadth doctrine has no application to criminal statutes outside the first amendment. State v. Jones, 11th Dist. No. 2002-T-0084, 2003 Ohio 2920 at P14, citing, State v. Mundy (1994), 99 Ohio App.3d 275, 290, 650 N.E.2d 502. No First Amendment issue has been raised in the context of the current matter.

[*P55] Moreover, in State v. Benner (1994), 96 Ohio App.3d 327, 644 N.E.2d 1130, the First District Court of Appeals held that ^{HN22} the conduct referred to by R.C. 2903.211 is not protected by the First Amendment. That is, R.C. 2903.211 is not, on its face:

[*P56] "so vague and indefinite, in form and as interpreted as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech, such that a facial challenge could be brought on the basis that the statute chills constitutionally protected conduct." Id., at 329. As such, the over breadth doctrine does not technically apply to the current matter.

[*P57] However, appellant **[**24]** argues that the over breadth doctrine may apply where the statute regulates conduct, rather than pure speech, where the over breadth is not only real, but substantial, judged in relation to the statute's plainly legitimate sweep. Appellant contends that the "history of violence" specification is accordingly overbroad because it fails to define, in a sufficiently narrow fashion, the phrases "history of violence" and "violent acts."

^{HN23} **[*P58]** Although the phrases "history of violence" and "violent acts" are not specifically defined, such phrases have an ordinary meaning that does not include benign, otherwise protected conduct such as corresponding with one's children. The conduct must be of a violent variety; such language is simple and easily understood. Therefore, the language of R.C. 2903.211 is not so broad as to sweep within its prohibitions what may not otherwise be constitutionally punished. Thus, appellant's challenge based upon R.C. 2903.211's over breadth is overruled.

[*P59] Alternatively, ^{HN24} an unconstitutionally vague statute is one which either forbids or requires the doing of an act in terms so vague that individuals **[**25]** of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Schwab (1997), 119 Ohio App.3d 463, 468, 695 N.E.2d 801. The vagueness doctrine requires a statute to give fair notice of offending conduct. State v. Dario (1995), 106 Ohio App.3d 232, 236, 665 N.E.2d 759. Moreover, in order to be declared unconstitutionally vague, the statute must lack explicit standards such that it permits arbitrary and discriminatory enforcement. Id., at 237.

[*P60] Appellant argues that, "the wording of the statute in question fails to inform a person of ordinary intelligence that sending letters to his children is criminal and is in fact a felony if the person has previously been convicted of Domestic Violence." [sic.] Again, appellant was not prosecuted for sending letters to his children; his children were unable to read at the time the letters were sent. As such, his former wife received and read letters, which could not be construed as an attempt to rear and educate appellant's children, and felt threatened by their content. Therefore, appellant was prosecuted for knowingly causing his wife to believe that he would cause her physical **[**26]** harm.

[*P61] Moreover, ^{HN25} a statute that is vague in some applications can be salvaged by a scienter requirement. Dario, supra, at 238. The level of intent required by a statute can

mitigate any perceived vagueness, both facial and as applied. R.C. 2903.211 ^{HN26} requires that the offender, "knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." "Knowingly" is one of the culpable mental states defined in R.C. 2901.22(B), which states: ^{HN27} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

^{HN28} [*P62] The scienter requirement vitiates any claim that the statute's purported vagueness could mislead a person of ordinary intelligence into misunderstanding what is prohibited. Viewing the statute in its entirety, we hold that a person of ordinary intelligence would be able to discern what conduct is prohibited. The statute, criminalizes ^{**27} conduct only when taken with the requisite mental state. *Dario, supra*, at 239. Moreover, the statute sets forth sufficient guidelines for its enforcement. Therefore, R.C. 2903.211 is not void for vagueness. Appellant's third assignment of error is without merit.

[*P63] In his fourth assignment of error, appellant asserts that the trial court erred when it granted the state's motion in limine seeking to exclude the testimony of Dr. Fabian, the court's psychological expert, regarding appellant's mental capacity at the time of the offense.

^{HN29} [*P64] Generally, the denial of a motion in limine rests within the sound discretion of the trial court. *In re Funk*, 11th Dist. Nos. 2002-P-0035 and 2002-P-0036, 2002 Ohio 4958, at P20. As a result, this court shall not disturb the trial court's ruling unless there has been an abuse of discretion. *Id.* at P20. An abuse of discretion connotes more than a mere error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P65] Initially, appellant ^{**28} filed a not guilty by reason of insanity defense, but withdrew the defense prior to trial. Consequently, the lower court ruled that appellant was prohibited from presenting testimony regarding his mental capacity at the time of the offense. However, the court did permit Dr. Fabian to explain what manic and bipolar disorders are and that appellant was diagnosed with these disorders.

[*P66] Appellant argues that Dr. Fabian's testimony would have aided the jury in making its determination regarding appellant's state of mind at the time of the crime. Further, appellant contends, pursuant to Evid.R. 704, that Dr. Fabian's testimony was admissible even though it addressed part of the ultimate issue; namely appellant's mental state at the time of the offense. Appellant also contends that failing to permit Dr. Fabian's testimony stripped him of his right to present a defense and thus, precluded his trial counsel from rendering effective assistance. We disagree.

[*P67] In *State v. Wilcox* (1982), 70 Ohio St.2d 182, 436 N.E.2d 523, ^{HN30} the Supreme Court of Ohio held that, "[a] defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that the ^{**29} defendant lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime." *Id.* at paragraph two of the syllabus. In so holding, the court concluded that the partial defense of diminished capacity is not recognized in Ohio.

[*P68] The insanity defense was relatively liberal at the time *Wilcox* was decided. ⁿ⁶ However, in 1990, the legislature codified a more conservative standard. ⁿ⁷ ^{HN31} In rejecting the defense of diminished capacity, the *Wilcox* court stated, "the diminished capacity defense does serve to ameliorate the limitations of the traditional *M'Naghten*, right from wrong test for insanity."

APPENDIX F

expenses of the deceased spouse. This division does not preclude a surviving spouse from assuming by contract the obligation to pay for the funeral expenses of the deceased spouse.

(1997 H 352, eff. 1-1-98; 1996 H 538, eff. 1-1-97; 1992 S 10, eff. 7-15-92; 1990 S 3, H 346; 1973 S 1; 1953 H 1; GC 8002-3; Source—GC 7997)

Uncodified Law

1990 H 346, § 3, eff. 5-31-90, reads, in part:

(A) Sections 1 and 2 of this act shall apply only to the estates of decedents who die on or after the effective date of this act.

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 124 v S 65

Amendment Note: 1997 H 352 inserted or a court-issued child support order provides that the duty of support continues beyond the age of majority" and added

the second sentence in division (B); and made changes to reflect gender neutral language.

Amendment Note: 1996 H 538 substituted "1109.75" for "1107.33" in division (E).

Comparative Laws

Fla.—West's F.S.A. § 61.13.
Ill.—ILCS 750 16/1 et seq.

La.—LSA-R.S. 14:74; LSA-C.C. art. 123.
N.Y.—McKinney's Family Court Act § 411 et seq.

Cross References

Age of majority, 3109.01
Assignment for benefit of creditors by husband not to include property of wife, 1313.17
Child support in divorce, dissolution of marriage, legal separation, or child support proceeding, 3109.05
Dissolution of marriage, release from obligations, 3105.10
Failure to support minor, consent to adoption not required, 3107.07
Grounds for legal separation, 3105.17
Minor can consent to diagnosis and treatment of drug-related condition, parents not liable for payment unless consent, 3719.012

"Neglected child," defined, 2151.03
Nonsupport of dependents, 2919.21
One spouse contracting for improvement to other's land deemed other's agent, when, 1311.10
Parents to support child committed by juvenile court, 2151.36
Payment of support, enforcement procedures, 3113.21
Reciprocal enforcement of support, Ch 3115
Small loans; assignment of personal earnings by married person, 1321.31
Small loans; assignment or order of wages for support, 1321.32, 1321.33

Ohio Administrative Code References

Department of job and family services, child support program, OAC Ch 5101:1-29

Department of job and family services, collection of past due support by federal tax refund offset, OAC Ch 5101:1-30

Library References

Adoption C=20.
Children Out-Of-Wedlock C=21, 67.
Husband and Wife C=4, 19(16), 282 to 284.
Parent and Child C=3.1(12), 3.1(13).
WESTLAW Topic Nos. 17, 76H, 205, 285.
C.J.S. Adoption of Persons §§ 134 to 139.
C.J.S. Children Out-of-Wedlock §§ 40 to 43, 122 to 126.
C.J.S. Husband and Wife §§ 48, 54, 238 to 240.
C.J.S. Parent and Child §§ 14, 49, 70, 71.
OJur 3d: 45, Family Law § 61; 47, Family Law § 999, 1018, 1023, 1024, 1027, 1034, 1035
Am Jur 2d: 41, Husband and Wife § 8, 329 et seq.; 59, Parent and Child § 50 et seq.
Parent's obligation to support adult child. 1 ALR2d 910
Construction and application of state statutes providing for reciprocal enforcement of duty to support dependents. 42 ALR2d 768
Parent's obligation to support unmarried minor child who refuses to live with parent. 98 ALR3d 334
Responsibility of noncustodial divorced parent to pay for, or contribute to, cost of child's college education. 99 ALR3d 322

Wife's liability for necessities furnished husband. 11 ALR4th 1160
Necessity, in action against husband for necessities furnished wife, of proving husband's failure to provide necessities. 19 ALR4th 432
Modern status of rule that husband is primarily or solely liable for necessities furnished wife. 20 ALR4th 196
Postsecondary education as within nondivorced parent's child-support obligation. 42 ALR4th 819
Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy. 2 ALR5th 337
Baldwin's Ohio Legislative Service, 1990 Laws of Ohio, H 346—LSC Analysis, p 5-87
Carlin, Baldwin's Ohio Practice, *Merrick-Rippner Probate Law* § 19A, 21.79, 89.9, 89.18, 98.31, 108.3, 108.34 (1997)
Klein & Darling, Baldwin's Ohio Practice, *Civil Practice* § 5 (1997)
Sowald & Morganstern, Baldwin's Ohio Practice, *Domestic Relations Law* § 1.7, 3.26, 3.55, 4.1, 4.3, 4.4, 4.5, 4.6