ORIGINAL

IN THE SUPREME COURT OF OHIO

BETH MILLER (nka BETH KNECE),	:	Case No. 11-1172
Appellant/Cross-Appellee,	:	Appeal and Cross-Appeal from the Delaware County Court of Appeals, Fifth Appellate District (Case No. 10 CAF 09 0074)
v.	:	
NORMAN MILLER,	:	
Defendant;	:	
REBECCA S. NELSON-MILLER, Administrator of the Estate of Norman Leslie Miller,	:	
Appellee/Cross-Appellant.	:	

COMBINED MEMORANDUM IN RESPONSE AND MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEE/CROSS-APPELLANT REBECCA S. NELSON-MILLER, AS ADMINISTRATOR OF THE ESTATE OF NORMAN LESLIE MILLER

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The appeal of Appellant Beth Miller (nka Beth Knece) ("Beth") does not present this Court with any issue worthy of discretionary jurisdiction. The court of appeals below declared the final divorce decree of Beth and Norman Miller ("Norman"), which was entered pursuant to an agreed judgment entry, null and void nearly six years after it was entered. Beth persuaded the court of appeals that because the trial court judge did not personally sign the final divorce decree—the judge instead authorized the magistrate to sign the judge's name to all judgment entries that were agreed to and approved by the parties—the judgment entry that granted the Millers their divorce was never effective. In other words, according to the court of appeals' ruling, the Millers never were divorced.

Not content with the relief she received, Beth asks this Court to accept her discretionary appeal and modify the court of appeals' judgment. She wants the court of appeals' judgment upheld to the extent that it declared the parties' final divorce decree invalid, but she seeks the additional relief of having the entire divorce action dismissed because Norman has died. (Appellant's Memorandum In Support of Jurisdiction, at 9.) Her appeal to this Court, however, presents no issue of public or great general interest, much less a substantial constitutional question, for this Court to review.

The absence of an issue worthy of this Court's attention in Beth's appeal is reflected most acutely in the proposition of law she presents to the Court. Conspicuously, Beth's lone proposition of law sounds in error correction rather than a proposed rule of law, making clear that all she seeks is this Court's reversal of the court of appeals' judgment for a purported "abuse of discretion." Unlike the propositions of law presented in the cross-appeal (discussed later in this memorandum), Beth's proposition of law is nothing but a poorly-disguised assignment of

error and hardly a matter deserving of this Court's attention. See S.Ct.Prac.R. 6.2(B)(4) (noting that a proposition of law should be able to "serve as a syllabus for the case if appellant prevails"); see, also, *Drake v. Bucher* (1966), 5 Ohio St.2d 37, 39.

There is another reason that Beth's appeal is not worthy of this Court's consideration. Her claimed entitlement to have the underlying divorce case "abated" in its entirety due to Norman's death presents an issue that is unripe for review. Though she claims an "abuse of discretion" on the part of the court of appeals, Beth *did not* ask the court of appeals to abate the underlying divorce case as part of the relief she sought. The Appellant's brief in the court of appeals raised four assignments of error, none of which mentioned or had anything to do with the theory that the underlying divorce case should be abated automatically following Norman's death. The appeal below was focused solely on the issue of whether Beth was entitled to relief from a divorce judgment. Thus, Appellant is asking this Court to "review" a determination that has not yet been made.

Indeed, Beth seems mindful of the fact that the lower courts have yet to pass upon the issue she presents in her appeal. Since the court of appeals' judgment in this case, Beth has moved the trial court to dismiss the divorce complaint altogether due to Mr. Miller's death. She has also filed a notice of appeal from the trial court's judgment entry on remand, in which the trial court entered a divorce judgment "retroactive" to October 2005 in an effort to reinstate the agreed divorce decree that the court of appeals vacated in this case. Beth is therefore poised to raise the issue of Mr. Miller's death in the trial court and in the court of appeals. There is no need for this Court to prematurely address the issue raised in Beth's appeal when the lower courts have not yet done so.

The Appellant's appeal is not worthy of this Court's attention, as it is little more than an attempt to use this Court as a shortcut to relief that the lower courts have not yet decided whether to grant. While this Court should exercise jurisdiction over the cross-appeal, it should not accept Beth's appeal in this case.

THE CROSS-APPEAL PRESENTS A MATTER OF PUBLIC OR GREAT GENERAL INTEREST

In contrast to the Appellant's appeal in this case, the cross-appeal presents this Court with an issue truly of public or great general interest that is worthy of this Court's exercise of jurisdiction. Our society of laws relies on a foundational principle that judgment entries are final, enforceable, and effective. Litigants must be able to rely on the finality of a court's final judgment, particularly in cases where it was entered pursuant to a court-approved agreement of the parties and unchallenged for years thereafter. This principle is particularly robust in domestic relations cases, especially where litigants rely on divorce or dissolution decrees as the bases for remarrying, starting a "second" family, and structuring their financial and business affairs. A procedural formality or a legal technicality—here, a signature of the court that purportedly does not comply with Ohio Civil Rule 58(A)—should not stand in the way of that finality, especially when the procedural formality does not call into question the genuineness of the court's judgment or the fact that it was agreed to by the parties.

The cross-appeal here presents an important issue for this Court to resolve, as the Fifth District Court of Appeals has interpreted Civ.R. 58(A) in a manner that undermines the principle of finality. In this case, the trial court judge did not personally sign the final divorce decree; rather, it was signed on the trial judge's behalf by the magistrate assigned to the case. The judge had authorized the magistrate to sign the judge's name to all judgment entries that were agreed to

and approved by the parties. The court of appeals held that the signature was not proper and that the judgment entry that granted the Millers their divorce never went into effect.

This holding below has implications that reach far beyond the parties to the instant case. The decision of the court of appeals undermines and "undoes" thousands of judgment entries and what otherwise would be final orders across the state of Ohio. These potentially void orders affect dramatically, detrimentally, and immediately the lives of many Ohio citizens and their families. The ripple effects of this ruling by the court of appeals are immense and staggering. Previous litigants in domestic relations cases in Delaware County and across the state must now revisit the validity of judgments long believed to be final. Where those judgments are not final, the previous litigants are being subjected to difficult questions of how the suddenly-invalid judgments impact their day-to-day lives. This appeal presents a classic case of the "law of unintended consequences"—in this case, the law of unintended and bad consequences.

One need only look at the Millers' case to see the sort of chaos that erupts from the decision below. The court of appeals decided that the judgment granting the Millers a divorce—which was entered pursuant to an *agreed entry* of the Millers—was not a final order. So the court of appeals has determined that the Millers' marriage never ended and, therefore, their divorce case remained pending. The judgment, then, calls into question the subsequent marriages of both parties. And now, with Norman Miller having died, there is more and greater uncertainty with respect to his estate: for example, if the judgment of the Court of Appeals stands, who is the decedent's surviving spouse?[1]

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[1] This appeal is brought by Rebecca S. Nelson-Miller (Norman's second wife) as administrator of Norman Miller's estate. The court of appeals below issued a judgment entry substituting Rebecca Nelson-Miller for Norman Miller as a party to the appeal. (Judgment Entry, Dec. 29, 2010.)

These practical consequences of the decision by the court of appeals are of interest to more persons than the Millers. As the *Columbus Dispatch* reported after the court of appeals' decision, there were at least 700 divorces similar to this one where the judge authorized a magistrate to sign the final entry on his behalf when the judgment was rendered pursuant to an agreement of the parties. Ludlow, Judge Told to Sign 700 Entries His Aide Signed (June 9, 2011), Columbus *Dispatch* at B3. Almost certainly, this preliminary estimate is extremely conservative. In response to an inquiry from counsel, the Delaware County Common Pleas Court indicated that the number is closer to 4,400 (the number of final orders issued by Judge Krueger between January 1, 2001 and June 30, 2011), *including 2,932 orders ending marriages* by divorce or dissolution.

Yet, this troubling issue is not confined to just one county or even one appellate district. Courts of appeals in other districts have grappled with cases in which parties have sought to invalidate judgments based on the argument that the trial court did not comply with the signature requirement in Civ.R. 58(A). Less than two months ago, the Second District Court of Appeals decided a case challenging the validity of a judgment that contained a "rubber stamp" signature of the judge. *Lamb v. Lamb*, 2d Dist. App. Nos. 24076 and 23538, 2011-Ohio-2970. Significantly, the *Lamb* court came to a much different result than did the Fifth District Court of Appeals in this case.

There is an interdistrict conflict in the way that the courts of appeals have interpreted the effect of a court's failure to comply with Civ.R. 58(A). The Fifth District Court of Appeals in this case has held that there is no final judgment (in essence, the "judgment" is a nullity) when the trial judge did not personally sign it. In contrast, the Second District Court of Appeals has held that the trial judge's failure to sign the judgment renders the judgment *voidable* and does not

prevent the judgment from becoming final if no appeal is taken from it. See *Lamb* at ¶ 12; *Platt v. Lander* (May 7, 1991), 2d Dist. App. No. 12371, 1991 Ohio App. LEXIS 2117, at *4-*5. Thus, the court of appeals' holding in this case with respect to the effect of a trial court's noncompliance with the signature requirement in Civ.R. 58(A) conflicts directly with the holdings in *Platt* and *Lamb*. And it is not inconceivable that there are many more cases lurking throughout the state in which trial judges have not personally signed judgment entries.

This case presents this Court with an opportunity to address and remedy a critical situation that has undesirable consequences. There now are real-life examples of the practical and very serious problems created by the ruling of the court of appeals. The following is a sampling of the issues that attorneys in Delaware County already have faced in the wake of the unfortunate decision of the court of appeals in this case.

- **Subsequent Marriages:** If parties to a "void" divorce have remarried, such as the Millers in this case, are *those* marriages invalid or bigamous? If a party to a previous divorce judgment issued, as here, by Judge Krueger asks for a legal opinion regarding his ability to remarry, what opinion can the attorney give? Is it "safe" for that person to marry again without running the risk of having two spouses?

- **Property Distribution.** A party to a previous divorce judgment wins the lottery. If the judgment was not personally signed by the trial judge, is the ex-spouse entitled to half of the lottery winnings as a division of marital property?

- **The Surviving Spouse.** If a party to a "void" divorce has remarried and later dies before the divorce has been declared "void," who is that deceased spouse's surviving spouse? This question must be answered in the instant case. Is Cross-Appellant Rebecca Nelson-Miller (Norman Miller's second wife) or Appellant Beth Knece (Norman Miller's first wife) the

surviving spouse? Which spouse can elect against the will or claim the family allowance or live in the mansion house? If a party to a "void" divorce judgment dies, what is the effect on the person's estate? For example, does the deceased suddenly have a surviving spouse, notwithstanding the good-faith belief that there was a divorce? In this case, if Norman's second wife, as administrator of his estate, sells property of the estate, is she personally liable for liquidating assets to which Beth might have a claim?

- **Children.** A divorced woman remarries and has two children with her second husband. Are her children with her second husband considered to have been born out of wedlock? Were the child support orders applicable to her first husband valid and enforceable?

- **Legal Ethics.** What ethical obligations do domestic relations practitioners in Delaware County have to contact clients whose divorce entries might not be final?

- **Contempt.** Was a party who served jail time for contempt unconstitutionally imprisoned if the child or spousal support order that was violated was not personally signed by the judge? If a former spouse now chooses to violate visitation orders, can the spouse be found in contempt?

- **"Fixing" the Problems.** In the thousands of cases with apparently invalid final orders, can the court "fix" the problem with retroactive or nunc pro tunc entries? What notice would have to be given to the parties? Would hearings be required?

These questions are likely just the tip of the iceberg. The court of appeals' judgment below has implications that reach far beyond these parties by setting forth a rule of law that casts doubt upon the validity of hundreds, and possibly even thousands, of judgments that long ago were deemed final by the parties affected by them. This Court should accept this appeal to decide what the "signature" requirement in Civ.R. 58(A) means and to decide the legal effect of

a trial judge's approval of a judgment entry being signed on the judge's behalf in lieu of personally signing it.

STATEMENT OF THE CASE AND FACTS

In September 2004, Beth filed a complaint for divorce against Norman in Delaware County. Norman filed an answer and counterclaim, and the case was referred to a magistrate of the Delaware County Court of Common Pleas. Three months later, a document was filed with the trial court with both the handwritten title, "Memorandum of Agreement," and a typewritten title, "AGREED JUDGMENT ENTRY (DECREE OF DIVORCE)." The document was mostly typewritten, but it also contained numerous handwritten changes initialed by the parties. This document, complete with the handwritten revisions, was signed by the parties and their counsel.

The "Agreed Judgment Entry" also contains a signature line for the trial court judge assigned to the case. Above the signature line is a handwritten signature that legibly reads "Everett H. Krueger"; next to the signature is a slash and initials that read "LS." A Shared Parenting Plan and a child-support worksheet also were docketed on the same day and also contained the same signature.

In October 2005, nearly ten months after the "Agreed Judgment Entry" was filed, the trial court entered a document captioned "Judgment Entry Decree of Divorce." That judgment entry states in its entirety: "The Court, sua sponte hereby adopts and incorporates the document filed December 27, 2004 titled, 'Memorandum of Agreement' as an Agreed Judgment Entry (Decree of Divorce) as a final Journal Entry, Decree of Divorce." The Judgment Entry shows the same signature as the previously-entered "Agreed Judgment Entry": the signature reads "Everett H. Krueger" followed by a slash and initials appearing to be "LS."

After the decree of divorce, both Beth and Norman remarried. In 2007, after Norman moved to amend the shared parenting plan and recalculate child support, the parties once again reached an agreement and resolved post-decree issues by agreed judgment entries.

In 2009, Beth moved to vacate the "Judgment Entry Decree of Divorce" filed in October 2005 and to strike the "Agreed Judgment Entry (Decree of Divorce)" filed in December 2004. For the first time, Beth challenged the validity of the final decree on the basis that both the Agreed Judgment Entry and the final Decree of Divorce were signed by the magistrate on behalf of the trial court judge.

A magistrate (not the same magistrate who presided over the parties' divorce proceedings in 2004 and 2005) set Beth's motion for an evidentiary hearing. In advance of that hearing, Beth served a subpoena upon Judge Krueger to testify. Judge Krueger moved to quash the subpoena and, along with the motion, submitted an affidavit that spoke to the signatures on the Agreed Judgment Entry of Divorce and the final Decree of Divorce. Specifically, Judge Krueger stated in his affidavit that he expressly authorized Lianne Santellani-Sefcovic, the duly-appointed magistrate for all domestic relations cases, to sign his name to "to all judgment entries that were agreed to and approved by the parties."

Judge Krueger did not testify at the hearing on Beth's motions. The parties stipulated that the Agreed Judgment Entry, the Shared Parenting Agreement, the final Decree of Divorce, and the Agreed Judgment Entry all were signed with Judge Krueger's name by Magistrate Sefcovic. (Magistrate's Decision, Jan. 26, 2010, at 3.)

Following the evidentiary hearing, the magistrate issued a written decision overruling Beth's motion. The magistrate concluded that the contested entries complied with Civ.R. 53 and that it was within Judge Krueger's authority to delegate to the magistrate the duty of signing his

name to agreed judgment entries. Emphasizing the evidentiary fact that Judge Krueger authorized Magistrate Sefcovic to sign his name to the agreed judgment entries, the magistrate reasoned that Judge Krueger could validly delegate his duty to sign under these circumstances. (Id. at 11.) And even assuming that the signature was not authorized, the magistrate concluded that the Decree was "at most...voidable" and that Beth had "waived any defect in this decree by her own conduct; using the terms of the decree for her own individual purposes and benefit, and by failing to object to the defect even after she should have known." (Id.) Indeed, *both* parties relied on the entries for their own individual purposes—for example, both Beth and Norman remarried.

Beth filed objections to the Magistrate's Decision. The trial court overruled the objections and approved the Magistrate's Decision, adopting it as the entry of the court. (See Judgment Entry, Aug. 19, 2010.)

Beth appealed the trial court's judgment to the Fifth District Court of Appeals. Among other issues, she once again raised the validity of the final Decree of Divorce and the Agreed Judgment Entry, contending that they never were valid because Judge Krueger himself did not sign them. The court of appeals agreed with Beth and reversed the judgment of the trial court, holding that the Decree of Divorce was not a final, appealable order. 2011-Ohio-2649, at ¶ 43. Applying reasoning from a case in which it had found a "rubber stamp" signature invalid, the court of appeals observed that the judge personally "must sign the [judgment] entry" to render a valid judgment under Civ.R. 58 Id. at ¶ 36, citing *Flores v. Porter*, 5th Dist. App. No. 2006-CA-42, 2007-Ohio-481.

The court of appeals remanded the case to the trial court "for further proceedings to enter a Final Decree of Divorce so that [Beth] can proceed on her arguments based on the underlying

Memorandum of Agreement." Id. at ¶ 46. The court of appeals did not explain how the trial court could enter a final Decree that was validly retroactive to October 2005. Nonetheless, on remand, the trial court issued a judgment entry stating that the parties "are granted a divorce effective 10/14/2005 under the terms and conditions of the parties' own memorandum of agreement filed on December 27, 2004." (Judgment Entry, June 7, 2011). The judgment entry did not state that it was being issued nunc pro tunc. Since the trial court's entry purporting to grant a divorce retroactive to October 14, 2005, Beth has (1) filed a notice of appeal from that judgment entry and (2) moved the trial court to dismiss the divorce complaint altogether due to Norman's death.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITION OF LAW

Response to Appellant's Proposition of Law: When deciding an appeal that seeks to vacate a final decree of divorce, a court of appeals is not required to sua sponte consider whether the divorce action should abate due to the death of one of the parties.

The Appellant's appeal seeks to capitalize upon the court of appeals' holding that the divorce decree ending the marriage of Beth and Norman Miller was not a "final judgment" because it was not personally signed by the trial judge. The court of appeals below accepted Beth's argument that Civ.R. 58 required the trial judge's personal signature. The court of appeals found that the magistrate signing an agreed judgment entry of the parties on behalf of the trial judge (with the trial judge's authorization) did not create a final appealable order. 2011-Ohio-2649, at ¶ 42.

In light of its holding (the propriety of which is challenged in the cross-appeal), the court of appeals remanded the matter to the trial court "for further proceedings to enter a Final Decree of Divorce," which would then allow Beth to proceed on her arguments on the merits of her Civ.R. 60(B) motion to vacate that decree. Id. at ¶ 46. Unsatisfied with this ruling, Beth

contends that the court of appeals erred in remanding for this purpose. Instead of remanding the matter for the trial court to enter a final decree (i.e., by having the trial judge personally signing the judgment), Beth says that the court of appeals should have dismissed the divorce action entirely because Norman died in 2010. See *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 99 (reciting the general rule that a divorce action abates by operation of law if one of the parties dies before a final decree of divorce). Citing to authority for the proposition that divorce actions abate upon the death of one of the parties, Beth asks this Court to accept this case solely to correct the court of appeals' determination of what is to happen on remand. (Appellant's Memo., at 10-12.)

Beth's appeal rests on the premise that the court of appeals was correct to declare the final Divorce Decree, which was entered per an agreed judgment entry and which the parties relied upon as such for years, never to have been a final appealable order. But, even if that decision were correct (which the Cross-Appellant contends it is not), Beth's requested relief asks this Court to preemptively decide the abatement issue before the trial court and the court of appeals have had a chance to decide it in the first instance. There is no reason for this Court to usurp the jurisdiction of the lower courts simply because Beth disagrees with the scope of the remand ordered by the court of appeals.

Further solidifying the premature nature Beth's appeal is the fact that Beth did not raise the issue of abatement in the appeal below. Though she claims an "abuse of discretion" on the part of the court of appeals, Beth *did not* ask the court of appeals to declare the divorce action abated by operation of law. Despite the fact that Cross-Appellant Rebecca Miller successfully moved to substitute for Norman as a party below, Beth did not bring up the issue of abatement at all: her arguments focused exclusively on the issue of whether Beth was entitled to relief from a

divorce judgment. Not surprisingly, then, the court of appeals did not decide any issue with respect to whether the divorce action should be considered abated.

The Appellant wants this Court to decide that the court of appeals should have found the parties' divorce action abated. So, she is asking this Court to act as a reviewing court over a determination that has not yet been made. But this Court need not—and should not—address an argument that was not before the courts below. See, e.g., *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, at ¶ 3 fn. 2 (declining to address an argument that was not raised as an assignment of error in the court of appeals); *McKimm v. Ohio Elections Comm.* (2000), 89 Ohio St.3d 139, 149 fn. 3 (declining to address an argument raised for the first time in this Court). Unless and until the lower courts decide the issue, there is no reason for this Court to step in prematurely—particularly here, where there is a legitimate question and serious doubt whether the Appellant's major premise (i.e., that there was no final judgment of divorce) is correct. See Argument In Support of Cross-Appeal, *post* at 15-21.

The prematurity of Beth's appeal is also reflected by her own actions since the court of appeals' judgment in this case. Beth has moved the trial court to dismiss the divorce complaint altogether due to Norman's death. She has also filed a notice of appeal from the trial court's judgment entry on remand, in which the trial court entered a divorce judgment "retroactive" to October 2005, in an effort to reinstate the agreed divorce decree that the court of appeals vacated in this case. There is no need for this Court to prematurely address the issue raised in Beth's appeal when the lower courts have yet to decide it.

For the foregoing reasons, this Court should decline to accept jurisdiction over the Appellant's appeal.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW IN CROSS-APPEAL

Cross-Appeal Proposition of Law No. I: When a trial judge authorizes the magistrate to sign a judgment entry, the signature affixed by the magistrate on the judge's behalf satisfies the "signature" requirement in Civil Rule 58.

Ohio Civ. R. 58(A) provides that, when entering a judgment, "* * * the court shall promptly cause the judgment to be prepared and, *the court having signed it*, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal." (Emphasis added.) Thus, the Rule identifies the signature of "the court" as a prerequisite to the clerk of court entering a judgment into the court's journal.

Civ.R. 58(A) speaks only to the requirement that the court signs the judgment before it is entered by the clerk. As a textual matter, it does not speak to the way in which the court effectuates that signature requirement. In this case, the trial judge expressly authorized the magistrate to sign his name to judgment entries that were agreed to and approved by the parties. As the magistrate noted in the decision denying Beth's motion to vacate the final Decree of Divorce, "[a] duty can be delegated, and in this case the Judge delegated the duty of authorizing his signature on those documents not requiring any contest or independent adjudication." (Magistrate's Decision, Jan. 26, 2010.) Under circumstances such as these, where the trial court expressly authorizes a magistrate to affix the judge's signature to a judgment entry, Civ.R. 58(A) should be deemed satisfied.

The purpose of Civ.R. 58(A)'s signature requirement is to set forth "a clear and unequivocal indication in the record that the action is that of the judge." *Peters v. Arbaugh* (1976), 50 Ohio App.2d 30, 36 (Whiteside, J., concurring). A judge's signature affixed by the magistrate can provide that unequivocal indication. Where, as here, the trial judge expressly authorizes the magistrate to sign on his behalf, there is no lack of unequivocal indication that the action is that of the judge. See *King v. King* (1882), 38 Ohio St. 370, 371 (finding that the trial

judge's failure to sign the judgment entry did not affect the entry's validity when it was entered by direction of the judge).

This Court should grant jurisdiction in this matter to clarify the Civ.R. 58(A) signature requirement. It can determine whether the trial court may validly delegate the act of signing a judgment, pursuant to an agreed entry of the parties or otherwise.

> **<u>Cross-Appeal Proposition of Law No. II</u>: If the trial court fails to comply with the signature requirement of Civ. R. 58(A) by failing to personally sign the judgment entry, the resulting judgment is voidable, not void, and may be attacked only through a direct appeal. A party is estopped from collaterally attacking the validity of the judgment. (State ex rel. Lesher v. Kainrad (1981), 65 Ohio St.2d 68, followed and extended.)**

Even if this Court were not inclined to hold that a trial judge could validly delegate to a magistrate the duty to sign an agreed judgment entry, Cross-Appellant's second proposition of law posits a logical rule of Ohio law that is deserving of this Court's consideration. If the trial judge does not personally sign a judgment, it does not necessarily follow that the judgment should be declared "void," as if it had never happened. This is especially so in the context of an *agreed* judgment entry of the parties.

A. The Court of Appeals' Analysis Is Inconsistent With This Court's Precedent.

In *State ex rel. Lesher v. Kainrad* (1981), 65 Ohio St.2d 68, this Court was called upon to determine the validity of a divorce judgment that was entered out of compliance with Civ.R. 53. There, the referee did not prepare a report required by Civ.R. 53(E)(1); instead, the referee prepared a judgment entry, signed it, and obtained the trial judge's signature to effectuate the final judgment. Id. at 70. Neither party filed objections to the entry or filed a timely appeal from the judgment. Id. at 68.

Two years after the divorce judgment was entered, the wife moved to hold the husband in contempt for failure to pay back child support. After he was found in contempt, the husband

filed an action seeking writs of mandamus and prohibition against the trial judge and the magistrate. The husband's theory of relief was that all previous orders of the judge and referee, including the final judgment of divorce, "were null and void" due to the lack of compliance with, inter alia, Civ.R. 53 and 58.

This Court rejected the husband's theory. In doing so, this Court was cognizant of the effect of determining a judgment void: "[i]t is as though proceedings had never occurred; the judgment is a mere nullity." Id. at 71, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267. Despite recognizing that the referee and the trial court did not comply with Civ.R. 53's mandatory duties, this Court nonetheless declared that those failures rendered the judgment *voidable* and not *void*. Id. In other words, the husband *could have* voided the divorce judgment based upon the trial court's lack of compliance with Civ.R. 53, but his failure to pursue "appropriate remedies" in a timely fashion (*e.g.*, a direct appeal from the judgment) acted "as an estoppel" to his ability to do so. Id.

Not lost on this Court was the practical effect of a contrary ruling. By declaring the judgment "voidable" instead of "void," the Court avoided the public policy nightmare of "finding many alleged divorces complete nullities." Id. In other words, the Court recognized that the problem of Civ.R. 53 compliance was potentially widespread, such that multitudes of divorce judgments would have been placed in jeopardy if the Court had adopted a rule that rendered the *Lesher* judgment "void." See, also, *Christy v. Christy* (June 12, 1997), 4th Dist. App. No. 96CA902, 1997 Ohio App. LEXIS 2692, at *12 (applying *Lesher* to find a judgment voidable, and not void, when it failed to satisfy Civ.R. 54(A)).

This case presents a crisis similar to the one that this Court sought to avoid in *Lesher*. Though this case involves an alleged violation of Civ.R. 58 rather than Civ.R. 53, it nonetheless

implicates the same sort of issue that was at stake in *Lesher*. Cf. *Baldesari v. Baldesari*, 6th Dist. App. No. L-10-199, 2011-Ohio-2957, at ¶ 38 (finding consent judgment entry regarding child custody to be "voidable," not "void," despite noncompliance with Civ.R. 53 requirement that trial judge file a separate document adopting, rejecting, or modifying the magistrate's decision), citing *Lesher*. By declaring the Millers' divorce judgment null and void, the court of appeals has held that the Millers never were divorced. Worse yet, the same reasoning applied in this case effectively declares hundreds or thousands of divorces/dissolutions to be complete nullities, potentially throwing into chaos the lives of thousands of well-meaning couples who sought to terminate marriages by the laudable mechanism of agreed judgment entries.

B. The Court of Appeals' Judgment Underscores the Presence of a Conflict Among the Appellate Districts Regarding the Proper Interpretation of Civ.R. 58.

The deleterious consequences of the court of appeals' decision aside, there is another reason cutting in favor of this Court's acceptance of a discretionary appeal in this case. The analysis of the Fifth District is not followed by other courts of appeals in Ohio. In other cases, courts of appeals have found, under analogous circumstances, that judgments not personally signed by the trial judge are merely *voidable* and do not render the judgments void.

Besides the Fifth District, at least two other appellate districts in Ohio have dealt with the effect of the trial court's failure to comply with the signature requirement in Civ.R. 58(A). The Second Appellate District has spoken on the issue twice, both times in the context of a court's "rubber stamp" signature in lieu of the trial judge physically signing the judgment. Nearly two months ago, in *Lamb v. Lamb*, 2d Dist. App. Nos. 24076 and 23538, 2011-Ohio-2970, the Second District visited the issue in a context similar to the one in this case—a party seeking to vacate a divorce judgment several years later on the basis that the trial court judge had not signed it.

In *Lamb*, the parties' marriage was dissolved through entry of a dissolution decree and separation agreement. Id. at ¶ 3. Fourteen years later, the ex-wife invoked the domestic relations court's jurisdiction to determine her portion of the husband's pension benefits (pursuant to the parties' separation agreement) and obtained a ruling from the magistrate. Id. at ¶ 7. The former husband objected, but did not raise any issue regarding the validity of the original dissolution decree. Id. at ¶¶ 7-8. One year later, however (and nearly 17 years after the dissolution judgment), the former husband moved to vacate the decree, arguing for the first time that it was invalid and unenforceable because the court's judgment entry bore a "rubber stamp" of the judge's name in lieu of the judge's signature. Id. at ¶¶ 8-10 and fn. 2.[2] The domestic relations court denied his motion, finding (as the trial court did in the Millers' case) the decree to be valid and enforceable.

On appeal, the court of appeals agreed with the appellant that a rubber stamp was not a valid signature within the meaning of Civ.R. 58. Id. at ¶ 11; cf. *Rowe v. The Aetna Casualty & Surety Co.* (1941), 69 Ohio App. 291, 299-300 (finding that a "facsimile signature" of the probate judge did not render a judgment invalid). But the Second District did *not* hold that the original dissolution decree was a void judgment that never became final. Id. at ¶ 12. Relying in part on its own precedent in *Platt v. Lander* (May 7, 1991), 2d Dist. App. No. 12371, 1991 Ohio App. LEXIS 2117, the Second District held that the rubber stamp signature rendered the trial court's judgment merely *voidable*. Id. at ¶¶ 12-13. A *voidable* judgment—in contrast to a void one—becomes final when no appeal is taken from it. Id. at ¶ 13. And when no appeal is taken from it, a party becomes estopped from challenging the validity of the judgment. Id. See, also,

[2] Coincidentally, the party who made this argument was represented by the same counsel as the Appellant in this case. That party, through the same counsel, has filed a discretionary appeal in this Court. *Lamb v. Lamb*, Ohio Supreme Court Case No. 2011-1308 (filed Aug. 1, 2011).

Platt at * 4-5 (holding that a judgment containing a rubber stamp of the trial judge's signature was voidable, not void); *Brewer v. Gansheimer*, 11th Dist. App. No. 2001-A-45, 2001-Ohio-4305 (finding that even if the judge had not signed the judgment, that was not a valid basis to declare the judgment void).

Lamb, *Platt*, and *Brewer* show that the court of appeals' approach in this case is not the only one that can be faithful to Civ.R. 58 and orderly civil procedure. In particular, *Lamb* and *Platt* stand for the proposition that a "voidable rubber-stamped order becomes final when no appeal is taken." *Lamb* at ¶ 13, citing *Platt*. Equally importantly, *Lamb* heeds the foundational principle of finality of judgments, finding that a party is *estopped* from challenging the validity of a judgment based on the court's purported noncompliance with the signature requirement. Id. Indeed, in the instant case, the *Lamb* court likely would have found that Beth was estopped from raising an issue as to the magistrate signing for the trial judge because Beth (1) never appealed the Decree of Divorce, (2) had relied on it (*e.g.*, by getting remarried), and (3) had even failed to raise validity of the decree as an issue when Norman moved in 2007 to amend the parties' shared parenting plan and recalculate child support.

Admittedly, there are appellate districts that join the court of appeals below in holding that a rubber-stamped judgment entry is not a final appealable order. See, e.g., *In re Mitchell* (1994), 93 Ohio App.3d 153, 154 (Eighth District deciding effect of rubber stamp signature). By holding that the court's failure to personally sign the judgment under Civ.R. 58 means there was no final appealable judgment in the first instance, these courts effectively hold such judgments to be nullities (*i.e.*, void). But all these cases reflect is that there is a difference of opinion in how to treat judgments that do not strictly comply with the "signature" requirement of Civ.R. 58.

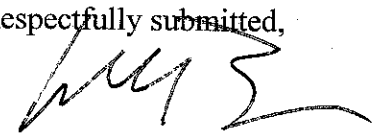
This case is worthy of jurisdiction to resolve this conflict among the appellate district and, in particular, to reconcile the Civ.R. 58 "signature" cases with this Court's holding in *State ex rel. Lesher*. While the trial judge's procedure for handling agreed entries in this case may not have been ideal, it is a needless disruption of finality to open such judgments to attack when such an issue should be raised, if at all, on a direct appeal. Indeed, the court of appeals' ruling in this case has spawned chaos from a judgment that both parties relied upon as final.

What was once a final Decree in divorce has now been tossed aside, resulting in multiple proceedings in the trial court and the court of appeals. There are now questions about who is Norman's surviving spouse, what the status of the divorce judgment is, and whether there can even be a divorce judgment in light of Norman's death. These issues are now on the table in the trial court and the court of appeals, all because the court of appeals has decided that a judgment entry entered pursuant to an agreement of the parties was never final—even though both parties fully intended it to be so. The chaos in this case could easily be replayed in other cases involving similar circumstances where a party seeks to vacate a judgment entry long thought to be final. This Court should accept this Cross-Appeal in order to determine whether this chaotic course of events is truly required by Ohio law.

CONCLUSION

For the reasons discussed above, the cross-appeal in this case implicates an issue of public and great general interest, as the court of appeals holding effectively declares void multitudes of divorces or dissolutions that were long ago deemed final. The Appellee/Cross-Appellant accordingly requests that this Court accept jurisdiction over the cross-appeal and decide the important issues presented.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that on August 5, 2011 a copy of the foregoing *Combined Memorandum In Response And Memorandum In Support Of Jurisdiction Appellee/Cross-Appellant Rebecca S. Nelson-Miller, As Administrator Of The Estate Of Norman Leslie Miller* was served via U.S. mail, postage pre-paid to the following:

Elizabeth N. Gaba, Esq.
1231 East Broad Street
Columbus, OH 43215

Vladimir P. Belo

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COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

32/272

BETH MILLER	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	Case No. 10 CAF 09 0074
NORMAN MILLER	:	
Defendant-Appellee	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Domestic Relations Division, Case No. 04DR A 09 434

JUDGMENT: REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FILED
2011 MAY 26 AM 10: 48
JAN ANTONOPLOS
CLERK

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Delaware, OH 43015

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rationale if the entry is combined with a decision or opinion; 4. *the judge's signature;* 5. a time stamp indicating the filing of the judgment with the clerk for journalization; and, 6. where applicable, a Civ.R. 54(B) determination and Civ.R. 54(B) language.' (Underlining added.) Id. at 109." Id. at ¶11-12.

{¶39} In *Peters v. Arbaugh*, (1976), 50 Ohio App.2d 30, 361 N.E.2d 531, the Tenth District Court of Appeals examined a judgment entry where the issue was whether a final, appealable order existed pursuant to Civ.R. 58. Judge Alba Whiteside wrote in his concurrence:

{¶40} "* * * Civ.R. 58 provides that '* * * the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. * * *' (Emphasis added.)

{¶41} "It is my view, as we originally held herein, that there can be no judgment unless and until it is signed by the court, that is by the judge personally. The affixing of the judge's name by some unknown person who then initials the 'signature' cannot meet the requirement by Civ.R. 58 that the court sign the judgment. The purpose of this requirement is obvious. There need be a clear and unequivocal indication in the record that the action is that of the judge. An initialed 'signature' does not furnish that degree of clarity and certainty that is required. This is especially true where the decision and judgment are contained in a single writing since there is no prior indication either orally in open court or by a writing of the court's decision with which the initialed signature judgment can be compared to ascertain whether or not the judgment truly constitutes the action of the judge."

{¶42} The January 26, 2010 Magistrate's Decision, in denying Appellant's Motion to Vacate and Strike, concluded that the trial court is permitted to delegate the duty of signing a judgment to the magistrate. Pursuant to the dictates of Civ.R. 53 and Civ.R. 58, we find this conclusion to be in error. A court may not supersede the Rules of Civil Procedure to give authority to a magistrate to sign the judge's name to a judgment. We further find that under the confines of Civ.R. 53 and Civ.R. 58, there is no differentiation between an "agreed judgment" and a "judgment." Therefore, in this case, the October 14, 2005 Judgment Entry Decree of Divorce is not a final, appealable order because it is not signed by the court pursuant to Civ.R. 58.

{¶43} We hereby sustain Appellant's first and second Assignments of Error that the trial court erred in finding that the October 14, 2005 Judgment Entry Decree of Divorce is a final, appealable judgment.

{¶44} We also note that the Magistrate's Decision also ruled upon the merits of Appellant's Civ.R. 60(B) motion to vacate the October 14, 2005 judgment based on Civ.R. 60(B)(4) and 60(B)(5). We find any conclusions on Appellant's Civ.R. 60(B) motion to be premature because (1) Appellant withdrew that motion on April 15, 2009 and it was not before the court and (2) there was no final judgment from which a Civ.R. 60(B) proceeding could rise.

{¶45} We find it unnecessary to address Appellant's remaining Assignments of Error based on our holding above.

{¶46} The August 19, 2010 decision of the Delaware County Court of Common Pleas, Domestic Relations Division is reversed and the matter is remanded to the trial

court for further proceedings to enter a Final Decree of Divorce so that Appellant can proceed on her arguments based on the underlying Memorandum of Agreement.

Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

Per Curiam

{¶1} Plaintiff-Appellant, Beth Miller (nka Knece), appeals the August 19, 2010 decision of the Delaware County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant and Defendant-Appellee, Norman Miller, were married on April 28, 1990. One child was born as issue of the marriage on September 9, 1990.

{¶3} On September 29, 2004, Appellant filed a complaint for divorce against Appellee. Appellee filed an answer and counterclaim. The matter proceeded before a magistrate of the Domestic Relations Division.

{¶4} The trial court docket shows the case was set for a settlement conference on December 21, 2004. On December 27, 2004, a document was filed with the trial court with the handwritten title, "Memorandum of Agreement." Underneath the words "Memorandum of Agreement" is a typewritten title, "AGREED JUDGMENT ENTRY (DECREE OF DIVORCE)." The body of the document is typed but it also contains handwritten interlineations initialed by the parties. The document is signed by the parties and the counsel for the parties. The document contains a signature line for the trial court judge assigned to the case. The signature line shows a signature of the "[trial court judge/initials of magistrate]". A Shared Parenting Plan and a guidelines worksheet were also docketed on December 27, 2004. That document also contains the same signature.

{¶5} On October 14, 2005, the trial court issued a *sua sponte* entry captioned "Judgment Entry Decree of Divorce." The judgment entry states:

{¶6} "The Court, sua sponte hereby adopts and incorporates the document filed December 27, 2004 titled, 'Memorandum of Agreement' as an Agreed Judgment Entry (Decree of Divorce) as a final Journal Entry, Decree of Divorce."

{¶7} The judgment entry contains the same signature.

{¶8} Since the divorce, both parties have remarried.

{¶9} In March 2007, Appellee moved to amend the shared parenting plan and recalculate child support. The parties resolved the issues by agreed entries in July 2007.

{¶10} On January 21, 2009, Appellant filed a motion for relief from the October 14, 2005 Judgment Entry Decree of Divorce and moved to vacate the December 27, 2004 Memorandum of Agreement, both pursuant to Civ.R. 60(B). Appellant argued in the motion that the trial court improperly adopted the Memorandum of Agreement without following the procedures of Civ.R. 53. Appellant further argued that the December 27, 2004 Memorandum of Agreement and the October 14, 2005 Judgment Entry Decree of Divorce should be vacated pursuant to Civ.R. 60(B)(4) and 60(B)(5).

{¶11} Appellee filed a Motion to Show Cause on April 7, 2009 for Appellant to show cause as to why she had not complied with a property division found in the Memorandum of Agreement.

{¶12} After a further review of the file, Appellant filed a "Motion to Vacate the 'Judgment Entry Decree of Divorce' and to Strike the 'Agreed Judgment Entry (Decree of Divorce)' for Cause Shown Herein", on April 10, 2009. The basis of Appellant's motion was that the December 27, 2004 Memorandum of Agreement and October 14, 2005 Judgment Entry Decree of Divorce were signed by the magistrate on behalf of the

trial court judge. Appellant argued in her motion that because the magistrate signed the October 14, 2005 Judgment Entry Decree of Divorce for the judge, the Decree of Divorce was a void judgment and was not a final, appealable order.

{¶13} The matter came on for hearing before a different magistrate on April 14, 2009. The issues before the magistrate were: (1) Appellee's motion to show cause, (2) Appellant's Civ.R. 60(B) motion, and (3) Appellant's motion to vacate and strike. At the hearing, Appellant withdrew her Civ.R. 60(B) motion without prejudice to re-filing and chose to proceed only on her motion to vacate and strike the December 27, 2004 and October 14, 2005 entries based on the signatures on the entries. The magistrate set Appellee's motion to show cause and Appellant's motion to vacate and strike for an evidentiary hearing on July 27, 2009. A Magistrate's Order memorializing these issues was filed on April 15, 2009.

{¶14} On July 20, 2009, Appellant served a subpoena upon the trial court judge to testify at the July 27, 2009 evidentiary hearing. The trial court judge filed a Motion to Quash the Subpoena. He also submitted an affidavit with the following statements:

{¶15} "* * *

{¶16} "[The magistrate] was duly appointed as Magistrate to conduct all Domestic Relations proceedings;

{¶17} "As Domestic Relations' Magistrate, she was given authority only to sign my name to all judgment entries that were agreed to and approved by the parties;

{¶18} "* * *"

{¶19} An evidentiary hearing was held before the magistrate on July 27, 2009 and a decision was issued on January 26, 2010. At issue before the magistrate was the

validity of the December 27, 2004 and October 14, 2005 entries and Appellee's motion to show cause. The magistrate reviewed the procedural history of the case and determined the Memorandum of Agreement and Judgment Entry Decree of Divorce were valid entries. He concluded that the contested entries complied with Civ.R. 53 and it was within the judge's authority to delegate the duty of signing his name to agreed judgment entries to the magistrate. Further, because the parties relied on the entries for their own individual purposes such as remarrying and that the case had been reopened in 2007 without issue as to the entries, the magistrate found that the parties waived any objection they may have to the validity of the entries.

{¶20} In the Magistrate's Decision, the magistrate went on to complete a Civ.R. 60(B) analysis of Appellant's original January 21, 2009 motion, although Appellant had withdrawn that motion. The magistrate denied Appellant's 60(B) motion. The magistrate also denied Appellee's motion to show cause.

{¶21} Appellant filed objections to the Magistrate's Decision. On August 19, 2010, the trial court approved the Magistrate's Decision and overruled Appellant's objections.

{¶22} It is from this decision Appellant now appeals.

ASSIGNMENTS OF ERROR

{¶23} Appellant raises four Assignments of Error:

{¶24} "I. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FINDING THAT THE JUDGMENT ENTRY WAS ENFORCEABLE BECAUSE THE ENTRY DID NOT ADHERE TO THE MANDATES OF CIV.R. 58.

{¶25} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FINDING THAT THE JUDGMENT ENTRY WAS ENFORCEABLE AND A FINAL APPEALABLE ORDER BECAUSE THE JUDGMENT ENTRY DID NOT ADHERE TO THE MANDATES OF CIV.R. 53.

{¶26} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY NOT DETERMINING THAT THE ALTERATION OF THE THEN-TITLED 'MEMORANDUM OF AGREEMENT' TO SAY 'AGREED JUDGMENT ENTRY DECREE OF DIVORCE' CAUSED THE MEMORANDUM TO NO LONGER EXIST IN THE COURT FILE, AND FURTHER BY NOT DETERMINING THAT THE NOW ALTERED DOCUMENT NEWLY CALLED 'AGREED JUDGMENT ENTRY (DECREE OF DIVORCE)' WAS NEVER FILED, AS IT WAS ABSENT FROM THE DOCKET OF THE COURT.

{¶27} "IV. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BECAUSE [THE JUDGE] SHOULD HAVE RECUSED HIMSELF FROM PRESIDING OVER THIS MATTER BECAUSE HE WAS CALLED AS A MATERIAL WITNESS TO TESTIFY ABOUT FACTS IN THE CASE, AND HE TESTIFIED BY AFFIDAVIT. IT WAS PLAIN ERROR FOR HIM TO RULE ON APPELLANT'S OBJECTIONS."

I., II.

{¶28} We consider Appellant's first and second Assignments of Error simultaneously because we find them to be dispositive of this appeal. Appellant argues that the trial court erred in adopting the Magistrate's Decision that found the October 14, 2005 Judgment Entry Decree of Divorce was a final, appealable order because the entry fails to comply with Civ.R. 53 and Civ.R. 58. We agree.

{¶29} At issue in this case is the October 14, 2005 Judgment Entry Decree of Divorce. The trial court judge attested that the magistrate was given authority to sign the judge's name to all judgment entries that were agreed to and approved by the parties. The underlying December 27, 2004 Memorandum of Agreement giving rise to the October 14, 2005 Judgment Entry Decree of Divorce was an agreed entry, signed by the parties and their counsel. On October 14, 2005, the trial court filed a *sua sponte* Decree of Divorce. A review of that entry shows that the magistrate signed the judge's name to the document and initialed the signature with her initials.

{¶30} The October 14, 2005 entry, as a Final Decree of Divorce, is a judgment because it terminates the case or controversy the parties have submitted to the trial court for resolution. *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 736 N.E.2d 101; *Aguirre v. Sandoval*, Stark App. No. 2010CA00001, 2010-Ohio-6006. Judgments that determine the merits of the case and make an end to it are generally final, appealable orders. *Harkai*, supra. There is no differentiation between an "agreed judgment" and "judgment" for purposes of finality. Appellate courts are given the jurisdiction to review the final orders or judgments of lower courts within their appellate districts. Section 3(B)(2), Article IV, Ohio Constitution. For a judgment to be final and appealable, however, it must satisfy not only the requirements of R.C. 2505.02, and if applicable, Civ. R. 54(B), but also Civ.R. 58. Civ.R. 58(A) states,

{¶31} "Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, * * *, the court shall promptly cause the judgment to be prepared and, *the court having signed it*, the clerk shall thereupon enter it upon the

journal. A judgment is effective only when entered by the clerk upon the journal." (Emphasis added.)

{¶32} At issue in the present case is whether the October 14, 2005 Judgment Entry Decree of Divorce complies with Civ.R. 58. Upon our review of the relevant case law and the rules of practice and procedure, we find it does not.

{¶33} "Where a matter is referred to a magistrate, the magistrate and the trial court must conduct the proceedings in conformity with the powers and procedures conferred by Civ.R. 53. 'Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court.'" *Yantek v. Coach Builders Limited, Inc.*, Hamilton App. No. C-060601, 2007-Ohio-5126, ¶9, citing *Quick v. Kwiatkowski*, Montgomery App. No. 18620, 2001-Ohio-1498, citing Sec. 5(B), Art. IV, Ohio Constitution.

{¶34} Civ.R. 53 does not permit magistrates to enter judgments. This is the function of the judge, not the magistrate. *Brown v. Cummins* (1997), 120 Ohio App.3d 554, 555, 698 N.E.2d 501; *In re K.K.*, Summit App. No. 22352, 2005-Ohio-3112, at ¶17; *Harkai v. Scherba Industries, Inc.* (2000), 136 Ohio App.3d 211, 217-218, 736 N.E.2d 101; *Kidd v. Higgins* (Mar. 29, 1996), Lake App. No. 95-L-112.

{¶35} The exercise of the magistrate's powers under Civ.R. 53 is intended only to "assist courts of record." *Yantek*, supra at ¶10. "A magistrate's oversight of an issue or issues, even an entire trial, is not a *substitute* for the [trial court's] judicial functions but only an *aid* to them.' '[E]ven where a jury is the factfinder [in a proceeding before a magistrate], the trial court remains as the ultimate determiner' of the case. It is the

primary duty of the trial court, and not the magistrate, to act as the judicial officer." Id. citing *Hartt v. Munobe*, 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617.

{¶36} One of the acts of the judicial officer is found in Civ.R. 58 where it states the court must sign the judgment. This Court examined Civ.R. 58 in an almost similar situation to the present case where a judgment entry was rubber-stamped with the trial judge's signature. In *Flores v. Porter*, Richland App. No. 2006-CA-42, 2007-Ohio-481, we found that the judge's rubber-stamped signature on a judgment entry did not comply with the requirement in Civ.R. 58 that the court must sign the entry, therefore rendering the entry not a final, appealable order. We cited to our brethren in the Twelfth District Court of Appeals in so holding:

{¶37} "The *Mitchell* court based its decision in part on the Twelfth District Court of Appeals case of *Brackmann Communications, Inc. v. Ritter* (1987), 38 Ohio App.3d 107, 526 N.E .2d 823, in which the court found that a judgment entry that was not signed by the trial judge was not a final appealable order. The *Brackmann* court stated:

{¶38} "'... simply because the amount in controversy is not large does not justify abandoning basic procedural formalities. Whether it be a county or common pleas court, a basic tenet of Ohio jurisprudence remains that a court speaks only through its journal ... Whether it be a county court or a common pleas court, the Ohio Rules of Civil Procedure, including Civ.R. 58, must be followed and obeyed where they are applicable.' *Id.* at 109. The *Brackmann* court thus held: 'In all civil cases appealed to this court, therefore, a formal final journal entry or order must be prepared which contains the following: 1. the case caption and number; 2. a designation as a decision or judgment entry or both; 3. a clear pronouncement of the court's judgment and its

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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

BETH MILLER	:	32/284
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
NORMAN MILLER	:	
Defendant-Appellee	:	Case No. 10 CAF 09 0074

For the reasons stated in our accompanying Opinion on file, the judgment of the Delaware County Court of Common Pleas, Domestic Relations Division is reversed and remanded. Costs assessed to be split equally between Appellant and Appellee.

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

HON. PATRICIA A. DELANEY

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DELAWARE COUNTY, OHIO
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IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BETH E. MILLER (NKA KNECE)

31/246

Plaintiff-Appellant,

-vs-

Case No. 10 CAF 09 0074

NORMAN MILLER,

Defendant-Appellee,

JUDGMENT ENTRY

Upon Motion of Rebecca S. Nelson-Miller, Administrator of the Estate of Norman Leslie Miller, she is hereby substituted as the Defendant-Appellee in this matter for Norman Miller.

Judge

APPROVED BY:

David J. Gordon (0031856)
Attorney for Defendant-Appellee

COURT OF APPEALS
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IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

BETH E. MILLER (nka KNECE), Plaintiff	)	JUDGE EVERETT H. KRUEGER
VS.	)	CASE NO. 04 DR A 09 434
	)	
	)	
NORMAN L. MILLER, Defendant	)	

JUDGMENT ENTRY
APPROVING THE MAGISTRATE'S DECISION OF JANUARY 26, 2010
OVERRULING PLAINTIFF'S OBJECTIONS

This matter comes on for consideration on the Magistrate's Decision filed on January 26, 2010. The court has independently reviewed the pleadings and arguments, and approves and adopts the Magistrate's Decision as ordered below.

Plaintiff filed her Objections on February 10, 2010. The transcript was filed on July 16, 2010 by Official Court Reporter Sylvia L. Mcelwain. The Magistrate's Decision filed on January 26, 2010 correctly outlines the procedural history before the Magistrate.

PLAINTIFF'S OBJECTIONS

Plaintiff's Objections Are Addressed As Follows:

Plaintiff filed Objections to the Magistrate's Findings and Conclusion of Law set forth in the Magistrate's Decision filed on January 26, 2010. However, the Objections have to do with the Magistrate Denying Plaintiff's Motion for Relief from Judgment Entry-Decree of Divorce filed October 14, 2005. Therefore, the Court will consider Plaintiff's Objection as one overall Objection.

-- FIRST OBJECTION: *Plaintiff objects to the Magistrate denying her Motion for Relief from Judgment Entry-Decree of Divorce filed October 14, 2005.*

Ohio Civil Rule 60(B) states: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable period of time, and for reasons (1),

EXHIBIT C

(2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

Plaintiff waited approximately 3 years and 3 months before she filed her Motion for Relief from Judgment Entry pursuant to Ohio Civil Rule 60 (B). Therefore, the length of time Plaintiff waited to file her 60(B) Motion prohibits her from pursuing remedies under Ohio Civil Rule 60(B) (1), (2) or (3).

Furthermore, Plaintiff failed to present sufficient probative evidence that a judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application. Finally, the Court finds based on the testimony that there is no other reason justifying relief from the judgment.

In order to prevail on a motion brought pursuant to Civ. R. 60(B) the movant must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ. R. 60(B)(1), (2) 0r (3), not more than one year after the judgment, order or proceedings was entered or taken. *Wooster Sheet Metal v. Lucak, et al(*2008-Ohio-3962; 2007 CA 326)(August 4, 2008).

If any prong of this requirement is not satisfied, relief shall be denied. *Argo Plastic Products Co. v. Cleveland (*1984), 15 Ohio St. 3d 389, 391.

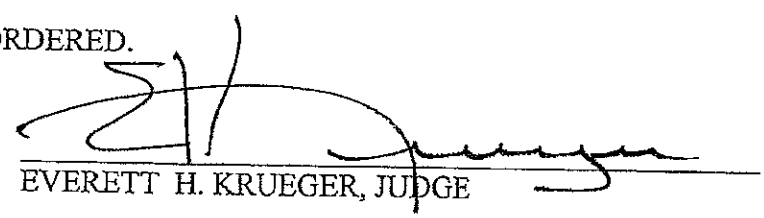
Plaintiff's objection to the Magistrate denying her Motion for Relief from Judgment Entry Decree of Divorce filed October 14, 2005 is not well taken.

Plaintiff's objection is overruled.

The Court adopts the Magistrate's Decision and incorporates the same in this Entry as the Judgment of this Court.

This is a Final Appealable Order and the Clerk is directed to notify the parties and counsel accordingly.

IT IS SO ORDERED.



EVERETT H. KRUEGER, JUDGE

CC: Parties
Elizabeth Gaba, Esq.
David Gordon, Esq.

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

Beth E. Miller Plaintiff VS. Norman L. Miller Defendant	)))))	JUDGE EVERETT H. KRUEGER CASE NO. 04 DR A 09 434 Magistrate David J. Laughlin

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MAGISTRATE'S DECISION

This matter came on for hearing on July 27, 2009 before the Magistrate. Present for the hearing was the Plaintiff nka Beth Knece, represented by attorney Elizabeth Gaba, and Defendant represented by attorney David Gordon. The matter was set for hearing based upon post decree motions set forth as follows :

- 4/7/2009 Motion to Show Cause-- filed by husband
- 4/10/2009 Motion "To Vacate the Judgment Entry Decree of Divorce and to Strike the Agreed Judgment Entry(Decree of Divorce) For Cause Shown Herein" –filed by wife
- 7/27/2009 Motion to Quash filed by the Hon. Everett H Krueger

The Magistrate makes the following findings of fact and conclusions of law:

The case was actually re-opened on January 21, 2009 with the filing by the Plaintiff of a Motion "For Relief From Judgment Entry- Decree of Divorce Filed October 14, 2005, Pursuant to Rule 60 (B), To Vacate the Incorporation of the Parties Memorandum of Agreement and to Vacate the terms of the Memorandum of Agreement. The 60(B) Motion was set for trial on April 14, 2009. On April 10, 2009 the Plaintiff filed a Motion to " Stay the Civ. R. 60(B) Motion For Cause Shown Herein". The Motion and memorandum speaks for itself.

The Magistrate indicated from the bench on April 14, 2009 that the Motion to Stay the Civ. R. 60(B) would be Overruled ("The Plaintiff cannot stay the prosecution of her original motion, so as to proceed under an alternative theory first."). The Plaintiff withdrew her 1/21/2009 Motion and "elected to proceed under her April 14, 2009 Motion. The Magistrate ruled that Plaintiff's 4/7/2009 Motion to Stay was then rendered moot by the withdrawal of the 60(B) Motion. The findings in the Magistrate's Order filed on April 15, 2009 are incorporated herein as if rewritten.

At issue is the validity of the underlying entries regarding the final divorce hearing I December 2004 and the filing of the Decree on October 14, 2005. . The Court Docket for this case indicates the following timeline :

The parties were married on April 28, 1990. Plaintiff's Complaint was filed on September 29, 2004. Plaintiff's counsel was John Gonzales. The parties have a daughter Marci, who was still a minor at the time of filing (d.o.b.9/9/90). The wife filed for a temporary order seeking to have the husband vacate the marital residence. The wife's affidavits were filed and/or

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attached to the motion, and she averred –in summation-- that husband drank and was verbally abusive and threatened her. Notably she "waited this long to file for a divorce so Marci could see for herself how he treated me and we both came up with the decision to divorce being in our best interests." Plaintiff's supplemental affidavit also makes averments as to the nature of the property down payment, the mortgage debt, and regarding the lack of a relationship between the father and daughter. The wife's financial affidavit was also filed, further outlining the existence of the nature of the mortgage encumbrance , the existence and value of various bank accounts and retirement assets.

The court did not Order the parties to separate. The Court instead, by Magistrate's order of September 30, 2004, set the case for a temporary orders hearing for November 10, 2009. The parties were ordered to mediate. The Court signed wife's restraining order regarding assets.

The husband was served on October 5, 2004. Husband filed his answer and counterclaim and affidavit on October 28, 2004. Husband also filed a proposed shared parenting plan. The Court signed husband's proposed restraining order effectively issuing reciprocal restraining orders on each party regarding property.

The parties agreed to temporary orders as indicated by the filings of 11/12/2004. Neither party moved to set aside the orders. The court set a settlement conference for 12/21/2004.

The file record does not show a specific procedural outline of that conference. The record does indicate that on 12/27/2004 a Memorandum of Agreement was filed and docketed. At the same time a Shared Parenting Decree, a Shared Parenting Plan and a guidelines worksheet was also docketed. The docket indicates that these were all filed together (Vol 304pgs 240-258 of the official record). This Magistrate also has the file record before the Court indicating the original documents. The Magistrate is able to view the original interlineations in the "memorandum of agreement" in the shared parenting plan, and the original signatures. It appears from the ink colors that most probably the black interlineations would have been written by Attorney Gonzales; the blue interlineations written by attorney Gordon. The interlineations are consistent with the "copies" proffered as the exhibits herein. The initials of the parties regarding each interlineation were in blue. Obviously one of the attorneys prepared the documents before the conference and proffered them for negotiation and approval. The interlineations as to the realty (Item I par.2 on page 3) and as to the financial and investment accounts (Item III par. 3 page 5) are noteworthy. These are the foundation of the underlying dispute before this magistrate.

The first page of the original document that is presently in the file is captioned in type similar to:

AGREED JUDGMENT ENTRY
(DECREE OF DIVORCE)

Directly above the words "Agreed Judgment Entry" the document contains a streak of WhiteOut covering up the words "Memorandum of Agreement" . The magistrate finds that the writing underneath the WhiteOut on the original is decipherable. (Moreover the evidence is clear that the parties have copies of that same front page *sans* the whiteout.) The document was time stamped as having been filed on December 27, 2004. The document is also signed under Judge Krueger's name by "proxy"(/s/or what appears to be "LS")--- what this magistrate now recognizes to be by former magistrate Lianne Sefcovic. The "Shared Parenting Decree" also bears a time stamp of 12/27/2004 . The signature lines of this document more readily indicate that the document bears the signature of Judge Krueger with the same "proxy" of a /s/ or /LS/.

The file record shows that on October 14, 2005 the Court issued an Entry, captioned "Judgment Entry Decree of Divorce" , *sua sponte.* The Entry provides that : "The Court sua sponte hereby adopts and incorporates the document filed December 27, 2004 titled "Memorandum of Agreement" as an Agreed Judgment Entry (Decree of Divorce) as a final Journal Entry, Decree of Divorce". The document is also signed under Judge Krueger's name by "proxy"(/s/or what appears to be "LS") The Entry shows that it was sent to both of the attorneys of record, and also directly to the parties.

There was no testimony or exhibit introduced at this instant hearing that gave any probative evidence or explanation to the circumstances of the change of the document . The wife subpoenaed the Delaware County Clerk of Court Jan Antonopolis, and subpoenaed the Hon Everett H Krueger. Judge Krueger filed an affidavit and motion to quash the subpoena.

The motion to Quash was granted by the magistrate. The Judge's affidavit remains in the record. Ms Antonopolis testified that she had no direct knowledge of any specific circumstances regarding an alteration to the document originally time stamped on December 27, 2004. She opined that based on the docket, the document in the file was changed after the original filing of docketing it in as a memorandum. She noted in her testimony that the *original* in the file clearly shows the existence of whiteout and the writing underneath was apparent. She feels her staff did not white out the term "Memorandum of Agreement" . She noted that the file is public record and literally anyone has access to the original. The docket does show and reflect a "Judgment Entry of Divorce."
Judge Krueger's affidavit states that he gave the authority and direction to Magistrate Sefcovic to sign Agreed entries on his behalf.

It is noted that the litigants stipulated that a)the 12/27/2004 "memorandum" / Agreed Judgment Entry of Divorce" ; b) the 12/27/2004 Shared Parenting Decree; c) the 10/14/2005 sua sponte order; and d) the 7/31/2007 Agreed Judgment Entry are all signed with Judge Krueger's name by proxy ; and they were signed by Lianne Sefcovic on his behalf.

As stated above, the Clerk and Judge Krueger were subpoenaed to testify regarding these circumstances; Lianne Sefcovic was not. The parties' stipulation established that she signed these . Judge Krueger's affidavit indicates that he gave permission and direction to do just that on "agreed matters". Other than these facts –especially without the testimony of the Magistrate that presided over each of these matters, the rest of the circumstances require this Magistrate to assume and speculate.

However the evidence before the Court now allows the drawing of a reasonable conclusion:

Each of these documents evidences in some form the litigants' agreements. (Wife argues that she did not agree to a Decree of Divorce however her signature and initials are affixed to the 12/27/2004 "agreement'. The law is so well settled that this magistrate need not recite the multitude of appellate precedent that establishes that in court memorandums and agreements are binding; the court having the power to journalize the terms without the subsequent "approval" of the parties on the decree itself) . the record shows the existence of the very agreement labeled as a memorandum but later signed as the "agreed entry". The record is devoid of any pleading before the court seeking to revoke the agreement(–present motion excepted).

The testimony and the document itself indicates that the litigants had some indication of the hearing on 12/21/2004 being a resolution of the case. Someone showed up with a proposed decree and a proposed shared parenting plan and decree **(it appears to be more likely from the nature of the writings and the significant differences in style from the husband's shared parenting plan that it was the wife who had the paperwork at hand (however, who it was bears only a little relevance).**
The present testimony from both parties –and also again a corroboration from the nature of the filed documents themselves—that indicated that the parties entered into significant and protracted negotiations on two floors of the courthouse- with the wife "upstairs"' and the husband "downstairs"(as the wife testified "we went back and forth and back and forth and back and forth…")

There were significant modifications made to the written terms, some written in blue (ostensibly by attorney Gordon) and some written in black, (ostensibly by attorney Gonzales). Eventually a full agreement was reached but because the terms of the negotiated agreement being so dissimilar to the typing, instead of proffering the "doctored up" document as their final Decree, the parties initialed each one of the changes and signed the documents.
The parties went before the magistrate, were placed under oath and testified as to the terms of the divorce and ,as husband testified before this magistrate, were *each* queried whether , "[you] agree to the document" and "agree on shared parenting." Each affirmed. Husband's recollection was that [they] "didn't say anything about her not making her Magistrate's Report at that time"

This magistrate notes that contrary to the assertion of wife's counsel, Civil Rule 53, does not necessarily mandate the requirement of the filing of a magistrate's decision in every case [CivR 53(D)(3)(a)(i)]. No one presented at trial the terms of the former magistrate's "relevant reference" that could have given her discretion by order *not to have to prepare and file a decision in a case such as this* having a written signed sworn/affirmed agreement and awaiting an Entry "cleaning up the messy memo" that would contain the waiver boilerplate, including that of the objection period as well.

Nor is there a requirement of having to always wait for a 14 day period – Different magistrates and different courts across the state utilize different procedures, especially with a proffered

memorandum of agreement and the promise or expectation of a prepared decree to be submitted by counsel often having the waiver language *in the decree* rather than requiring a separate waiver.

The "memorandum" stayed in the file from December 2004, until October 2005. There was no action on the part of the wife---or by the husband indicating any objection to or discontent with the to the proceedings before magistrate Sefcovic There is no evidence before this magistrate verifying which attorney was to complete the final paperwork in typed form , but the evidence appears uncontroverted that the court never received the "clean copy" of the document.

Judging by the time line of the next action on the file it can be assumed that the follow through on the file "slipped through the cracks' and was probably "caught" at the time of the annual physical inventory that takes place by 10/1/of each year. It was at this time—the next fall that the memorandum was signed by the magistrate as a Agreed Entry (pursuant to Judge Krueger's directive--- but not a new copy of the memo. The signing was the original Memo.)

There was testimony that, attorney Gordon did prepare the mortgage deed regarding the realty clause of the agreement, and the deed was signed by wife and recorded in the spring of 2005.

The file reflects that the parties entered into litigation in 2007 and used the "Decree" as the basis for modification. The magistrate also finds that both of the litigants believed in the validity of the decree—as long as that sought their individual purposes; to wit each used the "Memo/Decree" to request and obtain a marriage license and ultimately get re-married.

The wife testified on cross exam as part of husband's case in chief (husband's motion was first in time and he proceeded first at the hearing) that she did sign the memorandum of agreement and initialed it various places on the document. According to her testimony before this magistrate she stated she was under duress as "he threatened me." The magistrate finds that her testimony repeated this statement several times. There was no corroboration of any manifestation of the "duress" or fear. She repeated on several occasions that "I was scared to death because he was threatening me" There was no specific probative factual testimony as to what exactly the threats were and at what time they allegedly took place. She stated that she was coerced in obtaining her signature because of "living with [my] husband." The later testimony about the parties' separation and initial filings, as well as the testimony regarding the change of custody from her to the husband, is contradictory to the general statements she repeated.

She also testified that she gave away" the whole file to apply for her marriage license" so she did not have certain documents (including her copy of the Decree she used to get the license) . She received the license on August 6, 2007 and she stated that she saw the decree at that time. (this was also approximately during the time of the court litigation regarding the change of the parenting orders.)

She understood the terms of the 2004 memorandum as that she was required to pay $40,000 if she sold the farm and she does not understand the terms of the agreement. She stated that "no, my dad's not dead and I don't know if they want it before or after he's dead ." She stated that she does not have the money at the present time to pay under the terms of the decree. All of her money was used to pay the bills that she stated that the husband did not pay and she also used the money to take care of her daughter and to buy a vehicle.

Ms. Knece stated that she did sign the mortgage deed in March of 2005 but does not recall the document. When queried whether she was under duress at this time also, her answer was" if he is still around , yes." She stated that she signed the deed on March 23, 2005 and she believed she did so under duress then as well because "if I didn't, he'd do something." She does not remember where she signed it.

The issue of the divorce came up again in 2007. She does not remember much of that time and cannot remember the attorney's name that she employed at that time--- she thinks it may have been "Heald". She was also asked whether she was under duress when she entered into that Agreed Judgment Entry regarding the allocation of parental rights (also signed under the same directive) and she stated " I was not pleased,..... oh yeah! , I was ....because I was scared." She did state that the lawyer did not force her to sign the document, but she does not remember whether the attorney discussed the validity of the underlying divorce with her---- i.e. the signature of the Judge on the agreed entry.

On cross-examination the witness stated that as to her past-due mortgage bill she was "paying what's owed on it tomorrow" I have to bring it up current. She believes that the mortgage and her obligation to her former husband as outlines in the decree is unfair -- she got stuck with paying for everything and he just wants his money. She is currently employed at the Home Depot in Westerville.

Norman Miller testified on direct and on cross examination that the money for the purchase of the home that his former wife now resides in came from two sources $60,000 from her grandmother which was an inheritance and $70,000 from her father. He paid the house payments and he believed that there were improvements were made in the barn and paddocks ---- in fact there were 12 stalls and the parties boarded other horses besides their own.

Mr. Miller recalls the day of the negotiated agreement at the Courthouse. This was on December 21, 2004 where he was downstairs and Beth Knece was upstairs. He denies that there was any contact between the parties nor were any threats made to Ms. Knece. He admitted that there were guns in the house as stated by wife, but when he was served the guns went to a friend's house ;she moved all of his stuff out before he got home that day and the guns were part of the material that she sent to his friends house. He was served with the papers and he stayed at that friend's house during the course of the case.

Like Beth Knece, he got remarried subsequent to the divorce trial. It was his understanding that he and Beth were divorced on December 21, 2004. He did state that he understood that there was something said on the day of the hearing before the magistrate about a "14 day judgment" but he

can't recall the exact words. He did testify that he remembers going in front of the magistrate -- was put under oath--- and named his name and address and testified regarding agreeing to the documents and the shared parenting. The copy that is used as exhibit B herein was the same document he used to get his marriage license as well. The date of his marriage was October 31, 2008.

This witness is indicating that Ms. Knece has not paid the monies owed to him regarding the real estate under the two separate paragraphs of the decision. The first paragraph at issue is on page 3 at I(2) refers to $40,000. The second clause is on page 5 paragraph 3. The wife paid him the initial $10'000 and not the later due $40,000 .

He testified that they did have conversations after the divorce regarding the money and Ms. Knece told him that "you're not going to see any of the money." This was a couple of months after the divorce. After the divorce they also took their daughter to counseling together and it was Ms. Knece that also helped paint the apartment that he resided in

This witness denies threatening Ms. Knece to sign any of the documents, and he testified that he were in negotiations for at least two to three hours at the courthouse that day. By his testimony there were so many changes to the document it became a memorandum.

Beth Knece testified on direct examination regarding her motion (as the husband's motion being first in time cause the husband to proceed first) The witness expounded on her cross examination indicating that "every time that Mr. Miller threatened her with violence her daughter wasn't there."

The witness stated that by the time she filed for divorce she was scared and that the husband was drinking regularly. (Husband denies the connotation and indicated that they both drank beers in the barn regularly) At one point he grabbed her arm and told her he was "going to take it all including your daughter". This is when she filed. All the account money was "actually hers" (separate and not marital) but she thought putting his name on the accounts would "calm him down." She further explained her statement that she believes that she does not owe him any money because she was forced to refinance the house and that "the house was paid off which was marital that we both owed"; and she "paid off the fencing and the barn" and all into the marital debt that they owed. She was " stuck with everything in the barn which is on the credit cards mostly all the household debt".

On cross examination she did admit that she elected to pay off the mortgage (that provision was also placed into the agreement –page 3 paragraph I(3)) . The wife testified that she does not understand the terms of the agreement and they are unclear to her. The magistrate specifically asked the wife regarding the circumstances of the courthouse negotiations, and her testimony was consistent with the husband's, to wit; "we went back and forth and back and forth and signed them at the court..."

The magistrate finds that despite the testimony of the wife the terms of the agreement are clear. The valuation of the realty is clear and is in paragraph I(1) on page 2. The very next paragraph was extensively interlineated. The written words ----crossing out the typed words -----control. The clause states that " *wife shall sign a promissory note to husband for $40,000 due and payable when the property is sold or eight years from the date of this decree which ever is earlier. Husband shall have a security interest in wife's property for this amount . ... 3. The wife shall be liable on the mortgage and shall hold husband harmless thereon. Wife shall refinance the property within 12 months.* "

The second clause at issue is on page 5 under paragraph III (3). This clause is captioned "Financial and Investment Accounts"; was also interlineated, and provides that "3. *Wife shall pay to husband $10,000 within two days of the signing of the Final Divorce Decree. The wife shall pay the husband the sum of an additional $40,000 within 4 years of the divorce or sooner if wife receives more than $80,000 at the time of wife's receipt of such inheritance from her father's estate.* "

The clauses are unambiguous. It is clear that there are two separate obligations.
The first obligation deals with the realty. That clause requires the wife to remit the stated sum of $40,000 upon the date of October 14, 2013, or earlier on the sale of the property. (The Court speaks through its journal, and by simple mathematical calculation of eight years the due date is thus October 14, 2013) The wife participated in the negotiation of this clause and signed the deed. She also made efforts to follow the terms of the clause when it benefitted her, to wit the refinancing and obtaining more cash from the realty . She did not meet her burden to indicate that her signing of the deed was under duress.
The second obligation deals with the Financial and Investment Accounts. The wife paid the first $10,000. The clause also provides that the wife is responsible to pay to the husband the additional $40,000 "no later than four years from the date of the divorce or sooner if wife receives more than $80,000 at the time of wife's receipt of such inheritance from her father's estate."
The Court speaks through its journal, and by simple mathematical calculation the due date is thus October 14, 2009. The absence of a comma after "divorce' does not cause the clause to be ambiguous. Wife is simply subject to a second condition that could trigger her performance earlier than October 14, 2009—simply the death of her father and her receipt of an $80,000 inheritance.
Neither party established sufficient evidence that the wife's father died or that she received the sum of $80,000 as an inheritance from wife's father's estate. However, nor did wife provide evidence that this payment is somehow of such a nature that it is inequitable to be enforced under the totality of the property division.

While it is clear that, given the statements testified to by wife, the husband should not be expecting any future voluntary compliance, at the time of the motion to show cause and at the time of the trial (the only time frame that can be used) the wife had not yet violated the terms of the Decree of Divorce. Thus, the magistrate finds the Decree to be clear and unambiguous. (The magistrate further finds that at the time of the trial the defense of the wife of inability was not sustained.)

However, as aggravating as it would be to have to re-file, the husband's Motion to Show Cause fails as being premature as the time for performance was not proven to have passed.

The wife filed a Motion for Relief from Judgment based on a two prong argument. First, the Decree is not a valid judgment ----and is void. Second the wife is entitled to relief because she was under duress ----the "agreement' is not genuine.

The movant has the burden of proof to indicate that the prior judgment of this Court should be vacated or is no longer applicable pursuant to the specific enumerated reasons in Civil Rule 60(B)

A Civ R. 60(B) Motion pertains to the Court rendered final judgment and not the prior December 2004 decree/memorandum. One can only move for relief from a Judgment, not from a document that does not rise to the level of a final order. The Motion, therefore pertains to the Judgment of 10/14 2005 and the filing of the Motion on January 21, 2009 is not within the maximum period of time under any of the subsections ----except for reasons 4 or 5 .

Ohio Civ.Rule . 60(B) states:
"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.
The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation."

Recently the Fifth District Court of Appeals in *Wooster Sheet Metal v Lucak, et al* (2008-Ohio-3962; 2007 CA 326)(August 4, 2008) addressed the requirements to prevail under a 60(B) motion:
*In order to prevail on a motion brought pursuant to Civ.R. 60(B), " * * * the movant must demonstrate that (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceedings was entered or taken."* Argo Plastic

Products Co. v. Cleveland *(1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328, citing* GTE Automatic Electric v. ARC Industries *(1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. If any prong of this requirement is not satisfied, relief shall be denied. Argo at 391, 474 N.E.2d 328.*

Civ.R. 60(B) represents an attempt to "strike a proper balance between the conflicting principles that litigation must be brought to an end and justice should be done." (Wooster at par 18-19)

Regarding the requirements to prevail as indicated by the well settled law quoted above:

First, as stated above the Magistrate finds that the Motion was made more than three years from the date of the Decree The magistrate finds as a conclusion of law that the movant's Motion was not timely filed---- in calculating from the date of the Entry----- except under her argument that Civ R. 60 (B) (4) or (5) applies within the parameters contemplated in the rule as "within a reasonable time" . Thus the movant's arguments fail under reasons 1, 2, and 3 because of timeliness.

Movant first must satisfy the requirement that her underlying position would be meritorious under reason 4 or 5 should the court vacate the prior decree. The movant failed to provide sufficient probative evidence that the accounts and interests she spoke of were in fact separate—other than her testimony that living with the husband caused her such duress so as to establish the account as joint. This is not evidence indicating a separate property interest so as to show a patently one sided agreement.

Further the movant's position that the misconduct of the husband caused her to be under duress thereby skewing the property/debt division is also precluded by the time frame in the rule---even assuming that she had provided satisfactory and probative evidence to indicate duress. Her self serving statements do not rise to a level of probative evidence.

There is no evidence before the Court indicating that there was any newly discovered evidence or that that any of the Movant's evidence—or respondent's evidence for that matter--was unavailable for the hearing. The movant cannot bootstrap the argument of the signature on the original being a surprise. For all of the testimony regarding the genuineness of the signature or the altering of the document, the original has always been on record; the parties have always had the use of the certified copy provided by the Clerk (ostensibly with the signature on the last page) , and the parties---i.e. the movant in this case have had other opportunities to address the "issue" ,if it was one prior to this instant litigation. Movant failed to establish this ground.

The movant failed to prove the essential elements of fraud. The movant failed to timely exercise her opportunity to raise an objection to any irregularity in the hearing or in the signature on this reason. Moreover her own later testimony contradicts his assertion of fraud.

The Movant did not present any probative evidence that would cause the Court to vacate the Decree under reason number four. The movant failed to show that the decree was inequitable---particularly as she used the terms of the decree during this same course of time for her own individual interests and purposes. The believed she was divorced; and that the decree granted her the sole title to the realty. Only now as she is facing the enforcement of her duties under the decree , is the issue of duress and equitability being raised.

Finally, the movant is seeking to have the court grant the Motion under reason number 5, "any other reason justifying relief". There has been no testimony indicating the existence of any such reason in this case. Again, as stated above, there is insufficient evident to even determine that the movant has a meritorious ground if relief were granted.

First, the evidence indicates that the Judge specifically authorized the signatures—and directed them on this type of agreement/ decree. A duty can be delegated, and in this case the Judge delegated the duty of authorizing his signature on those documents not requiring any contest or independent adjudication. Even assuming *arguendo* that the signature was not authorized, the characterization by the movant of the decree being void is misplaced. The Decree at most, would be voidable ----- not automatically invalid, but subject to collateral attack by one or both of the parties.

At that time the court then looks at the conduct of the complaining party. Here, certainly the defect, as voidable, is *waivable* . In this case the movant has waived any defect in this decree by her own conduct ;using the terms of the decree for her own individual purposes and benefit, and by failing to object to the defect even after she should have known. The movant failed to prove that she did not have in front her, and at her disposal, the copy of the decree indicating the very signature that she now complains is insufficient.

The case law regarding this particular ground clearly outlines that the facts under this particular scenario and reason number 5 reason be compelling. Given the facts as set forth in evidence here---if any set of circumstances would constitute a waiver, these would. . The totality of the testimony clearly indicates that there is no particular equitable or legal cause to grant relief to the movant under Civ Rule 60 (B) .

The decree is enforceable; any defects in same having been waived by the litigants by their conduct.

Based upon the above the Magistrate's Decision is as follows:

A The Motion to Show Cause, filed by the husband on April 7, 2009 pertaining to the obligations in the decree maturing on October 14, 2009 is dismissed as premature.

B The Motion for Relief from Judgment filed by wife on January 21, 2009 is denied and dismissed.

C In all other resects all orders not modified herein remain in full force and effect.

D Each shall party his or her fees; Costs of the matter to be shared equally by the parties after the application of the deposits.

DATE

DAVID J. LAUGHLIN, MAGISTRATE

NOTICE

Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R.53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civil Rule 53(D)(3)(b).

CC: Elizabeth Gaba, Esq.
David Gordon, Esq.

This document sent to each attorney/party by:
- [x] ordinary mail
- [ ] fax
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- [ ] certified mail

Date: 1-26-10 **By:** sl

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO
DIVISION OF DOMESTIC RELATIONS

BETH E. MILLER	:	
Plaintiff,	:	Case No. 04DRA-09-434
-vs-	:	Judge Everett H. Krueger
NORMAN L. MILLER	:	Magistrate Lianne L. Sefcovic
Defendant.	:	

COMMON PLEAS COURT
DELAWARE COUNTY, OHIO
FILED
2004 DEC 27 AM 9: 59
JAN ANTONOPLOS
CLERK

Memorandum of Agreement

AGREED JUDGMENT ENTRY
(DECREE OF DIVORCE)

This 21st day of December 2004 this matter came to be heard upon the complaint of the Plaintiff seeking a divorce from the Defendant. The Court finds that service of the complaint and summons was made upon the Defendant and that service upon the Defendant of the complaint and summons was in compliance with the laws of the State of Ohio.

The Court finds that the Plaintiff at the time of the filing of the complaint for divorce had been a resident of the State of Ohio and the County of Delaware for more than six (6) months immediately preceding the filing of the complaint for divorce. The Court also finds that the Plaintiff and the Defendant were married on the 28th day of April 1990 and there is one (1) child born issue of this marriage, Marci, born September 9, 1990.

The Court further finds that the duration of the parties' marriage was from the 28th day of April 1990 until the 21st day of December 2004.

The Court further finds that upon the evidence adduced the Plaintiff and the Defendant are incompatible and that incompatibility has not been denied and by reason thereof the Plaintiff is entitled to a divorce from the Defendant as demanded in his complaint.

TERMINATION CODE 6

EXHIBIT
D

It is therefore, **ORDERED, ADJUDGED AND DECREED** that the marriage contract heretofore existing between the Plaintiff Beth E. Miller and the Defendant Norman L. Miller is hereby terminated and the Plaintiff and the Defendant are released from the obligations of their marriage contract.

The Court further finds that the Plaintiff and the Defendant have entered into an agreement, which forever settles and resolves all issues of spousal support, division of property, and all rights arising by reason of their marriage to each other. The Plaintiff and Defendant in entering into this agreement have done so only after consulting with their respective counsel and reviewing all of their rights and responsibilities arising from their marriage. The parties have each been advised by their respective Counsel regarding their understanding of the terms of the agreement, and the Court finds that each of the parties desires the terms of their agreement be adopted and made the Order of the Court.

The parties have each been advised by their respective Counsel and understand the terms of the agreement; the agreement is a fair division of the assets and liabilities of the parties, and, therefore, the Court adopts the agreement as the Order of the Court.

The Court further finds that the Plaintiff and Defendant have each been advised by their respective Counsel that they each have the right to have the Court value each item of property, whether that property be personal or real property, in order for the Court to arrive at an equal and/or equitable division of the property acquired by the parties during the duration of their marriage. The Plaintiff and Defendant having been advised of their right to a valuation of property and waive their right to have the Court value each and every item of property The Plaintiff and Defendant further acknowledge that the distribution of their property as set forth in

this decree of divorce, while if not precisely equal, is equitable and in accordance with their agreement.

The Court, having reviewed the agreement of the Plaintiff and the Defendant and their waiver of the valuation of property, adopts their agreement as the Order of this Court.

The Court having adopted the agreement of the parties as the Order of the Court makes the following Orders:

I. Real Property

1. The parties' own real property consisting of a house, garage, barn and approximately 30 acres located at 2882 S.R. 229, Delaware, Ohio 43003 with an appraised fair market value of approximately $300,000.00. The property is encumbered by a mortgage lien in the approximate amount of $132,000.00.

2. The parties agree that on the date of the signing of this decree the ~~property shall be divided with~~ Wife ~~having~~ shall have immediate possession and exclusive control of the property. ~~approximately 14.7 acres along with the house, garage, barn and small paddock~~. Husband shall ~~have immediate possession and control of the approximately 15 acres that are remaining~~. ~~The division of the property shall be as generally depicted in the attached exhibit A and more precisely divided pursuant to a survey and legal separation of the property~~. ~~The parties shall cooperate and share equally in the costs of such survey and legal division of the property~~. ~~Husband shall be entitled to use the stalls in the barn for as long as wife owns the property~~.

quit claim his interest to the property to wife w/30 days, wife shall sign a promissory note to Husband for $40,000 due and payable when the property is sold or 8 years from the date of this Decree, whichever is earlier. Husband shall have a ~~primary~~ security interest in wife's property for this amount. Husband's attorney shall prepare the quit claim deed and wife's atty shall prepare the promissory note.

NM BM

3. The ~~parties~~ Wife shall ~~remain jointly~~ liable on the mortgage ~~with the husband paying 40% of the monthly payment, $420.00 per month and wife paying 60% of the monthly payment, $628.00 per month, until paid in full~~. ~~Husband shall pay his portion directly to wife by the 15th of each month and wife shall send the payment to the mortgage company. Wife shall have a~~ and shall hold Husband harmless thereon. Wife shall be responsible for the property w/in 12 months or sooner.

security interest in an amount equal to the Husband's share of the outstanding balance of the mortgage in Husband's property until his share of the mortgage is paid in full. Either party shall have the right to pay off the entire mortgage balance, however, such payment shall not excuse the other party's obligation. Should either party pay off the mortgage, the other party shall be liable for the amount due for his/her share at the time the mortgage is paid in full and shall continue to make monthly payments to the party that has paid off the mortgage equal to the amount he/she was paying prior to the mortgage being paid off. Should either party be successful in court to enforce the other party's obligations under this provision, the court shall have full authority to enforce the obligations herein, including ordering the sale of either of the properties herein and shall award all costs of such action, including the award of reasonable attorney fees to the prevailing party.

II. Personal Property and Household Goods and Furnishings

1. Wife shall retain the 2000 Dodge Durango. Wife shall retain the Bison 2-Horse Trailer.

2. Husband shall retain the 2001 Dodge Ram Pick-Up. Husband shall retain the Corvette.

NM ~~Wife~~ Husband shall retain tractor, ~~tools~~, bush hog, post hole digger. ~~Wife may use these~~ Wife may use a prior items ~~with Husband's permission.~~ with Husband's permission

BM NM

4. Each party shall retain as their own property, their clothing, jewelry and items of personalty, free and clear of any claim of the other.

5. Though the parties have not conducted an inventory of their personal property, they have agreed in general as to the value and the division of their personal effects, household goods, furnishings and furniture, and neither party shall make any claim to any of the items remaining in

the other's possession or control as of the date of the final hearing. While this division of property may not be exactly equal, it is equitable and the parties waive further findings with regard to their property.

III. Financial and Investment Accounts

1. Wife shall retain, free and clear of any claim by Husband, all right title and interest in all checking accounts, savings accounts, retirement accounts including IRA accounts in her individual name.

2. All joint accounts shall be closed and the remaining funds, if any, divided between the parties.

2. Husband shall retain, free and clear of any claim by Wife, all right and interest in all remaining checking accounts, savings accounts, and retirement accounts including 401K in his individual name.

3. Wife shall pay to Husband $10,000 within ~~thirty~~ Two (2) days of the signing of the Final Divorce Decree. ~~Should~~ THE wife ~~receive money from her father's estate through an inheritance, Husband shall receive ½ of such money or $40,000 whichever is less, (In no event shall Husband~~ shall pay the husband the sum of $40,000.- within 4 years of the divorce or sooner if wife receives more than $40,000.00) at the time of Wife's receipt of such inheritance from her father's estate. to the husband an additional

NM
BM

IV. Spousal Support

Neither party shall pay spousal support to the other party. This provision shall be non-modifiable, and the Court does not retain subject matter jurisdiction over the matter of spousal support.

V. Debts of the Marriage

1. Wife shall assume the Equity Line of Credit and shall hold Husband harmless thereon.

2. Husband shall be responsible for his credit card(s) in his individual name.

3. Save and except for the debts referred to herein, each party warrants to the other that no other debts have been incurred by one party on the credit of the other; each party shall be responsible for debts incurred by him or her on or after the signing of this agreement; each party shall hold the other party harmless from any liability thereon. Neither party will henceforth incur any obligation or incur any indebtedness upon the credit of the other.

VII. Income Taxes

The parties will file ~~jointly~~ separate for 2004 income tax returns, and ~~any tax refund shall be equally divided between the parties~~ each will be liable for any tax debt in their own return and shall be entitled to any Refund associated with their own return. The husband RECEIVES deduction on interest on property for 2004. THEREAFTER WIFE'S. NM BM

However, in the event that any tax adjustments must hereafter be made for prior years' taxes incurred while married, the parties shall share equally in any such adjustment.

VIII. Attorney Fees and Expenses

The parties shall each be responsible for the payment of their separate legal expenses incurred in this action and neither party shall be responsible for the payment of legal fees to their spouse.

IX. Full Understanding And Full Disclosure.

Both parties warrant they have made full disclosure of all debts or liabilities incurred upon the obligation of the other.

Both Wife and Husband expressly certify that they have entered into this agreement upon mature consideration and that consent to the execution of this agreement has not been obtained

by duress, fraud or undue influence by any person; that this agreement represents the entire agreement and understanding of the parties and is entered into without reliance upon any representation of fact or intention by either party except as herein expressly set forth; that the rights and duties of neither party hereto shall be enlarged nor diminished by reason of his or her acquiescence in any failure of the other to comply with the terms of this agreement or by reason of the assumption by either of any responsibilities, duties or expenses not expressly imposed upon such parties by the terms herein. Each of the parties has fully disclosed to the other all assets, liabilities and sources of income that he has or she has.

Releases

Except as provided in this agreement, the parties do further release and relinquish each unto the other, his or her heirs, executors, administrators and assigns, any and all rights or claims by way of dower, inheritance and descent or otherwise, in and to any property, real or personal, earnings or gains which either now owns or may hereafter acquire, including claims to a distributive share of his or her personal estate now owned or hereafter required, and all right and claims as an heir, distributee, survivor or next of kin in and to the estate of the other party, and whether now owned or hereafter acquired, and all other rights and claims of any kind or nature arising out of said marriage relationship, whether the same were conferred by contract, by laws of the State of Ohio, any other state, or the United States, and which are now or which may hereafter be in effect.

It is further agreed by the parties that each hereby forever releases and discharges the other, his or her heirs, executors, administrators and assigns, from any and all claims, demands, liabilities, causes of action of every kind and description, save and except as provided by the terms of this agreement, and that neither shall hereafter have or hold any claims, demands or

causes of action whatsoever nature against the other, except the cause of action for dissolution of marriage or divorce and such others as are specifically provided herein.

Costs paid.

ALL UNTIL FURTHER ORDER OF THIS COURT.

APPROVED:

John M. Gonzales (0038664)
JOHN M. GONZALES, LLC
140 Commerce Park Drive
Westerville, Ohio 43082
Attorney for Plaintiff

Beth E. Miller, Plaintiff

David J. Gordon (0031856)
40 N. Sandusky Street, Suite 300
Delaware, Ohio 43015
Attorney for Defendant

Norman L. Miller, Defendant

Judge Krueger

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

COMMON PLEAS COURT
DELAWARE COUNTY OHIO
FILED
2005 OCT 14 AM 9:34
JAN ANTONOPLOS
CLERK

BETH E. MILLER,	:	
Plaintiff,	:	
Vs.	:	**Case No. 04DR-A-09-434**
NORMAN L. MILLER,	:	**Judge Everett Krueger**
Defendant.	:	**Magistrate Lianne Sefcovic**

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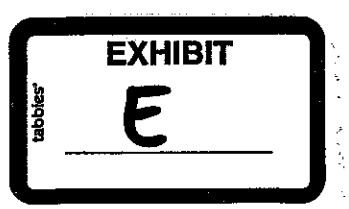
JUDGMENT ENTRY DECREE OF DIVORCE

The Court, sua sponte hereby adopts and incorporates the document filed December 27, 2004 titled, "Memorandum of Agreement" as an Agreed Judgment Entry (Decree of Divorce) as a final Journal Entry, Decree of Divorce.

Everett H. Krueger III
EVERETT H. KRUEGER, JUDGE

cc: John M. Gonzales, Attorney for the Plaintiff, 140 Commerce Park Dr., Westerville, Ohio 43082
David J. Gordon, Attorney for the Defendant, 40 N. Sandusky St., Suite 300, Delaware, Ohio 43015
Beth E. Miller, 2882 S.R. 229, Delaware, Ohio 43015
Norman L. Miller, C/O Cardington Yutaka Tech, 575 W. Main St., Cardington, Ohio 43315