

IN THE SUPREME COURT OF OHIO

NIYATI GUPTA

Plaintiff/Appellee,

vs.

VIVEK R. GUPTA, et. al

Defendant/Appellant.

) CASE NUMBER: 2013-1093

)

)

) (On appeal from Cuyahoga County

) Court of Appeals, Eighth Appellate

) District, Court of Appeals Case No. 99005)

)

)

MEMORANDUM IN OPPOSITION OF JURISDICTION  
OF APPELLEE NIYATI GUPTA

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**EXPLANATION WHY CASE DOES NOT INVOLVE A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND IS NOT A CASE  
OF A GREAT PUBLIC OR GENERAL INTEREST**

The Appellant states on page 1 of his Memorandum in Support of Jurisdiction that this Court must clearly establish the application of the jurisdictional priority rule to international divorces. But, this Court has already clearly established that the jurisdictional priority rule only applies between state courts of concurrent jurisdiction, not to courts of a foreign nation. See State ex rel Lee v. Trumbull County Probate Court, 83 Ohio St. 3d 369, 1998 Ohio 51, 700 N.E. 2d 4.

The Appellant further contends that there must be clear guidance to the trial courts that a judicial order made by a country of competent jurisdiction must be given full faith and credit or comity by the other country. But Article IV, Section 1 of the United States Constitution mandates that full faith and credit be given to judicial proceedings of every other state. See In Re All Cases Against Sager Corp., 132 Ohio St. 3d 5, 2012 Ohio 1444, 967 N.E. 2d 1203 (Emphasis added). Further, 28 United States Code Section 1738 requires Ohio state courts to give the judicial proceedings of another state, territory or possession of the United States, the same full faith and credit which they have by law or usage in the courts of the state from which they are taken. See Fifth Third Bank, N.A. v. Maple Leaf Expansion, Inc., 7<sup>th</sup> Dist., 188 Ohio App. 3d 27, 2010 Ohio 1537, 934 N.E. 2d 366 (Emphasis added). Also, the doctrine of comity is a matter of courtesy not a matter of right. See State ex rel. Lee v. Trumbull County Probate Court, *supra*.

Rather than applying the jurisdictional priority rule, an Ohio court should determine whether the foreign court is a more convenient forum under the doctrine of forum non

conveniens. See State ex rel Smith v. Cuyahoga County Common Pleas Court, 106 Ohio St. 3d 151, 2005 Ohio 4103, 832 N.E. 2d 4206. The Appellant has not contested the facts found by the Court of Appeals on page 9 of its Opinion in its determination that trial Court did not abuse its discretion by disregarding the purported stay from the Supreme Court of India.

The Appellant further contends on page 1 of his Memorandum that it is plain error for a trial court to offset spousal support arrearages against a property division. However, he fails to cite any legal authorities in his Argument supporting that claim.

He also contends that the public must be assured that pre-decree spousal support orders, if incorrect, will be corrected by the trial court in the final decree. But, the Appellant did not present any evidence at trial that would establish that the interim order was incorrect. Further, by not participating in the divorce trial before the Magistrate, any such argument is barred by the invited error doctrine.

#### **STATEMENT OF THE CASE AND FACTS**

The Appellee originally filed a Complaint for divorce in the trial Court, case number 324383, on December 31, 2008. Due to her inability to obtain discovery from the Appellant in India, that case could not be decided within the trial Court's guidelines. The parties agreed to dismiss the original divorce Complaint with a stipulation that the temporary spousal support orders would be applied to the new divorce Complaint, case number 329401, filed on the same day the previous case was dismissed.

In addition, despite not participating in the divorce trial before the Magistrate, the Appellant file Preliminary and Supplemental Objections to the Magistrate's Decision, attaching Exhibits regarding the values of the parties' marital assets. On August 24, 2012, the trial Court

overruled all of the Appellant's Objections on the basis that they were based upon evidence that could have been presented to the Magistrate (Emphasis supplied).

Further, contrary to the Appellant's argument, the trial Court did not give virtually all of the parties' assets to the Appellee. See p. 14 of the Court of Appeals Opinion holding that the trial Court ordered that the division of marital property be substantially equal. Then, after the property division, the trial court factored a lump sum payment to the Appellee to cover the Appellant's temporary spousal support arrearage and the award of attorney fees.

The Appellant, on page 4 of his Memorandum, referred to the Appellee's withdrawal of marital funds before and during the divorce proceedings. However, the Appellee failed to present any evidence at trial that showed that any funds were inappropriately transferred or spent. The Appellee introduced all of the parties' bank statements into the record at trial. Therefore, the trial court had the opportunity to determine if there was any marital waste of assets by the Appellee and it found none.

The Appellant was employed by A.T. Kearney from 1989 until August 31, 2008, an international business consulting firm headquartered in Chicago. In 2004, he took an expatriate position in India while his family remained in the United States. As an expatriate Appellant's permanent address remained in the U.S.A. and he was obligated to pay United States federal income taxes. He continued to support his family in the United States until just prior to the divorce litigation. His wages were deposited in the parties' United States joint Fidelity account and then transferred to their Key Bank account to pay the family's bills and expenses.

Moreover, the Appellant contends on page 3 of his Memorandum that his actual gross income was \$152,855.81, not the \$460,000 as found by the trial Court. But, in 2007, the year prior to the filing of the divorce Complaint, his base salary was \$480,000. With bonuses his

income was \$1,790,628 with a majority of his living expenses reimbursed by his employer, A.T. Kearney Co. See Court of Appeals Opinion, pp. 19-20. On August 31, 2008, he took an unpaid leave of absence but still earned \$1,218,854 through August, 2008. Phong-Ahn Perpert of A.T. Kearney testified and confirmed that the Appellant's leave of absence was voluntary. She also testified that Appellant voluntarily terminated his employment with A.T. Kearney after his leave of absence ended. Appellant then started his own consulting firm in India so that his income could not be attached by the trial Court. The trial Court found it equitable to impute income to the Appellant from his most recent employment in 2007 and 2008.

Moreover, the Appellant failed to send any significant money to the Appellee in the United States after the litigation commenced. A temporary spousal support order was issued for \$21,000 per month commencing on August 18, 2009. It ordered the Appellee to pay the mortgage on the parties' Solon home and various other marital expenses. But, the Appellant only paid a total of about \$8,000 of his temporary spousal support obligation during the approximately four years of the litigation.

Finally, contrary to the Appellant's contention on page 3 of his Memorandum, the trial Court's June 7, 2010 Agreed Judgment Entry did not suspend the total monthly amount of temporary spousal support owed at \$21,421.00. Instead that order was only entered as an enticement for the Appellant to pay some amount of temporary spousal support and in exchange avoid a contempt citation. Further, contrary to the assertion of Appellant, the trial Court overruled all of his Objections to the Magistrate's Decision while granting in part and overruling in part the Appellee's Objections.

Further, the Appellant filed a bankruptcy petition. The bankruptcy trustee testified at the divorce trial that the Appellant would not be granted a discharge due to his failure to cooperate

with the trustee and because he had sufficient assets to pay his creditors. The Appellant also failed to file the parties' 2006, 2007 and 2008 federal income tax returns thus incurring substantial interest and penalties.

The Appellant also failed to answer questions during his deposition concerning his business and financial information. He failed to respond to the Appellee's numerous discovery requests and to trial Court orders regarding his financial information. He failed to sign releases so that the Appellee could obtain information on his assets and failed to provide the Appellee and the trial Court with information regarding his business and personal financial records such as his bank accounts, checking accounts and check registers.

In addition, the Court of Appeals found on page 10 of its Opinion that the Appellant's failure to appear before the Magistrate was fatal to all of his non-jurisdictional Assignments of Error (II through IX). The trial Court's August 24, 2012 Judgment Entry overruling the Appellant's Objections to the Magistrate's Decision found that his Objections were based upon evidence that he could have presented to the Magistrate had he chosen to appear at the Magistrate's hearings (Emphasis supplied). The Appellant did not raise as an Assignment of Error the trial Court's adoption of the Magistrate's Decision, nor did he raise his Constitutional Due Process argument in the trial Court nor as an Assignment of Error in the Court of Appeals.

### ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

#### PROPOSITION OF LAW NO. I

Where there are divorce actions in two different countries, the action must proceed in the country in which service was first perfected and all judicial orders made by that country must be afforded full faith and credit or comity by the other country.

As previously stated herein, the Appellant's First Proposition of Law is directly contrary to previous decisions of this Court. The case cited by the Appellant, Kalia v. Kalia, 11<sup>th</sup> Dist.,

151 Ohio App. 3d 145, 2002 Ohio 7160, 832 N.E. 2d 1206, specifically held that the doctrine of comity is a matter of a trial court's discretion rather than a matter of right. See also the recent cases of Patel v. Krisjal, L.L.C., 10<sup>th</sup> Dist., 12AP-6, 2013 Ohio 1202 (holding that comity is a matter of courtesy rather than of right), and Mustafa v Elfadli, 5<sup>th</sup> Dist., 12 CAF08 0058, 2013 Ohio 1644 (holding that, under comity, states are empowered, if they freely elect to do so, to recognize the validity of certain judicial decrees of foreign governments).

Further, this case does not involve a jurisdictional issue. Rather, it involves whether the trial Court abused its discretion when it decided to exercise its jurisdiction. See Yawei Zhao v. Zeng, 1<sup>st</sup> Dist., C-020131, 2003 Ohio 3060, holding that an Ohio trial court errs when it dismisses a party's action solely because of the other party's similar pending action in a foreign country without considering the doctrine of forum non conveniens. The Appellant has not contested the facts found by the Court of Appeals on page 9 of its Opinion finding that the trial Court did not abuse its discretion by disregarding the purported stay order from the India Supreme Court.

Furthermore, the doctrine the Appellant wishes this Court to adopt would not be good public policy. The Appellant would have citizens of the United States submit to the jurisdiction of foreign countries merely because service was perfected first. There would be no consideration of the other country's laws to determine if they even remotely resembled the laws of the United States. In this case, the Appellee, an American citizen, would be forced to be divorced in a foreign country after raising her family in America and living in Ohio for 30 years. The present law as enumerated by the Eighth District Court of Appeals in this case should not be overruled. Recognition of a foreign suit should remain a matter of courtesy and not a right.

## PROPOSITION OF LAW NO. II

A litigant is denied due process of law where, in obedience to an order of the Court of competent jurisdiction, he does not participate in divorce proceedings in another country, resulting in being divested of virtually all of his assets acquired during the marriage by the fruits of his labor, ordered to pay all of the debts of the marriage and ordered to pay indefinite spousal support in an amount which exceeds his annual income.

In this Proposition of Law the Appellant tries to turn his dissatisfaction with the division of property into a constitutional issue. However, the Appellant failed to raise his Constitutional Due Process argument before the trial Court or as an Assignment of Error to the Court of Appeals. Ohio App. R. 12 (A) (1) (b) states that an appeal is to be determined by the Assignments of Error raised by the Appellant, the trial court record, and, unless waived, oral argument. See Burr v. Ohio State Highway Patrol, 10<sup>th</sup> Dist., 12 AP-26, 2012 Ohio 4906. It is a cardinal rule of appellate court review that a party cannot assert a new legal theory on an appeal. See Stores Realty Co. v. Cleveland, 41 Ohio St. 2d 41, 43, 322 N.E. 2d 629 (1975).

In this case the Appellant failed to appear at trial and present evidence. His lawyers were present for trial but the Appellant instructed them to not participate. He also told them to withdraw. Consequently, the Appellant did not present any evidence at trial. The Magistrate that heard the matter provided for an equal division of assets. The Magistrate attached "Chart 1" to her decision setting forth the equal division of property. The property division was reviewed by the trial judge and the Eighth District Court of Appeals and no error was found. In the Appellants Brief at pages 7 and 8 the Appellant provides a chart of assets. However, the chart includes numbers which were not presented to the Magistrate at trial. For example, the appraisal of the marital residence by Anthony Musca was not an exhibit. The value of the vacant lot was not submitted in any exhibit. Furthermore, the values cited by the Appellant for all of the

retirement assets are not supported by any evidence submitted at trial. Consequently, the Appellant's representation of the property division ordered by the trial Court and affirmed by the Court of Appeals is inaccurate.

Further, the fundamental requirement of Due Process is the opportunity to be heard. See Wuich v. Wuich, 9<sup>th</sup> Dist., 25481, 2013 Ohio 956, citing this Court's decision of Ohio Valley Radiology Associates, Inc., v. Ohio Valley Hospital Associate, 28 Ohio St. 3d 118, 124-125, 502 N.E. 2d 599 (1986). Both Article I, Section 16 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution guarantee an opportunity to be heard after reasonable notice of such hearing. See Id. Due process requires notice of a pending legal proceeding and an opportunity to present objections to a proposed action. See Cameron v. Cameron, 10<sup>th</sup> Dist., 12AP-349, 2012 Ohio 6253, citing this Court's decision in Galt Alloys, Inc. v. Keybank National Association, 85 Ohio St. 3d 383 1999 Ohio 383, 708 N.E. 2d 701. The Appellant had an opportunity to be heard before the Magistrate but voluntarily waived that right.

In addition, the doctrine of invited error prevents a party from taking advantage of an error that he himself invited or induced the trial court to make. See State, ex rel. Bell v. Pfeiffer, 131 Ohio St. 3d 114, 2012 Ohio 54, 961 N.E. 2d 181. See also Woody v. Woody, 4<sup>th</sup> Dist., 09 CA 34, 2010 Ohio 6049, holding that invited error occurs when a party fails to present evidence before a Magistrate and then files Objections to the Magistrate's Decision asserting that the Magistrate failed to consider such evidence. By failing to proffer evidence as to the value of the parties' marital assets, the Appellant waived his right to contest the trial Court's determination of those values. See page 15 of the Court of Appeals Opinion.

Moreover, any claim of trial court error must be based on actions of the trial Court, not on the Magistrate's Findings or proposed Decision. See Morrow v. Becker, 9<sup>th</sup> Dist., CA0066-M,

2012 Ohio 3875, appeal pending on other grounds, 134 Ohio St.3d 1415, 2013 Ohio 158, 981 N.E. 2d 883. A Court of Appeals reviews a trial Court's adoption of a Magistrate's Decision under an abuse of discretion standard. See Guzzo v. Kercher, 11<sup>th</sup> Dist., 2012-L-117, 2013 Ohio 2825, and Bell v. Nichols, 10<sup>th</sup> Dist., 10AP-1036, 2013 Ohio 2559. The Appellant failed to raise as an Assignment of Error in the Court of Appeals that the trial Court abused its discretion in finding that he could have presented his evidence to the Magistrate. Civ. R. 53 (D) gives a trial court broad discretion when deciding to hear additional evidence and requires acceptance of such evidence only if the objecting party demonstrates that, with reasonable diligence, he or she could not have produced the evidence for the Magistrate's consideration. See Welch v. Welch, 4<sup>th</sup> Dist., 12CA12, 2012 Ohio 6297 and in Re A.S., 9<sup>th</sup> Dist., 26462, 2013 Ohio 1975. The Appellant failed to make such a showing.

### **PROPOSITION OF LAW NO. III**

**Property must be divided before a determination can be made as to whether it is reasonable and appropriate that spousal support be awarded, and it is plain error for a Court to offset alleged arrearages in spousal support against a property division and thus alter the taxability of spousal support pursuant to I.R.C. Section 71 and non-taxability of property division pursuant to I.R.C. Section 1041 and to further exacerbate its error by ordering the pre-decree spousal support to continue for an indefinite period of time.**

First, the Appellant failed to cite any specific case citations supporting his argument that a trial court cannot offset alleged arrearages in spousal support against a property division. In the case of Lam v. Lam, 5<sup>th</sup> Dist., 2012 CA 00041, 2012 Ohio 4885, the Court of Appeals upheld a lump sum payment of spousal support from the husband's share of marital property because it was more likely than not that he would move out of the country placing him beyond the reach of the trial Court's contempt powers. Further, Ohio Revised Code Section 3105.011 provides domestic relations courts with full equitable powers and jurisdiction regarding all domestic relations matters. See State, ex rel. Downs v. Panioto, 107 Ohio St. 3d 347, 2006 Ohio 8, 839

N.E. 2d 911. Since the Appellant resides in India and failed to disclose his financial information even after being ordered to do so by the trial Court, any remedies under Ohio Revised Code Section 3123.21 would not be adequate to collect the substantial amount of his temporary spousal support arrearage.

The Appellant alleges the awarding of assets to offset the arrearage was error due to the tax consequences. Generally spousal support is taxable to the payee and deductible to the payor. See 26 USC §71 and 26 USC §215. However, in this case the Appellee was granted additional assets to reduce the support arrearage. The Judgment Entry of Divorce does not indicate the retirement assets and A.T. Kearney stock are awarded "as and for spousal support." Rather, the Appellee was awarded additional assets. See page 4 of the September 18, 2012, Judgment Entry. Consequently, the transaction is not taxable to Appellee and not deductible to the Appellant.

Furthermore, the Appellee is receiving assets worth the amount of the temporary support arrearage. The Court awarded the Appellant \$371,000 in pretax retirement assets. In order to actually obtain cash for the retirement assets, the Appellee will not only incur income taxes but she will incur penalties for her early withdrawal of the funds. Similarly, the Appellee will incur capital gains taxes when she liquidates the A.T. Kearney stock she was awarded. Therefore, the Appellee's net after tax receipt of funds will be approximately equal to what the Appellee would have received if the Appellant had paid the support as ordered and Appellee had reported the income on her tax returns. On the other hand, the Appellant is able to transfer retirement assets and stock to the Appellee to reduce the arrearage. The assets are pretax so that Appellant did not incur tax upon the receipt of assets. Therefore Appellant has no need to deduct the payment of support to reduce his income taxes. If the Appellant had earned the income as wages, he would

have had to pay tax on the earnings, but he would have been able to utilize the payment of support as a tax deduction.

The Appellant further contends on page 11 of his Memorandum that the trial Court erred in its determination of his temporary spousal support arrearage. As previously stated by the Appellee, he is barred from raising any such error under the invited error doctrine. Further, if a party is less than forthcoming regarding an issue he has the right to do so, but any alleged error committed by the trial court regarding that issue must be treated as invited. See Tyler v. Tyler, 8<sup>th</sup> Dist., 93214, 2010 Ohio 1428.

The Appellant further argues on page 12 of his Memorandum that his gross income is actually \$152,855.81, not \$460,000 as found by the trial Court. However, the Appellant actually earned 1.7 million dollars and 1.2 million dollars in the two years preceding his voluntary underemployment at the end of 2008. A trial court is required to consider both the parties' incomes and earning capacities under Ohio Revised Code Sections 3105.18 (C) (1) (a) and (b). See Valentine v. Valentine, 9<sup>th</sup> Dist., 11CA0088-M, 2012 Ohio 4202, and Kelly v. Forbis, 6<sup>th</sup> Dist., WD-09-050, 2010 Ohio 3071. A trial court has the discretion to consider a party's intent to avoid the payment of spousal support. See Collins v. Collins, 9<sup>th</sup> Dist. 10CA 0004, 2011 Ohio 2087.

The Appellant also argues on page 13 of his Memorandum that the trial Court should have deducted from his temporary support arrearage the total amount of expenses that the Appellee failed to pay as ordered. To find financial misconduct, a trial court must look to the reasons behind the questioned activity and determine whether the spouse profited from the activity or intentionally dissipated, destroyed, concealed, or fraudulently disposed of the other spouse's assets, see Thomas v. Thomas, 5<sup>th</sup> Dist., 11CAF090079, 2012 Ohio 2893, 974 N.E. 2d

679, and Walker v. Walker, 3<sup>rd</sup> Dist., 9-12-15, 2013 Ohio 1496, which was not the situation in this case. The Appellee failed to pay those expenses solely due to the Appellant's failure to pay her any support as ordered by the trial Court. To withhold justice to a wronged party due to the voluntary conduct of another is contrary to the principles of equity. See Wehrle v. Wehrle, 10<sup>th</sup> Dist., 12AP-386, 2013 Ohio 81. It is a fundamental rule of equity that he who seeks equity should not be allowed to profit from his own wrongdoing. See Langer v. Langer, 2<sup>nd</sup> Dist., 123 Ohio App. 3d 348, 704 N.E. 2d 1275 (1997).

Finally, in civil cases, plain error is not favored and may be applied only in an extremely rare case involving exceptional circumstances and which seriously affects the basic fairness, integrity or public reputation of the judicial process. See Goldfuss v. Davidson, 79 Ohio St. 3d 116, 1997 Ohio 401, 679 N.E. 2d 1099. Under the facts and circumstances of this case, the Appellant cannot show that the trial Court committed plain error in applying some of his share of the marital assets to secure the payment of his substantial spousal support arrearage and attorney fee award.

### CONCLUSION

The Appellant has not shown that this case involves a substantial Constitutional question or an issue of a great public or general interest so that this Court should not accept jurisdiction in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

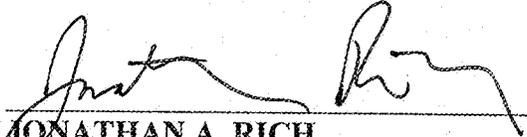
I hereby certify that a true and correct copy of the foregoing was served by regular U.S. Mail on this 6<sup>th</sup> day of August, 2013 upon the following:

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