

2009 Annual Convention

HIPAA in Family Law Cases

Family Law Committee

3.0 General CLE Hours



May 13-15, 2009 ♦ Cleveland

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HIPAA in Family Law Cases

Session # 702

General Case Law Update

Stanley Morganstern

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General Case Law Update

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CHILD SUPPORT

Wolfe v. Schmitz.

Citation: 2008-Ohio-4254, 2008 WL 3878366 (Ct. App. 10th Dist. Franklin Cty. 2008).

Pursuant to the parties' divorce decree, Father was responsible for one-half of all uncovered medical expenses for the parties' two minor children. Mother filed a motion for contempt due to Father's failure to pay his one-half of the uncovered medical expenses for the children through July 2006. Mother claimed those expenses totaled \$39,104.90, for which father was responsible for one-half.

At trial, father introduced a summary of the uncovered medical expenses that he had compiled from receipts, bills and statements provided by mother. Father's calculations indicated that the total uncovered expenses were \$7000 and he admitted that he owed mother \$3500. The trial court accepted father's calculations and ordered him to pay mother \$3500 in monthly installments of \$200.

On appeal, mother argued that the trial court erred in finding that Father only owed \$3500. The appellate court agreed. Using Father's calculations of the uncovered costs, the appellate court found that Father actually owed Mother \$8691.08. The appellate court found that mathematical errors and failure to credit Mother for the amounts she paid to some medical providers resulted in the discrepancy. The appellate court remanded the matter to the trial court to re-evaluate the amount Father must pay to Mother.

CONTEMPT

A. *Beck v. Beck.*

Citation: 2008-Ohio-4027, 2008 WL 3184166 (Ct. App. 6th Dist. Fulton Cty. 2008).

Wife was found to be in contempt for failure to deliver a clear title to a motorcycle awarded to Husband. The finding of contempt was based upon Husband's motion and a brief in opposition filed by Wife.

The standard of appellate review on contempt proceedings is abuse of discretion. The Sixth District Court of Appeals found that the trial court abused its discretion in holding Wife in contempt without conducting an evidentiary hearing. Ohio Rev. Code § 2705.05(A) mandates that a court “shall conduct a hearing” in all contempt proceedings. The matter was remanded to the trial court.

B. *Ride v. Ride.*

Citation: 2008-Ohio-4144, 2008 WL 3583360 (Ct. App. 2d Dist. Greene Cty, 2008).

The parties’ divorce decree provided that Husband was to pay Wife \$13,228.22 plus interest as part of the division of property. The Entry was silent as to how or when the funds were to be paid, but a judgment for the award was rendered.

Wife sought to find Husband in contempt for failure to pay the judgment. Both the magistrate and the trial court held that Husband could not be found in contempt as the decree did not specify how or when the judgment was to be paid. Wife was advised of her “remedies” to effectuate collection of a judgment. The trial court held that it no longer had jurisdiction over the judgment.

The Second District Court of Appeals agreed with the trial court. As the trial court did not provide a payment schedule in its decree, Husband could not be held in contempt. He did not violate any order requiring him to pay the judgment. The court of appeals, however, stated that in its opinion, the trial court had jurisdiction to re-open the divorce decree to establish a reasonable payment schedule and urged the trial court to do so.

CUSTODY

Henderson v. Henderson.

Citation: 2008-Ohio-5360, 2008 WL 4599607 (Ct. App. 2d Dist. Clark Cty. 2008).

Two children were born of the parties’ marriage. After the children were born, Father stopped working as a carpenter and stayed at home with the children while Mother maintained her employment as a pharmaceutical sales representative. In its final Entry and Decree of Divorce, the trial court denied Mother’s request for Shared Parenting, named Father as the residential parent, and awarded Mother standard visitation.

On Appeal, Mother argued that the trial court erred in failing to order shared parenting because she had a close bond with the children. She had a superior education and reading ability, and she and Father were able to agree on major decisions affecting the children. The appellate court agreed that both parents were involved in the care of the children and had a close bond with them. However, the appellate court affirmed the trial court's decision because the evidence established that the parties had an inability to communicate and cooperate and to make decisions jointly with respect to the children.

***DE FACTO* TERMINATION DATE**

Dill v. Dill.

Citation: 2008-Ohio-5310, 2008 WL 4559966 (Ct. App. 3d Dist. Logan Cty. 2008).

Husband and Wife were married in 1973. In July, 1995, Wife, suspecting that Husband was having an extramarital affair, asked him to move out of the marital residence. Husband complied and the parties lived in separate residences since that time. In February, 2005, Wife filed a complaint for divorce. In January, 2008, the trial court issued its final judgment granting the divorce. For purposes of property division and spousal support, the trial court found that the marriage terminated on October 26, 2005.

DIVISION OF PROPERTY

A. *Cooper v. Cooper.*

Citation: 2008-Ohio-4731, 2008 WL 4278215 (Ct. App. 2d Dist. Greene Cty. 2008).

Husband and Wife both appealed the trial court's division of an IRA Account which Husband contended was substantially his separate property. Wife claimed that she was not awarded her share of the marital portion of the asset.

The trial court had evidence as to the value of two accounts Husband owned at the date of marriage and that the two accounts had, at some point, been combined. The magistrate's decision adopted by the trial court held that the appreciation of the account belonged to Husband as his separate property. Husband's claim on appeal that the trial court used an inappropriate valuation date was overruled.

Wife's claim that the trial court should have not awarded Husband all the appreciation in the account was sustained. The only evidence of the nature of the growth in the account was Husband's testimony. Husband, asserting separate property, had the burden of proof. He did not show by clear and convincing evidence that the appreciation in the account was from reinvestment of passive gains in the account.

B. *Dudley v. Dudley.*

Citation: 2008-Ohio-3760, 2008 WL 2896657 (Ct. App. 5th Dist. Guernsey Cty. 2008).

During the parties' marriage, Wife's parents provided funds, materials and land for the parties' marital home. The trial court concluded that the value of those items, \$64,900, was a gift to Wife as an advancement on her inheritance. The Fifth District Court of Appeals reversed the trial court, concluding that Wife's parents' contribution were gifts to both parties and to be considered as marital property.

An advancement of inheritance is an irrevocable gift. The advancement must be declared in a contemporaneous writing. The writing may be made by the donor or an acknowledgment by the heir. The procedure is governed by Ohio Rev. Code § 2105.51. In the absence of a contemporaneous writing and the fact that the property has been jointly deeded to Husband and Wife, the trial court did not have clear and convincing evidence as required by Ohio Rev. Code § 3105.171 that the gift was to Wife alone.

C. *Hout v. Hout.*

Citation: 2008-Ohio-6219, 2008 WL 5064912 (Ct. App. 5th Dist. Stark Cty. 2008).

The trial court ordered Husband to list marital real estate with an auctioneer within 48 hours. Wife alleged Husband was not complying with prior orders to sell the real estate. After the order to list the property with the auctioneer, the trial court found Husband "did not use all good faith efforts in the sale of the marital residence." Husband was found to be in willful contempt.

On appeal, Husband argued that the order to list the property with an auctioneer within 48 hours was unreasonable and that the separation agreement had not provided any time requirement. He claimed the time requirement added a term to the separation agreement as did the requirement to sell the property by auction.

In addressing the time requirement, the Fifth District Court of Appeals noted that in the absence of an express time for performance in an agreement, the court may infer a reasonable time for performance. That decision is reversible under an abuse of discretion standard.

In this case, Husband failed to provide the court of appeals with a transcript of the proceedings giving rise to the trial court's order. Accordingly, the court of appeals had no choice other than presuming the trial court acted properly.

D. *Keating v. Keating.*

Citation: 2008-Ohio-5345, 2008 WL 4599681 (Ct. App. 8th Dist. Cuyahoga Cty. 2008).

Husband and Wife were married in June 1995. Husband was a practicing physician during the entire course of the marriage. In 2001, Husband opened his own sole private practice and became a one-sixth owner in the business that owned the commercial property where his office was located. Husband purchased his one-sixth interest for \$275,000, via a \$100,000 loan from Dollar Bank and a \$175,000 loan from Dr. Rao. The balances on the two loans at the start of the final hearing in June 2005, totaled \$188,284 and the appraised value of the property was \$135,000.

On appeal, Husband argued that the trial court failed to properly consider or allocate the indebtedness associated with his interest in the commercial property. The trial court determined that neither the negative value of the asset nor the outstanding debt for the purchase of the property would be factored into the property division. The appellate court found no err in the trial court's determination. The appellate court agreed with the trial court's finding that this manner of accounting would actually benefit Husband since the property's value would most likely increase with the passage of time and Husband would also benefit from payment of the debt as he is able to deduct the monthly loan payments as well as depreciation of the building as a business expense.

E. *Kotch v. Kotch.*

Citation: 2008 Ohio 5084, 2008 WL 4416463 (Ohio Ct. App. 5th Dist. Stark Cty. 2008).

Husband and Wife lived together for three years prior to their marriage on September 1, 2000. Husband purchased a residence in early 1997, using his separate funds for the \$38,444 down payment.

The parties stipulated that the value of the home was \$200,000 at trial. The parties refinanced the property in 2002 and 2003. The mortgage balance was \$114,979.03 at the time of trial. The trial court found that the residence had appreciated in value by 21% since the date of purchase. Using the rate of appreciation of 21%, the trial court found that Husband's down payment had grown from \$38,444 to \$46,517, which was Husband's separate property.

Husband appealed the trial court's decision finding that only \$46,517 was his separate property and dividing the remainder of the equity. Evidence at trial revealed that, over the course of their relationship, both Husband and Wife contributed to the household finances and

expenses. After the parties' marriage in 2000, marital funds were used to pay down the mortgage. Both parties contributed to the upkeep of the residence. During the 2003 refinance, Wife was named as an obligor on the mortgage, assuming the consequences of and liabilities associated with being a mortgagor. The court of appeals affirmed the trial court's decision, finding that characterization of marital and separate property was supported by competent, credible evidence.

F. *Mankin v. Mankin.*

Citation: 2008-Ohio-6214, 2008 WL 5059434 (Ct. App. 7th Dist. Monroe Cty. 2008).

As a result of an uncontested divorce proceeding, Wife was awarded the parties' marital home. Both Husband and Wife were allocated some debt. The division of property order left wife with \$24,408 of net assets and Husband with \$13,500 of debt.

The Seventh District Court of Appeals affirmed the trial court's division of property order by noting that Ohio Rev. Code § 3105.171(F) factors include which party is awarded the custody of children and the desirability of awarding the family home or right to reside in it to the spouse with custody of the children. Those factors justified the unequal property division.

G. *Schroeder v. Schroeder.*

Citation: 2008-Ohio-3875, 2008 WL 2942219 (Ct. App. 2d Dist. Montgomery Cty. 2008).

Wife was awarded the first \$25,000 of equity in the marital home as her separate property. She established at trial that she had withdrawn the funds from her 401(K) to make the down payment on the home. There was very little additional equity at the time of divorce. Subsequent to withdrawing the 401(K) funds, Wife borrowed additional funds from the 401(K) to pay the income taxes incurred because of the withdrawal.

The trial court treated the loan as Wife's separate obligation. On appeal, Wife argued that the loan, in part, paid for taxes incurred as a result of Husband's self-employment. The appellate court held that the record was insufficient to demonstrate that the loan proceeds were used for any other purpose than to primarily pay the taxes associated with the withdrawal. As Wife was awarded the down payment as her separate property, it would have been inequitable to find Husband responsible for any part of the loan.

The trial court did, however, err in valuing Series E Savings Bonds at face value when it was clear that they had not matured on the date used for valuation of assets.

DIVISION OF PROPERTY/SPOUSAL SUPPORT

Ebner v. Ebner.

Citation: 2008-Ohio-5335, 2008 WL 4572516 (Ct. App. 5th Dist. Stark Cty. 2008).

Husband and Wife were married in 1984. Wife filed her Complaint for Divorce in May, 2006. Divorce hearings were held in April, May, June and July, 2007. In August, 2007, the Magistrate recommended a divorce, allocated marital property and set spousal support for Wife at \$1000 per month for eight years. Over Husband's objections, the trial court increased spousal support to \$2500 per month because the trial court found that the Magistrate had failed to account for Husband's financial misconduct. Specifically, \$210,000 "disappeared" from Husband's corporation during the pendency of the divorce. On Appeal, the Appellate Court agreed that there was ample evidence of Husband's financial misconduct. However, the Appellate Court sustained Husband's assignment of error because the determination of Husband's financial misconduct should have been addressed and/or assigned when determining the distribution of assets, not spousal support.

DIVORCE

Broach v. Broach.

Citation: 2008-Ohio-4132, 2008 WL 3582809 (Ct. App. 2d Dist. Montgomery Cty. 2008).

Wife's divorce complaint brought by her son as her legal guardian was dismissed by the trial court. It held that since Wife had been determined to be incompetent prior to the divorce filing, and was unable to "form the requisite intent to maintain a divorce action," the guardian could not maintain the action.

Clearly, case law provides that once instituted, a divorce action should not be abated by a determination of incompetency of a party. However, case law also support the trial court's dismissal of the action brought by a guardian after the adjudication of incompetency.

The Second District Court of Appeals reversed the trial court relying on the Ohio Rules of Civil Procedure which were enacted after the cases which supported the trial court's holding. Civ. R. 17(B) provides that a guardian "may sue or defend" on behalf off an incompetent. Civ. R. 75(A) directs that the Civil Rules shall apply to divorce actions. Although not raised on appeal, the court of appeals noted that the defense of capacity to bring the action was waived when it was not specifically pled in the Answer pursuant to Civil Rule 9(A).

A dissenting and concurring opinion opined that the trial court was correct in dismissing the claim for divorce brought pursuant to Ohio Rev. Code § 3105.01(J) living separate and apart, but in error when dismissing the claim for divorce pursuant to Ohio Rev. Code § 3105.01(D) extreme cruelty and (K) incompatibility. Ohio Rev. Code § 3105.01(J). A no fault provision can be brought on the application of either party. The dissent argued that only Husband or Wife could assert that claim for divorce and it could not be brought by a guardian or representative.

JUVENILE CUSTODY

In re Semedo-Blythe Children.

Citation: 2008 Ohio 5494, 2008 WL 4675407 (Ohio Ct. App. 5th Dist. Stark Cty. 2008).

Mother appealed the trial court's decision to award permanent custody of her three daughters to the Stark County Department of Job and Family Services (SCDJFS).

SCDJFS was awarded temporary custody of the children after alleging that mother struck a child with a pair of scissors. Father was living in the home despite a no contact order issued in a domestic violence case, was using cocaine, and had outstanding cocaine possession charges. There was a prior allegation that one child was sexually abused by her brother. One child later disclosed that Father was the perpetrator of sexual abuse. The trial court determined that SCDJFS should be granted permanent custody of the children because the children could not be placed with either parent within a reasonable amount of time.

Mother acknowledged that there were domestic violence issues with Father and that Father had a substance abuse issue. Mother acknowledged that there were sexual abuse allegations by one child against the father, but Mother felt that the report was "hearsay." Although Mother engaged in the services recommended by the case plan, she failed to adequately complete the programs. Mother resumed her relationship with Father after he was released from prison, despite warnings from the guardian *ad litem* and the SCDJFS caseworker. The court of appeals found that there was ample evidence to demonstrate that Mother's choices continually placed her children at risk. As a result, the trial court's decision was affirmed.

PARENTAL RIGHTS AND RESPONSIBILITIES

A. *Edwards v. Edwards.*

Citation: 2008-Ohio-4418, 2008 WL 4052894 (Ct. App. 5th Dist. Fairfield Cty. 2008).

Father and Mother were divorced and Mother was named residential parent of their minor son. Shortly after the divorce, mother traveled to Canada with the parties' minor child and remained there for several

months due to the murder of her sister. Father filed a motion for reallocation of parental rights and responsibilities, and a guardian *ad litem* was appointed. The trial court denied Father's motion.

On appeal, Father argued, *inter alia*, that the trial court erred by permitting the guardian *ad litem* to participate in the proceedings as attorney, guardian and witness. The appellate court disagreed. In holding that Father was not prejudiced by the guardian's participation, the appellate court cited Juv. R. 4(C)(1) which permits an attorney to function as both guardian and counsel for a minor child and agreed with the trial court's determination that the guardian was not biased against Father.

B. *Henderson v. Henderson.*

Citation: 2008-Ohio-5360, 2008 WL 4599607 (Ct. App. 2d Dist. Clark Cty. 2008).

Two children were born of the parties' marriage. After the children were born, Father stopped working as a carpenter and stayed at home with the children while Mother maintained her employment as a pharmaceutical sales representative. In its final Entry and Decree of Divorce, the trial court denied Mother's request for Shared Parenting, named Father as the residential parent, and awarded Mother standard visitation.

On Appeal, Mother argued that the trial court erred in failing to order shared parenting because she had a close bond with the children. She had a superior education and reading ability, and she and Father were able to agree on major decisions affecting the children. The appellate court agreed that both parents were involved in the care of the children and had a close bond with them. However, the Appellate Court affirmed the trial court's decision because the evidence established that the parties had an inability to communicate and cooperate and to make decisions jointly with respect to the children.

C. *Stalnak v. Peterson.*

Citation: 2008-Ohio-4329, 2008 WL 3914995 (Ct. App. 9th Dist. Summit Cty. 2008).

The parties had four minor children and Father was named the custodial parent. Father filed a motion to suspend Mother's companionship with their children. Father argued that companionship should be suspended because Mother allowed the children to spend time with a registered sex offender, told the children to lie to their father, repeatedly changed residences, and her current husband, on house arrest, was arrested in front of the children. The trial court denied father's motion.

On appeal, Father argued that the trial court failed to consider the best interests of his children when it denied his motion. In upholding the trial court's denial, the appellate court pointed out that although the motion was denied, the trial court ordered mother to keep the children away from the sex offender. Mother, not the custodial parent, need only provide a place where companionship can be exercised that is sufficient for the duration of the visits. It was Father who called the police to Mother's home to arrest her husband, so at that time, Father was not concerned that his children would witness the arrest.

PATERNITY

In re My'kavellie E.

Citation: 2008 Ohio 5035, 2008 WL 4409430 (Ohio Ct. App. 6th Dist. Lucas Cty. 2008).

Father appealed the trial court's decision to dismiss him from a custody proceeding when he failed to submit to genetic testing, then awarded custody to the Lucas County Children's Services (LCCS).

LCCS filed a dependency and neglect complaint when the child tested positive for cocaine at birth. On November 15, 2006, the trial court awarded temporary custody to LCCS and ordered father to submit to a genetic test. On March 28, 2007, Mother's rights were terminated and LCCS was awarded permanent custody. Father appealed, arguing that he was denied due process because he was not given the opportunity to establish paternity by alternate means because he was opposed to genetic testing due to his religious beliefs. The court of appeals reversed the trial court's dismissal and vacated the award of permanent custody to LCCS based upon father's arguments.

The trial court ordered the Lucas County Child Support Enforcement Agency (LCCSEA) to conduct genetic testing using a DNA sample from a prior case. The test results showed a zero percent probability that Father was the parent of the child. LCCS filed a motion to dismiss father as a party to the proceedings based upon the genetic testing results, which was granted by the court. Father appealed again, arguing that the trial court erred by ordering LCCSEA (a third party to the action) to wrongfully use his private health information to determine paternity. The court of appeals noted that the state has a substantial interest in establishing paternity. Father failed to object to the genetic test results at the trial court level. The trial court's judgment was affirmed.

PROCEDURE

A. *Boggs v. Boggs.*

Citation: 2008-Ohio-5411, 2008 WL 4616052 (Ct. App. 5th Dist. Delaware Cty. 2008).

Husband argued that the trial court erred by failing to conduct an evidentiary hearing regarding Wife's financial misconduct after the case was remanded by the appellate court. The appellate court initially remanded the matter in order for the trial court to properly address Wife's financial misconduct of contributing \$29,000 toward a lease for a new Cadillac. The appellate court noted that it did not direct the trial court to hold a hearing and, therefore, the trial court did not err by determining, without conducting a hearing, that \$17,000 was a more appropriate vehicle expense for Wife.

B. *Breedlove v. Breedlove.*

Citation: 2008-Ohio-4887, 2008 WL 4356813 (Ct. App. 4th Dist. Washington Cty. 2008).

Husband claimed on appeal that the trial court's award of approximately one-half of his income derived from his VA and Social Security benefits was excessive in light of the distribution of marital debt. Much of the debt Husband was ordered to assume was associated with the marital home he was to continue to occupy until it was sold. At sale, Husband was to receive from the proceeds, the principal reduction of the mortgage he made since the parties' separation.

The Fourth District Court of Appeals, in affirming the trial court's decision, noted that Husband had failed to provide a complete transcript of the proceedings. Husband's claim that the award was excessive could not be fully examined without Wife's testimony which Husband failed to provide. In the absence of a complete transcript, the court of appeals was bound to presume the validity of the trial court's judgment.

C. *Orama v. Orama.*

Citation: 2008-Ohio-5188, 2008 WL 4455576 (Ct. App. 9th Dist. Lorain Cty. 2008).

The parties were divorced in 1988 and a Qualified Domestic Relations Order was issued to divide Husband's Ford Motor Company Pension. Husband retired in 2007. When Husband realized Wife was entitled to full post-retirement surviving spouse benefits, he filed a Civil Rule 60(B)(5) motion seeking relief from that provision of the QDRO.

As Wife was entitled to the surviving spouse benefits, Husband could not select a cash payment, but rather was required to receive monthly payments. His current wife would not receive any benefits if he predeceased his former wife. Husband claimed that the court made a mistake when adopting the QDRO awarding former wife all of the survivor benefits, including those accumulated after the divorce.

The trial court granted Husband's motion and entered an Amended QDRO eliminating former wife's surviving spouse benefits. The majority of the Ninth District Court of Appeals disagreed with the trial court. Even if the delay of 19 years in filing the motion was reasonable, the trial court's mistake should have been the subject of a direct appeal. Husband attempted to use a Civil Rule 60(B)(5) motion as a substitute for appeal.

A concurring opinion opined that Husband's motion should have been brought pursuant to Civil Rule 60(B)(4) in that it was a more appropriate argument that the judgment become inequitable.

A dissenting opinion argued that the trial court was within its "considerable discretion" in granting the motion:

"Civ. R. 60(B)(5) is an appropriate mechanism to allow a trial court to remedy errors or omissions in the interest of justice to the parties."

The dissent also argued that the motion was timely brought, as Husband was not alerted to the mistake until he applied for the cash payment at retirement.

D. *Pastor v. Pastor.*

Citation: 2008-Ohio-4362, 2008 WL 3927623 (Ct. App. 5th Dist. Fairfield Cty. 2008).

Husband filed a complaint for divorce that was accompanied by a separation agreement executed by the parties. The separation agreement was prepared by Husband's attorney. Wife was not represented by counsel. The trial court accepted the separation agreement and issued a decree of divorce. Wife filed a timely motion for relief from judgment, pursuant to Civil Rule 60(B)(1), (2), (3), and (5). The trial court granted Wife's motion and declared the Judgment Entry/Divorce Decree to be null and void. Husband appealed. The appellate court upheld the trial court's decision to vacate the divorce decree, but remanded the matter to the trial court for an evidentiary hearing on the issue of the validity of the separation agreement. On remand, the trial court concluded that the separation agreement was not fair and equitable and, therefore, found it null and void.

On appeal, Husband argued that the trial court erred in declaring the separation agreement null and void. In affirming the trial court, the Appellate Court pointed out then in its order remanding the case, it

ordered the trial court to further analyze the grounds for nullifying the separation agreement and trial court did so. Furthermore, Article 7 of the separation agreement permitted the trial court to validate or invalidate the agreement based upon its fairness and equity.

E. *Stano v. Stano.*

Citation: 2008-Ohio-5527, 2008 WL 4693195 (Ct. App. 9th Dist. Medina Cty. 2008).

The Ninth District Court of Appeals declined to address Wife's assignment of error relating to the division of property order. The trial court, in its divorce decree, reserved jurisdiction to make adjustments to its order regarding marital debt and expenses after considering the parties' arrearages.

The order appeals from was not a final judgment. It failed to meet the requirements of Ohio Rev. Code § 205.02 and Civ. R. 54(B). Accordingly, the appeal was dismissed.

F. *Szmania v. Szmania.*

Citation: 2008-Ohio-4091, 2008 WL 3522345 (Ct. App. 8th Dist. Cuyahoga Cty. 2008).

A trial court does not have a duty to determine if an In-Court Agreement is fair, just and equitable. As long as the agreement is not obtained by fraud, duress, overreaching or undue influence, the trial court may accept it. When the agreement is reached in the presence of the court, it constitutes a binding contract. As such, neither a change of heart nor poor legal advice will support a repudiation of the agreement.

Wife failed to allege any duress, nor did she argue that any of the terms were incomplete, ambiguous or disputed. Accordingly, the Eighth District Court of Appeals affirmed the trial court's denial of Wife's motion to set aside or modify the separation agreement that the trial court incorporated into its decree of divorce.

G. *Thomas v. Thomas.*

Citation: 2008-Ohio-6209, 2008 WL 5059135 (Ct. App. 7th Dist. Mahoning Cty. 2008).

Wife's Civil Rule 60(B) motion sought to vacate her decree of dissolution, especially with respect to the spousal support provision. She claimed the support was inadequate and that she was defrauded and coerced when agreeing to it. She further claimed "mental duress" as one of her sons was serving in Iraq and another under indictment for aggravated murder.

Wife's claim with respect to the adequacy of spousal support was that she was not aware of Husband's actual income. Both the trial court and the court of appeals rejected the argument. Wife had signed joint tax returns.

Wife failed to present any expert evidence regarding her mental status. She did not have suicidal thoughts, nor was she taking significant medication for depression and anxiety.

Although Wife was not represented by counsel at the dissolution hearing, she had consulted with counsel throughout the negotiations.

Considering all of the factors, the court of appeals affirmed the denial of Wife's motion.

H. *Thompson v. Dodson-Thompson.*

Citation: 2008-Ohio-4710, 2008 WL 4263564 (Ct. App. 8th Dist. Cuyahoga Cty. 2008).

Husband's Civil Rule 60(B) motion was overruled by the trial court without a hearing. Husband contended that the terms of a separation agreement incorporated into the decree of divorce was "unfair, unreasonable and inconsistent." Although by affidavit he alleged that he entered into the agreement under duress and extreme exasperation," Husband primarily complained about the substantive provisions of the agreement.

On appeal, Husband argued that the trial court abused its discretion by failing to hold a hearing on the motion. The court of appeals affirmed the trial court. Husband's complaints about the separation agreement terms should have been raised on direct appeal. He failed to raise operative facts sufficient for relief from judgment. He attempted to use Civil Rule 60(B)(4) and (5), but neither was supported sufficiently. Additionally, the court of appeals noted that the claim of duress was not timely brought, although the motion was filed only eight months after the judgment.

I. *Williams v. Williams.*

Citation: 2008-Ohio-5076, 2008 WL 4415793 (Ct. App. 5th Dist. Delaware Cty. 2008).

The parties were granted a dissolution of marriage. The decree incorporated a separation agreement. Wife was represented by counsel. Husband was not represented, although he negotiated and signed the agreement. The terms were reviewed with the parties by the judge at hearing.

Husband filed a Civil Rule 60(B) motion approximately eight months after the decree. He claimed that he was “unfairly coerced into an inequitable division of the marital property.” He also claimed his mental capacity and health at the time of the decree were such as to make him susceptible to duress and fraud. In support of his claim, Husband presented his own affidavit and a psychological report which discussed Husband’s mental status at the time of the agreement. The motion was denied without a hearing.

The Fifth District Court of Appeals affirmed the trial court, holding that Husband had not presented sufficient operative facts to require a hearing. He did not present operative facts to establish a meritorious defense to the terms of the separation agreement. His claim of incompetence was also denied as his alleged mental issues had existed throughout the marriage and had not prohibited him from negotiating two drafts of the agreement and entering into it.

SEPARATION AGREEMENTS

A. Clemens v. Clemens.

Citation: 2008-Ohio-4730, 2008 WL 4278216 (Ct. App. 2d Dist. Greene Cty. 2008).

At trial, Wife claimed that the parties had entered into an oral agreement with respect to use of Husband’s Personal Savings Plan through his employment. The trial court rejected Wife’s argument, holding that “under Ohio law, separation agreements must be in writing.” The trial court also held the existence of the agreement could not be proven by parole evidence.

The Second District Court of Appeals held that the parole evidence rule did not apply and was not a proper basis for rejecting Wife’s testimony about the oral agreement. The parole evidence rule only applies to written contracts.

In the opinion of the court of appeals, the trial court also erred when it held that separation agreements must be in writing. While written agreements are preferred, oral agreements may be enforced where the terms can be established by clear and convincing evidence.

While the trial court erred in its legal pronouncement of enforceability of an oral separation agreement, its ultimate rejection of the agreement was correct as there was no corroborating evidence of Wife’s testimony. The court of appeals noted that the record tended to substantiate Husband’s denial of the agreement.

B. *Klein v. Klein.*

Citation: 2008-Ohio-6234, 2008 WL 5064848 (Ct. App. 2d Dist. Montgomery Cty. 2008).

When Husband filed a divorce action asking the court to incorporate a Separation Agreement signed by both parties into a decree of divorce, Wife denied that the parties had reached an agreement as to the division of property. After a hearing, the court found the agreement to be valid and enforceable and incorporated it in its final order.

On appeal, Wife argued that because the parties continued to live together after signing the agreement, it was not enforceable pursuant to Ohio Rev. Code § 3103.06. As Wife had not raised the argument in the trial court, the court of appeals did not have to consider it. The court of appeals did, however, note that the evidence indicated that the agreement was signed on September 18, 2006 and that Wife had moved out sometime in October. Husband testified that during that period, he spent considerable time away from the home.

The court of appeals distinguished the case relied upon by Wife, *Schaum v. Schaum* (1978 WL 216519, Greene Cty. 1978) in that the parties in *Schaum* lived together for fifteen months after signing the agreement and had not performed under the agreement “in any respect.” The court of appeals also rejected Wife’s arguments that Husband had not fully disclosed the value of a particular asset and that she signed the agreement under duress.

SPOUSAL SUPPORT

A. *Bils v. Bils.*

Citation: 2008-Ohio-4125, 2008 WL 3582803 (Ct. App. 6th Dist. Wood Cty. 2008).

The trial court determined Husband’s income for purposes of calculating support to be \$117,433.33. The figure was arrived at by averaging Husband’s farm income for three years and added back depreciation as claimed on his tax forms. Husband argued that the depreciation expense represented actual cash expenditures for equipment and, therefore, should not have been added back to net income.

The Sixth District Court of Appeals agreed with Husband holding that the depreciation represented actual cash expenditures and should have been recognized as ordinary and necessary expenses as defined in Ohio Rev. Code § 3119.01(C)(9)(a). The trial court abused its discretion in not considering those expenses.

The trial court also erred by requiring Husband to maintain life insurance in favor of Wife to secure his spousal support obligation. The obligation was to terminate upon the death of either party. The court of appeals cited cases from several districts in support of the proposition.

“A trial court may secure a spousal support order with life insurance, but only if the court makes it clear that it is, in effect, ordering spousal support to extend beyond the death of the obligor.”

The court of appeals did not address further issues as to the amount of the spousal support award since the calculation of income available to base an award on was found to have been inaccurate.

B. *Fabre v. Fabre.*

Citation: 2008-Ohio-5677, 2008 WL 4767047 (Ct. App. 5th Dist. Stark Cty. 2008).

By agreement, the parties suspended a portion of Husband’s \$10,000 per month spousal support obligation for a period of twelve months. At the end of the originally scheduled term, Husband sought to terminate his obligation and Wife sought to recoup the agreed reduction and other arrearages.

The Agreed Entry, which suspended the payment, clearly provided that at the termination of the suspension period, the court had jurisdiction, not only to review and modify the amount, but to add the reduced amount to the end of the original term. The trial court was not required to determine if a change of circumstances has occurred at that point. The parties’ previous agreement was clear and unambiguous. The court could, by their agreement, award arrearages and extend the term of support to allow Wife to recoup the suspended support.

C. *Hiscox v. Hiscox.*

Citation: 2008-Ohio-5209, 2008 WL 4456964 (Ct. App. 7th Dist. Columbiana Cty. 2008).

On appeal, Husband argued that the trial court erred by failing to expressly state that it retained jurisdiction to modify the spousal support award. The Ohio Supreme Court has held that “a trial court has the authority to modify or terminate an order for alimony or spousal support only if the divorce decree contains an express reservation of jurisdiction.” *Kimble v. Kimble*, 97 Ohio St. 3d 424, 2002-Ohio-6667, 780 N.E.2d 273, at syllabus.

In this matter, the parties decree stated that “spousal support shall continue until further order.” The appellate court found this language to be a sufficient reservation of jurisdiction over the spousal support award and overruled Husband’s assignment of error.

D. *Hutta v. Hutta.*

Citation: 2008-Ohio-3756, 2008 WL 2896631 (Ct. App. 5th Dist. Delaware Cty. 2008).

The trial court erred by limiting the terms of the spousal support award to eight years. The parties had been married for 21 years. At the time of divorce, Wife was 49 years old. She had little opportunity for a meaningful career after divorce. Her access to retirements accounts and Social Security would be beyond the spousal support term. Husband's income and professional dentist practice clearly could sustain a spousal support award until Wife could access her retirement funds and social security without tax penalty.

As the trial court failed to support its limited spousal support term, the court of appeals remanded the award for further consideration. A dissenting opinion argued that the trial court did not abuse its discretion in limiting the award to eight years.

E. *Latimer v. Latimer.*

Citation: 2008-Ohio-5655, 2008 WL 4766738 (Ct. App. 9th Dist. Medina Cty. 2008).

Husband filed a motion to terminate his support obligation of \$1000 per month for 90 months a few years after termination of the parties' 34-year marriage. His retirement was the change of circumstance upon which he relied. The trial court not only denied Husband's motion, but held that the support obligation should continue beyond the original term until further order of court.

The trial court clearly had jurisdiction to revisit the order, both with respect to the amount and term. The changed circumstances since the original order included not only Husband's retirement, but also his remarriage to a woman who had full-time employment. His former wife had been unable to find full-time employment, and after she stopped receiving child support, she could not afford to rent an apartment, purchase medical insurance, or replace her 13-year-old car.

The trial court, as requested, reviewed the factors of Ohio Rev. Code § 3105.18(C) and did not abuse its discretion in modifying the term of the spousal support award.

F. *Schwenker v. Schwenker.*

Citation: 2008-Ohio-4036, 2008 WL 3198711 (Ct. App. 6th Dist. Lucas Cty. 2008).

Husband was ordered to pay Wife spousal support plus child support for the six minor children. The spousal support was to increase up to a maximum of \$4000 per month when the minor children reached the age of majority. The parties had been married for 26 when the

dissolution of marriage was granted in February 1999. In December 2005, Husband filed a motion to terminate his spousal support obligation. He had remarried and alleged that his current wife had extreme medical issues and that he intended to retire at the end of 2005. Husband, an airline pilot, had a federally mandated retirement age of 60. His voluntary retirement was approximately 8½ months prior to the required retirement date.

As Husband failed to make any support payments after January 2006, Wife filed a motion to find him in contempt of court.

The magistrate found Husband in contempt and ordered him to pay any arrearages through September 2006. The magistrate terminated Husband's support obligation as of his 60th birthday. The trial court overruled Wife's objections to the magistrate's decision.

The Sixth District Court of Appeals noted that the parties' Separation Agreement provided that the mandatory retirement of Husband would be a valid change of circumstances to be considered by the court. In determining that the trial court had not abused its discretion in terminating the support obligation as of the mandatory retirement date, the court of appeals noted that Wife had substantial income from her employment, Husband's pension and annuity. Her 2006 income exceeded that of Husband. Although Wife had a substantial mortgage and considerable monthly expenses, the court of appeals could not conclude that the trial court's decision terminating the support obligation was arbitrary, unreasonable or unconscionable.