

**Recent Court Decisions
Family Law Task Force
December 1, 2009**

MEDIATION AGREEMENT AND CUSTODY

Roguska v Roguska, unpublished, docket no. 136310 (9/29/09)

Facts: The parties negotiated a mediation agreement regarding custody that was signed by the mediator, both parties and their attorneys. At the divorce hearing the plaintiff testified that she thought defendant was lying during the mediation and that the parties could not communicate. The trial court found her credible and also took into account plaintiff's PPO against defendant. The court rejected the mediation agreement and set a trial date. Defendant appealed arguing that the court erred by rejecting the parties' mediated agreement.

Decision: The Court of Appeals affirmed trial court's award of physical custody of the parties' three children to plaintiff mother. The Court also affirmed the decision rejecting the parties' mediation agreement, noting that although a court must generally enforce contractual agreements, contract law does not govern child custody. *Brausch v Brausch*, 283 Mich App 339, 350 (2009). Further, regardless of a mediation agreement, the Child Custody Act requires a court to independently determine custody based on the child's best interests. *Rivette v Rose-Molina*, 278 Mich App 327, 332-3 (2008). The Court also rejected defendant's arguments that the trial court erred by failing to find an established custodial environment with defendant and erred in its findings regarding certain best interest factors.

ENFORCEMENT OF SETTLEMENT AGREEMENT

Sharkey v Sharkey, unpublished docket # 286135 (9/15/2009)

Facts: In this case, defendant-husband appealed a judgment of divorce arguing that the trial court should have enforced the parties' pre-divorce settlement agreement. There was evidence at trial that plaintiff was subjected to verbal and some physical abuse by defendant for 25 years. On the day plaintiff signed the agreement she hadn't anticipated doing so. Defendant wrote the agreement and plaintiff stated that she signed it because she couldn't take his "badgering" and feared for her safety. The trial court refused to enforce the agreement finding "that plaintiff signed the agreement because of duress or severe stress resulting from the nature of the parties' relationship that she endured for 25 years."

Decision: The Court of Appeals affirmed the trial court's determination that plaintiff entered into the agreement as a result of duress or severe stress. The Court relied on *Lentz v Lentz*, 271 Mich App 465 (2006), which holds that parties are bound by property settlements in the absence of fraud, duress, mutual mistake or severe stress. The Court distinguished this case from *Lentz*, where the agreement was enforced because in *Lentz* negotiations occurred over six weeks, the agreement was drafted by a third party attorney, and the defendant sought advice of her own attorney.

ABATEMENT OF CONFINEMENT COSTS

Booker v Shannon, ___ Mich App ___ (9/17/2009) docket # 284937

Facts: In this case, the parties were not married when their child was born. Medicaid paid the mother's confinement costs and the defendant-father was ordered to repay them. The parties subsequently married in 1997 and ten years later father brought a motion for abatement based on MCL 722.215(5), which permit abatement of pregnancy and confinement expenses if the father marries the mother after there is an order to pay. This language was pursuant to an amendment to the statute in 2004. The trial court denied father's motion to abate unpaid expenses.

Decision: The Court of Appeals held that father was entitled to abatement pursuant to the plain language of the statute and reversed and remanded for entry of an order abating unpaid expenses. The prosecutor, on behalf of the mother and the State, argued that the marriage must occur after the effective date of the amendatory act. The Court of Appeals disagreed and found that the plain language of the statute clearly provides that orders entered before the effective date of the statute are also subject to abatement if the father marries the mother. The statute does not provide that the marriage must occur after the amendatory date and the Court declined to read it into the statute.

PERSONAL PROTECTION ORDERS

Campbell v Wolanin, unpublished, docket no. 286331 (10/13/09)

Facts: Petitioner was leasing a house from respondent. Respondent lost his landlord license because he was behind in making necessary repairs and petitioner was at risk of losing her Section 8 status. Respondent entered the home without her consent after he claimed he tried to contact her. Petitioner was behind in rent and respondent began eviction. In her PPO petition, petitioner alleged that respondent entered her house without notice, screamed at and threatened her and left intimidating messages on her voicemail. The court granted a PPO precluding respondent from entering the home for 60 days. Respondent appealed arguing that the court lacked subject matter jurisdiction because this was a landlord-tenant dispute and erred in entering the PPO.

Decision: The Court of Appeals found the trial court had jurisdiction. The court must look to the nature of the plaintiff's claim. Here, the petitioner alleged that respondent threatened her and entered her home. Despite the fact that the case involves a dispute between the parties in their capacities as tenant and landlord, the nature of these claims comports with a PPO claim over which the court has jurisdiction. However, the Court found the court erred in granting the PPO because it was unclear whether the court considered all the necessary elements of stalking as required under the statute. Finally, since the PPO expired prior to this decision the Court addressed the issue of mootness and found the issues not moot since the statute requires entry of a PPO as well as rescission of a PPO into LEIN, which may affect the respondent.

Dukes v Hampton, unpublished, docket no. 292258 (10/20/09)

Facts: Petitioner filed a petition for a PPO alleging that respondent called her employer accusing her of unethical actions, which placed her job in jeopardy, sent numerous threatening emails and telephoned her 25 times in one day leaving threatening messages. The court entered a PPO and respondent challenged the order denying any threats of harm and claiming he called petitioner's employer in an attempt to collect a debt. The trial court denied his motion and noted he had other remedies for debt collection. Respondent appealed arguing that his conduct did not constitute stalking.

Decision: The Court of Appeals affirmed finding respondent's conduct constituted harassment and the repeated instance constituted stalking under the statute. First, the Court found that respondent's 25 calls in one day constituted harassment since the excessive nature of the unwanted calls would and did cause emotional distress. Second, respondent's repeated emails about the debt and the parties' relationship constituted harassment where he continued to email after petitioner asked him to stop and the emails although not explicitly threatening were aggressive, vulgar and could be interpreted by the court as a threat.

ERISA-CONTROLLED SAVINGS PLANS

In re Estate of Ernest J. Lager, ___ Mich App ___ (11/3/2009) docket #276843

Facts: In 1992, Ernest designated his son Eric, Appellee, as the primary beneficiary of his personal savings plan (PSP). At that time, Ernest was unmarried. He married Georgia, appellant and personal representative, in 1997. Ernest died intestate in 2005. Georgia was appointed the personal representative of his estate. She contacted the administrator of the PSP, who paid the PSP proceeds to her as the surviving spouse. Claiming that he was the designated beneficiary, Eric petitioned the probate court to determine the disposition of the proceeds. The probate court awarded them to Eric and Georgia appealed for a determination of her right to the proceeds under ERISA, 29 USC 1055.

The parties do not dispute that Ernest elected Eric as a beneficiary *prior* to the marriage or that Georgia did not consent to this election *following* the marriage. Thus, the key issue on appeal is whether an election by an unmarried participant is effective following the participant's subsequent marriage if the new spouse fails to consent to the election.

Decision: The Court of appeals reversed, finding that, "In keeping with authority from other jurisdictions and the plain language and purpose of 29 USC 1055(c)(2), we conclude that an election by an unmarried participant is not effective following a subsequent marriage if the new spouse fails to consent to the election. In this case, Georgia did not provide consent to Ernest's election of Eric according to 29 USC 1055(c). Thus, the probate court erred when it determined that Eric was the proper beneficiary."