

MICHIGAN FAMILY LAW ARBITRATION AND AND MEDIATION 2010-2011 CASE LAW UPDATE

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I. INTRODUCTION

This article supplements “Michigan Family Law Arbitration and Mediation Case Law Update,” *Michigan Family Law Journal* (March 2010), <http://www.leehornberger.com/UserFiles/File/Update-FAMILY-March-2010.pdf> , by reviewing significant Michigan arbitration and mediation cases concerning family law since early 2010.

II. ARBITRATION

A. Michigan Supreme Court Decisions

1. Parental pre-injury waivers and arbitration

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), was a five (Justices Young, Hathaway, Kelly, Weaver and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young. The decision held that a parental pre-injury waiver is unenforceable under Michigan common law because, absent special circumstances, a parent does not have authority to contractually bind his or her child. In reaching this conclusion, Justice Young cited *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In *McKinstry*, a pregnant mother signed a medical waiver requiring arbitration of any claim on behalf of her unborn child. The mother contested the validity of the waiver after her child was injured during delivery. The Court considered the effect of the Medical Malpractice Arbitration Act, MCL 600.5046(2) (since repealed by 1993 PA 78), which provided:

A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement.

McKinstry held that the statute required that the arbitration agreement signed by the mother bound her child. According to Justice Young, *McKinstry* acknowledged that the arbitration agreement would not have been binding under the common law. He indicated that *McKinstry*'s interpretation of MCL 600.5046(2) was a departure from the common law rule that a parent has no authority to release or compromise claims by or against a child. He indicated that the common law can be modified or abrogated by statute. A child can be bound by a parent's act when a statute grants that authority to a parent. Justice Young believed that MCL 600.5046(2) changed the common law to permit a parent to bind a child to an arbitration agreement.

2. Michigan Supreme Court reopens issue of how many correction motions allowed

Vyletel-Rivard v Rivard, 486 Mich 938; 782 NW2d 502 (2010), granted the application for leave to appeal the Court of Appeals' judgment in *Vyletel-Rivard v Rivard*, 286 Mich App 13; 777 NW2d 722 (2009). In *Vyletel-Rivard, id*, defendant had challenged the trial court's order denying his motion to vacate the arbitration award concerning tort damages in a Domestic Relations Arbitration Act (DRAA), MCL 600.5070 *et seq*, case. The Court of Appeals affirmed the Circuit Court's denial because the Court concluded that defendant's motion to vacate was not timely filed.

The Supreme Court ordered the parties to address whether the Court of Appeals correctly held that: (1) MCL 600.5078(1) and (3) contemplate no more than two arbitration

awards (the initial award and any modified award following a motion to correct errors and omissions); (2) MCL 600.5078(3) does not permit the filing of more than one motion to correct; and (3) defendant's motion to vacate the award was untimely.

The Supreme Court's order resurrects the issue of whether there can be more than one motion to modify or correct an arbitration award.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any Michigan Court of Appeals published decisions concerning arbitration in family law cases during the review period.

C. Michigan Court of Appeals Unpublished Decisions

1. "Till death do us part"

In *Anoshka v Anoshka*, unpublished opinion of the Michigan Court of Appeals, issued April 19, 2011 (Docket No 296595) (Gleicher, Sawyer and Markey), plaintiff decedent appealed the trial court's denial of plaintiff's motion for an amended judgment of divorce and remanding the case for issuance of an updated arbitration award based on changes in circumstances following the plaintiff decedent's death. An arbitration award had been issued in 2003. The award was never incorporated into a judgment. The plaintiff died two months after the issuance of the award. The defendant did not comply with certain requirements of the award. In 2009 the plaintiff decedent filed a motion to have further arbitration based on changes in circumstances following the decedent's death. The Court of Appeals reversed the trial court's order remanding the case for further arbitration because, according to the Court of Appeals, the motion was barred by laches

and unclean hands, and general principles of equity.

2. Ex parte communication okay if not forbidden by agreement to arbitrate

Cipriano v Cipriano, unpublished opinion of the Michigan Court of Appeals, issued August 10, 2010 (Docket No 291377, 292806) (Sawyer, Bandstra and Whitbeck). In *Cipriano* the Court of Appeals affirmed the Circuit Court’s order confirming the arbitrator’s award. In addition, the Court of Appeals reversed that portion of the Circuit Court order which changed a monthly payment amount ordered by the arbitrator. MCR 3.602(K)(2).

In this case, there had been a brief ex parte communication by one party to the arbitrator. The Court of Appeals noted that the ex parte communication did not violate the parties’ arbitration agreement. As in *Miller v Miller*, 474 Mich 27 (2005), the allowances and prohibitions of the arbitration agreement were given great deference by the reviewing court.

3. Importance of raising issues in motion for relief from award

Crowley v Crowley, unpublished opinion of the Michigan Court of Appeals, issued April 15, 2010 (Docket No 288888) (Markey, Zahrat and Gleicher). In this case defendant argued that the arbitrator committed errors of law, exceeded his authority, and was biased against her. The Court of Appeals held that defendant is not entitled to relief because she failed to raise these issues in a timely motion for relief from the award. The same basic result was reached in *Voltz v Voltz*, unpublished opinion of the Michigan Court of Appeals, issued January 21, 2010 (Docket No 291573) (KF Kelly, Hoekstra and Whitbeck).

III. MEDIATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning facilitative mediation in family law cases during the review period.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any Michigan Court of Appeals published decisions concerning facilitative mediation in family law cases during the review period.

C. Michigan Court of Appeals Unpublished Decisions

1. Mediation resolution does not deprive the court of its authority and obligations

In re BJ, unpublished opinion of the Michigan Court of Appeals, issued January 20, 2011 (Docket No 296273) (Jansen, Owens and Shapiro), held that MCR 3.216 domestic relations mediation is not binding but is subject to acceptance or rejection by the parties; and parents' utilization of alternative dispute resolution does not deprive the court of its Child Custody Act, MCL 722.23, authority and obligations.

2. Circuit Court cannot always order mediation

In *Baker v Holloway*, unpublished opinion of the Michigan Court of Appeals, issued January 26, 2010 (Docket No 288606) (Murphy, Jansen and Zahra), respondent appealed the trial court's order denying her motion to terminate petitioner's ex parte personal protection order (PPO). Instead of receiving a hearing on the merits of whether the PPO should have been terminated, respondent was ordered to mediate her dispute with petitioner. Respondent claimed the Circuit Court erred by requiring her to enter mediation because she was entitled to a prompt

hearing on the merits of the PPO. The Court of Appeals held that mediation may not be required as a condition to having a hearing on the merits of a PPO. The Court of Appeals vacated the order denying respondent's motion to terminate the PPO and remanded for an evidentiary hearing to determine whether the PPO should be terminated.

IV. CONCLUSION

Michigan appellate courts have issued several potentially important decisions concerning arbitration and mediation of family law cases since early 2010. These decisions included:

1. *Vyletel-Rivard, id*, implied that the issue of how many motions to correct errors or omissions can be timely filed is not clear.
2. *Cipriano, id*, signified that the wording of the agreement to arbitrate is crucial even to the point of allowing an ex parte communication to the arbitrator..
2. *Baker, id*, clarified that not all cases can be ordered to mediation.

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