MICHIGAN FAMILY LAW ARBITRATION AND MEDIATION 2011-2012 CASE LAW UPDATE

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I. INTRODUCTION

This article supplements "Michigan Family Law Arbitration and Mediation 2010-2011 Case Law Update," Michigan Family Law Journal (August/September 2011), by reviewing significant Michigan cases concerning arbitration and mediation issued since January 2011. For the sake of brevity, this article uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning arbitration during the review period.

B. Michigan Court of Appeals Published Decisions

1. Offsetting decision-maker biases can arguably create neutral tribunal

White v State Farm Fire and Cas Co, 293 Mich App 419 (2011) (Borrello, Meter, and Shapiro [concurring]), was not an arbitration case. It discussed whether a MCL 500.2833(1)(m) appraiser who receives a contingency fee for an appraisal is sufficiently neutral. The Court of Appeals indicated at fn 7 " '[c]ourts have repeatedly upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when a neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create an effectively neutral tribunal by

building in presumably offsetting biases.'" *Whitaker v Citizens Ins Co of Am*, 190 Mich App 436, 440 (1991), quoting *Tate v Saratoga S & L Ass'n*, 216 Cal App 3d 843, 852 (1989), disapproved on other grounds by *Advanced Micro Devices, Inc v Intel Corp*, 9 Cal App 4th 362; 885 P2d 994 (1994).

C. Michigan Court of Appeals Unpublished Decisions

1. Vacating of domestic relations arbitration award reversed

In ***MacNeil v MacNeil***, 301849 (March 15, 2012) (O'Connell, Sawyer, and Talbot), plaintiff appealed the successor Circuit Court judge's order vacating a domestic relations arbitration award. The Court of Appeals reversed. According to the Court of Appeals, the successor judge misconstrued the arbitrator's assessment of witness credibility as an indication that the arbitrator was prejudiced against defendant, and the successor judge incorrectly determined that the arbitrator was required to reopen the proofs to receive additional evidence of defendant's change in circumstances.

2. Pre-existing tort claim commenced after domestic relations arbitration

Chabiaa v Aljoris, 300390 (February 21, 2012) (Stephens, Whitbeck, and Beckering). Under a domestic relations arbitration agreement, an arbitrator was to decide property division and support. After arbitration, the Circuit Court entered a judgment of divorce pursuant to the arbitration award. The judgment provided that it resolved all pending claims and closed the case. Subsequently, plaintiff filed an assault and battery complaint against the defendant for events that preceded the arbitration. According to the Court of Appeals, the scope of the arbitration agreement did not include the resolution of tort claims, and an assault and battery cause of action could be brought in a separate proceeding after the domestic relations case and arbitration.

3. "Till death do us part"

In ***Anoshka v Anoshka***, 296595 (April 19, 2011) (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

4. Court of Appeals affirms Circuit Court orders favoring arbitration

In the following cases the Court of Appeals affirmed orders ordering arbitration or declining to vacate awards. *Bies-Rice v Rice*, 295631, 295634, 300271 (September 4, 2012) (Meter, Fitzgerald, and Wilder); *Lipka v Lipka*, 307408 (August 27, 2012) (Gleicher, Cavanaugh, and Saad); *Foster v Foster*, 302287 (July 24, 2012) (Donofrio, Ronayne Krause, and Boonstra); *Kutz v Kutz*, 300864 (May 1, 2012) (Meter, Servittot, and Stephens), lv dn ___ Mich ___ (2012); *Suszek v Suszek*, 299167 (February 28, 2012) (Saad, K F Kelly, and M J Kelly); *Armstrong v Rakecky*, 301423 (February 21, 2012) (Saad, K F Kelly, and M J Kelly*); Bird v Oram*, 298288 (September 27, 2011) (M J Kelly, Owens, and Borrello); *Souden v Souden*, 297676, 297677, 297678 (September 20,

2011) (M J Kelly, Owens, and Borrello) (remand for clarification reversed by Court of Appeals).

III. MEDIATION

A. Michigan Supreme Court Decisions

There do not appear to have been any Michigan Supreme Court decisions concerning mediation during the review period.

B. Michigan Court of Appeals Published Decisions

1. "Pressure to Settle" in Mediation Discussed

In ***Vittiglio v Vittiglio***, ___ Mich App ___ (July 31, 2012) (303724 and 304823) (K F Kelly, Sawyer, and Ronayne Krause), plaintiff appealed the Circuit Court order denying plaintiff's motion to set aside a judgment of divorce entered pursuant to a mediated settlement agreement. The Court of Appeals affirmed the holding that the audio recorded settlement agreement at the mediation session was binding and that "a certain amount of pressure to settle is fundamentally inherent in the mediation process." The Court of Appeals also affirmed the Circuit Court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and that the Circuit Court did not abuse its discretion in awarding costs and attorney fees of $17,965.

C. Michigan Court of Appeals Unpublished Decision

1. Court Considers Post Arbitration-Mediation Vacation between Arbitrator-Mediator and One of Attorneys

Hartman v Hartman, 304026 (August 7, 2012) (Donofrio, Ronayne Krause, and Boonstra), concerned the same individual serving as arbitrator and mediator and the post-arbitration/mediation conduct of the arbitrator-mediator and the defense counsel. The Circuit Court ordered the parties to mediation. When mediation failed, the parties agreed

to arbitrate using the mediator as the arbitrator. The arbitrator issued some awards covering minor issues. Before arbitration on the major issues, the parties agreed to again mediate utilizing the arbitrator as a mediator. This mediation failed. The parties then reached a settlement agreement on their own. At the entry of judgment hearing, plaintiff stated that he had concerns about the arbitrator acting as a neutral. He did not ask to have the settlement agreement set aside. The final judgment hearing was continued for four weeks. Plaintiff's counsel contacted the arbitrator to inform the arbitrator of the dates. The arbitrator informed plaintiff's counsel that the arbitrator was going to be in Florida and staying at the home of defense counsel while defense counsel would also be present. Plaintiff's counsel then contacted defense counsel to request a new arbitrator to handle the remaining issues. Defense counsel refused the request.

Plaintiff filed motions to remove the arbitrator, have a new arbitrator appointed, and obtain relief from the settlement agreement. Defendant argued that the arbitration awards were moot because a settlement had been reached. Defense counsel argued that what occurred between himself and the arbitrator was hospitality and that numerous attorneys, including judges, had stayed at defense attorney's Florida home. The Circuit Court denied plaintiff's motion, stating that there was no appearance of impropriety because the parties ultimately reached a settlement agreement and that the trip to Florida occurred 30 days after the mediation. A judgment of divorce was entered. The Circuit Court held that there was no evidence of clear or actual bias by the arbitrator and no evidence to prove that what occurred between the arbitrator and defense counsel rose to the level of clear actual partiality.

The Court of Appeals affirmed the denial of plaintiff's motion to set aside the settlement agreement and judgment of divorce. The Court of Appeals stated that:

> The totality of the circumstances in the case at bar rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters. However, the final matters that remained outstanding at the time of the arbitrator's and defense counsel's vacation together were settled by the judge. The arbitration awards issued before the settlement agreement became moot because the settlement agreement handled those matters. The only issue not moot is whether the settlement agreement can be set aside. We find that it cannot. … [See generally] *Cain v Michigan Dep't of Corrections*, 451 Mich 470; 548 NW2d 210 (1996); …. [and] *Gates v Gates*, 256 Mich App 420; 664 NW2d 231 (2003).

2. Circuit Court Can Enter Judgment on Mediation Agreement

Unit 67, LLC v Hudson, 303398 (June 7, 2012) (Donofrio, Jansen, and Shapiro), affirmed a Circuit Court entry of a consent judgment because defendant had agreed to the terms of the consent judgment and the mediator did not engage in fraudulent conduct.

3. Mediated agreement enforced

Roe v Roe, 297855 (July 19, 2011) (Talbot, Hoekstra, and Gleicher). The Court of Appeals held that the mediation agreement evidenced the intent of the parties to value the retirement assets, the agreement was enforceable and binding, and property settlement provisions in a divorce judgment typically are final and cannot be modified by the court.

4. Mediation Child Custody Resolution Does Not Deprive Court of its Authority and Obligations

In re BJ, 296273 (January 20, 2011) (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 the parents' utilization of alternative dispute resolution does not deprive the court of its Child Custody Act, MCL 722.23, authority and obligations.

IV. CONCLUSION

Court decisions since January 2011 concerned the following ADR issues.

1. Arbitration and mediation can be a favored way to resolve disputes. *White, MacNeil, Anoshka, Vittiglio, Unit 67,* and *Roe*.

2. Pressure to settle recognized in mediation. *Vittiglio.*

3. Raising tort claim after arbitration. *Chabiaa*.

4. Implications of arbitrator-mediator staying at counsel's Florida home. *Hartman.*

5. Court cannot always order mediation. *In re BJ*.

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