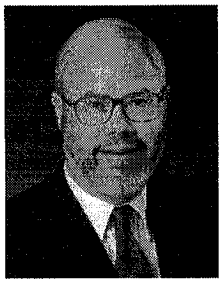

Michigan Family Law Arbitration and Mediation 2013-2014 Case Law Update

By Lee Hornberger
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Introduction

This article supplements "Michigan Family Law Arbitration and Mediation 2011-2012 Case Law Update," *Michigan Family Law Journal* (January 2013), by reviewing significant Michigan family law cases issued since January 2013 concerning arbitration and mediation. For the sake of brevity, this article uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

Arbitration

Michigan Supreme Court Decisions 10-24-2014

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

Michigan Court of Appeals Published Decisions

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

Michigan Court of Appeals Unpublished Decisions

COA Reverses Circuit Court's Affirmance of Award and Remands for Reconsideration of Air Force Pension Distribution.

Torres v Torres, 314453 (August 19, 2014) (Gleicher and O'Connell [majority]; and Hoekstra [dissent]). The parties submitted their divorce proceedings to binding arbitration. Evidence submitted to the arbitrator revealed that the husband, after achieving 20 years of service, was entitled to a United States Air Force pension. The arbitrator's initial decision overlooked the Air Force pension. When the wife brought this omission to the arbitrator's attention, he acknowledged the existence of the unvested pension but refused to value or divide it. As a result, the award, on its face, improperly treated the pension as the husband's separate property. The Court of Appeals reversed the Circuit Court's affirmance of the arbitration award and remanded for reconsideration of the pension distribution.

COA Holds Circuit Court Erred in Refusing To Vacate Provision of Award and Proposed Judgment Concerning Child Support.

Visser v Visser, 314185 (July 15, 2014) (Murphy, Shapiro, and Riordan). In this domestic relations matter, the parties agreed to arbitration in order to resolve issues relating to child custody, parenting time, child support, and property division. The parties agreed that, pursuant to MCL 600.5077(2), if child custody, child support, and/or parenting time were at issue, a court reporter would be hired to transcribe the portion of the arbitration proceedings affecting those issues. They agreed that the arbitrator must adhere to the Michigan Rules of Evidence (MRE) in rendering his decision.

After the custody and parenting time issues were successfully mediated, arbitration was held to decide the child support and property issues. Without the presence of a court reporter, and without adhering to the MRE, the arbitrator entered an award and proposed judgment.

Defendant argued the arbitrator exceeded his authority in failing to apply the MRE and failing to hire a court reporter for the arbitration. The Circuit Court ruled in favor of plaintiff, entered the arbitrator's proposed judgment of divorce, and denied defendant's motion to vacate the award.

The COA held that because of the arbitrator's failure to comply with the arbitration agreement by neither utilizing the MRE nor obtaining a court reporter, the Circuit Court erred in refusing to vacate the provision of the award and proposed judgment of divorce concerning child support.

COA Affirms Circuit Court Orders Favoring Arbitration

In the following cases, the COA affirmed rulings ordering arbitration, confirming awards, or declining to vacate awards. *Ross v Ross*, 319576 (September 24, 2014) (Riordan, Cavanagh, and Talbot) (DRAA); *Kosiur v Kosiur*, 314841 (April 22, 2014) (Meter, O'Connell, and Shapiro) (DRAA); *Pugh v Crowley*, 313471 (April 8, 2014) (Donofrio, Cavanagh, and Jansen) (attorney fees).

Mediation

Michigan Supreme Court Decisions

COA Enforces Mediated Agreement Concerning Parental Rights.

In *re Wangler/Paschke,* ___ Mich ___, 149537 (September 19, 2014), the Supreme Court ordered that the application for leave to appeal be held in abeyance pending the decision in *In re Farris* (147636) [*In re Farris*, COA 311967 (August 8, 2013) (Servitto, Whitbeck, and Shapiro), leave granted ___ Mich ___, SC 147636 (September 19, 2014)].

In *In re Wangler/Paschke*, 305 Mich App 438, 318186 (May 27, 2014) (Hoestra and Sawyer [majority]; Gleicher [dissent]), the parties entered into a mediated agreement. Respondent failed to comply with the mediated ordered services. Pursuant to the agreement, the Circuit Court accepted her plea and took jurisdiction over the minor children. Respondent's attorney agreed that the mediation agreement authorized the court to take jurisdiction over the children. The court stated that it was taking "formal jurisdiction" and authorized petitioner to file a supplemental petition asking for termination of respondent's parental rights. On appeal, respondent argued that her written plea that was incorporated into the mediation agreement was invalid and could not form a basis for the court to take jurisdiction over the minor children. The court ordered the parties to engage in mediation immediately after the preliminary hearing wherein it found probable cause to authorize the petition and ordered temporary placement of the minor children. During mediation, the parties negotiated an agreement that was signed by all participants, including respondent. The agreement set forth the consequences of the court's acceptance of respondent's plea of admission.

Judge Gleicher's dissent indicated that before a court may exercise jurisdiction based on a parent's plea it must satisfy itself that the parent knowingly, understandingly, and voluntarily waived certain rights. MCR 3.971(C)(1). No dialogue between court and parent had occurred. The mediation employed as a substitute for the adjudicative trial improperly bypassed the due process protections in the court rules, and the Circuit Court never obtained jurisdiction.

Supreme Court Denies Leave to Appeal in "Pressure to Settle" Case.

In *Vittiglio v Vittiglio*, 493 Mich 936; 825 NW2d 584, SC 145825 and 145826 (February 8, 2013), the Supreme Court denied leave to appeal from *Vittiglio v Vittiglio*, 297 Mich App 391 (2012) (KF Kelly, Sawyer, and Ronayne Krause). In *Vittiglio,* the COA had affirmed the Circuit Court's 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 COA also affirmed the Circuit Court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and Circuit Court did not abuse its discretion in awarding costs and attorney fees.

Michigan Court of Appeals Published Decisions

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

Michigan Court of Appeals Unpublished Decision

COA Affirms Circuit Court's Refusal to Enter Judgment Implementing Mediated Settlement Agreement.

Hayes v Morris, 315586 (July 29, 2014) (Boonstra, Meter, and Servitto). The parties were ordered to domestic relations mediation. MCR 3.216. The parties reached a settlement that provided for a largely equal division of the marital estate. No judgment based on the agreement was entered. Then the husband died. In *Tokar v Albery*, 258 Mich App 350, 351-352; 671 NW2d 139 (2003), the parties, amidst divorce proceedings, submitted property issues to binding arbitration. After the filing of the award but before entry of judgment, the *Tokar* husband died. *Tokar* held that the trial court correctly denied the motion to enforce the award because "the trial court retains ultimate control over a divorce action" and an "award, standing alone, does not have full force and effect unless and until the trial court enters a judgment of divorce based on that award." The COA mentioned two possible exceptions under which the award could be enforced: (1) if entry of judgment would have been "ministerial" and (2) if the decedent had acted in reliance on the award.

The COA found that entry of judgment would not have been "ministerial" because, in part, there were issues of household furnishings remaining and "before the judgment of divorce was entered, the parties had the option to reconcile or stipulate to an agreement entirely different from the arbitration award."

The COA also found no reliance by the decedent, stating that, to show reliance, "[m]eaningful proof of conduct indicating the parties themselves in good faith believed they were divorced is required." Such reliance has not been shown in the present case either.

COA Enforces Mediated Agreement Concerning Parental Rights.

In re Vanalstine, Minors, 312858 (April 11, 2013) (Fitzgerald, O'Connell and O'Brien). The respondent mother appealed from an order terminating her parental rights to her minor children. MCL 712A.19b(3)(b)(ii), (c)(i) (g), and (j) The Circuit Court ordered the parties to participate in mediation. This resulted in a mediation agreement concerning parental

rights to minor children. The mother did not comply with the agreement and the Court terminated her parental rights. The COA indicated that, contrary to the mother's assertion, the Circuit Court did not terminate her parental rights solely for her failure to comply with the agreement. The Circuit Court's decision was based on the mother's conduct, which included but was not limited to her failure to comply, and which led to the Circuit Court's assessment of the statutory termination factors. The COA found it unnecessary to resolve whether a defense of impossibility could render such an agreement void or voidable.

Conclusion

Michigan appellate court family law decisions since early 2013 reviewed the following ADR issues.

1. Under what circumstances can an award be vacated? *Torres, id; Visser, id.*
2. Is there a recognized pressure to settle in mediation? *Vittiglio, id.*
3. When is entry of judgment concerning a mediated settlement a ministerial act? *Hayes, id.*
4. Are mediated settlement agreements concerning jurisdiction over children enforceable? *In re Wangler/Paschke, id*; and *In re Vanalstine, id.*

About the Author

Lee Hornberger *is an arbitrator and mediator. He received the George N. Bashara, Jr. Award from the State Bar of Michigan's Alternative Dispute Resolution Section in 2014 in recognition of exemplary service to the ADR Section and its members. He is a member of the SBM's ADR Section Council and SBM's Representative Assembly, editor of The ADR Quarterly, Chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, and a former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is an arbitrator with the AAA, FMCS, FINRA, MERC, NAF, and NFA. He can be reached at 231-941-0746 and leehornberger@leehornberger.com.*