MICHIGAN DOMESTIC RELATIONS ARBITRATION AND MEDIATION CASE LAW UPDATE

STATE BAR OF MICHIGAN FAMILY LAW SECTION ST. REGIS BAHIA BEACH RESORT, PUERTO RICO

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I. INTRODUCTION

This update reviews significant Michigan cases issued since 2008 concerning domestic relations arbitration and mediation. For the sake of brevity, this update uses a short citation style rather than the official style for COA unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

Arbitrator can hear claims arising after referral to arbitration.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, ___ Mich ___, 825 NW2d 580 (2013), in lieu of granting leave to appeal, reversed COA judgment, for reasons stated in COA dissenting opinion, and reinstated Circuit Court order, denying defendants' motion to vacate award and confirming award.

Judge Servitto's dissent in ***Wireless Toyz Franchise, LLC***, 303619 (May 31, 2012), said stipulated order intended arbitration would include claims beyond those that were pending because it allowed further discovery, gave arbitrator powers of Circuit Court judge, and stated that award would represent "full and final resolution" of matter. Order did not exclude new claims from arbitration. Parties' intent appears to have been that arbitrator would determine all claims in case. Claims that were not pending at time order was entered were not outside scope of arbitrator's powers.

Parental pre-injury waivers and arbitration.

Woodman ex rel Woodman v Kera LLC, 486 Mich 228; 785 NW2d 1 (2010), a 5 to 2 decision by Justice Young, held that parental pre-injury waiver is unenforceable under Michigan common law because, absent special circumstances, parent does not have authority to contractually bind his or her child. Justice Young cited *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167; 405 NW2d 88 (1987). In *McKinstry*, pregnant mother signed medical waiver requiring arbitration of any claim on behalf of her unborn child. Mother contested validity of waiver after her child was injured during delivery. Court considered effect of Medical Malpractice Arbitration Act, MCL 600.5046(2) (since repealed by 1993 PA 78), which provided: A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of agreement on his behalf by parent or legal guardian. Minor child may not subsequently disaffirm agreement. In *McKinstry*, Court held that statute required that

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

Ex parte submission to arbitration panel inappropriate.

In ***Gates v USA Jet Airlines, Inc***, 482 Mich 1005; 756 NW2d 83 (2008), Supreme Court vacated award and remanded case to Circuit Court because one of parties submitted to arbitration panel an *ex parte* submission in violation of arbitration rules. Submission may have violated MRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) and 3.5(b) (prohibiting ex parte communication with judge, juror, or other official regarding pending matter).

Failure to tape record domestic relations arbitration hearing.

Kirby v Vance, 481 Mich 889; 749 NW2d 741 (2008), in lieu of granting leave to appeal, reversed COA and held that arbitrator exceeded arbitrator's authority under DRAA, MCL 600.5070 *et seq*, when arbitrator failed to adequately tape record arbitration proceedings. Circuit Court erred when it failed to remedy arbitrator's error by conducting its own evidentiary hearing. Supreme Court remanded case to Circuit Court for entry of order vacating award and ordering another arbitration before same arbitrator.

Formal hearing format not required.

Miller v Miller, 474 Mich 27; 707 NW2d 341 (2005), held that DRAA, MCL 600.5070 *et seq*, does not require formal hearing during arbitration concerning property issues similar to that which occurs in regular trial proceedings.

B. Michigan Court of Appeals Published Decisions

Pre-arbitration hearing submission of exhibits.

Fette v Peters Constr Co, 310 Mich App 535 (2015). Michigan Arbitration Act (MAA), MCL 600.5001 *et seq*, controlled this case; not Uniform Arbitration Act (UAA), MCL 691.1681 *et seq*. COA concluded record did not support plaintiffs' contention that arbitrator considered exhibits that defendant electronically shared before hearing in making award determination. Even if award were against great weight of evidence or was not supported by substantial evidence, COA would be precluded from vacating award. Allowing parties to electronically submit evidence prior to hearing did not affect plaintiffs' ability to present any evidence they desired.

Pre-award lawsuit concerning arbitrator selection.

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, 304 Mich App 46; 850 NW2d 408 (2014), is an example of viewpoint that "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[,]" Elkouri & Elkouri, *How Arbitration Works* (7th ed), p 4-37, and "[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process." Abrams, *Inside Arbitration* (2013), p 37. In *Oakland-Macomb*, AAA did not appoint a member of the arbitration panel who had specialized qualifications required in agreement to arbitrate. Agreement modified AAA rules by mandating qualifications for the panel and outlining manner in which AAA must appoint panel. Plaintiff brought suit against defendant and AAA to enforce these requirements. Circuit Court ruled in favor of defendant and AAA. COA in a split decision reversed.

Issue was whether plaintiff could bring pre-award lawsuit concerning arbitrator selection process. According to majority, courts usually will not entertain suits to hear pre-award objections to arbitrator selection. But, when a suit is brought to enforce essential provisions of agreement concerning criteria for choosing arbitrators, courts will enforce such mandates. According to majority, agreement to arbitrate made specialized qualifications of panel central to entire agreement; and, when such a provision to arbitrate is central to agreement, the Federal Arbitration Act (FAA), 9 USC 1, *et seq*, provides that it should be enforced by courts prior to the arbitration hearing. "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed … ." 9 USC 5.

According to majority, party may petition court before award has been issued if (1) arbitration agreement specifies detailed qualifications arbitrator(s) must possess and (2) arbitration administrator fails to appoint arbitrator that meets these qualifications. Court may issue order, pursuant to § 4 of FAA, requiring that arbitration proceedings conform to terms of arbitration agreement. Majority awarded plaintiff its Circuit Court and COA costs and attorney fees.

Judge Jansen's dissent said party cannot obtain judicial review of qualifications of arbitrators prior to award. There was no claim that selection of panel member involved fraud or any other fundamental infirmity that would invalidate arbitration agreement, or any claim that appointee had inappropriate relationship with a party. Although appointee might not have had requirements for appointment, plaintiff was required to wait until after issuance of award in order to raise issue in a proceeding to vacate. 9 USC 10.

Offsetting decision-maker biases can arguably create neutral tribunal.

White v State Farm Fire and Cas Co, 293 Mich App 419; 809 NW2d 637 (2011) , discussed whether MCL 500.2833(1)(m) appraiser who receives contingency fee for appraisal is sufficiently neutral. COA said 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).

How many correction motions are allowed?

In ***Vyletel-Rivard v Rivard***, 286 Mich App 13; 777 NW2d 722 (2009); lv gtd 486 Mich 938; 782 NW2d 502 (2010), stip dism ___ Mich ___ (2010), defendant challenged Circuit Court's order denying motion to vacate award concerning tort damages in DRAA, MCL 600.5070, *et seq*, case. COA affirmed Circuit Court's denial because Court concluded that defendant's motion to vacate was not timely filed. On March 28, 2008, defendant, pursuant to MCL 600.509(2), filed motion to vacate "arbitration awards" of November 13, and December 7, 2007, as to tort damages. Party has 21 days to file motion to vacate in DRAA case. MCR 3.602 (J)(2). Lesson of this case is to think carefully before filing second round of reconsideration motions rather than filing notice of appeal. *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

COA approves probate arbitration.

In split decision, ***In re Nestorovski Estate***, 283 Mich App 177; 769 NW2d 720 (2009), held that probate proceedings are not inherently unarbitrable.

C. Michigan Court of Appeals Unpublished Decisions

Court appointment of DRAA substitute arbitrator reversed

In *Zelasko v Zelasko*, 324514 (December 8, 2015), defendant appealed order appointing substitute arbitrator after agreed-upon arbitrator died. The same order denied defendant's request that interim arbitration orders be vacated. Indicating nothing in DRAA, MCL 600.5070 et seq., permits Circuit Court to appoint substitute arbitrator absent agreement of parties, COA reversed that portion of order appointing substitute arbitrator. COA agreed with Circuit Court that there was no reason to disturb interim orders, which were either not contested or were affirmed by Circuit Court, and affirmed that portion of order.

COA approves informal method of conducting DRAA arbitration

Fadel v El-Akkari, 321931 (October 15, 2015). (DRAA). COA held that Circuit Court acted within its discretion in revisiting its initial decision to vacate arbitration award. DRAA does not require arbitrator to hear live rebuttal testimony.

Lack of transcript cannot be raised for first time on appeal

Ellis v Ellis, 321972 (August 6, 2015). Failing to record arbitration proceedings when required pursuant to MCL 600.5077(2) exceeds arbitrator's authority. Parties may not waive availability of evidentiary hearing if Circuit Court determines that hearing is

necessary to exercise its independent duty under CCA. MCL 722.25. A party has to raise the transcript issue before the Circuit Court for the COA to consider it.

COA confirms binding mediation award.

In ***Cummings v Cummings***, 318724 (May 19, 2015), plaintiff appealed Circuit Court order denying plaintiff's motion to vacate "binding mediation award." COA affirmed. COA held binding mediation is equivalent to arbitration and subject to same judicial review. According to COA, parties agreed to binding mediation, which like arbitration, does not require a certain degree of formality. Relief from untimely award was not warranted where appellant failed to allege what substantial difference would have resulted from a timely award. According to COA, cases where award was vacated due to *ex parte* communication involved a violation of arbitration agreement prohibiting such conduct. The binding mediation agreement did not contain a clause prohibiting *ex parte* communication, so there is no indication that mediator exceeded his powers by acting beyond material terms of parties' contract. COA said "Plaintiff also asserts that the mediator badgered witnesses, but the only example he gives is that the mediator poked a witness with a pencil. While poking a witness with a pencil, if that is exactly what occurred, is inappropriate, it does not show a concrete bias." COA pointed out hearings were often hostile or aggressive. Although there were times where mediator's behavior was not indicative of "a good mediator" or necessarily professional, mediator did best he could to control situation he was presented with and keep calm when hearings became aggressive.

COA confirms award in spite of discovery and witness interview issues.

Perry v Portage Pub Sch Bd of Ed, 319170 (March 12, 2015), lv dn ___ Mich ___ (2015). In this AAA employment arbitration case, plaintiff appealed Circuit Court's order denying plaintiff's motion to vacate award. COA affirmed. Prior to arbitration, employer retained investigator who created a report. Employee requested copy of report before arbitration hearing. Employer declined, indicating it would provide report to employee only if employee realized this would make document subject to public disclosure under Public Records Act. In addition, employee asked authorization to interview potential employee witnesses. Employee did not request to take formal depositions. At arbitration hearing, employer utilized investigator as witness. Arbitrator issued award in favor of employer. Circuit Court refused to vacate award. COA agreed with Circuit Court that (1) employer did not refuse to produce the report but rather correctly conditioned such production on a realization of Public Records Act implications, and (2) employee could have used deposition procedure to interview witnesses but chose not to.

USAF pension consideration in DRAA arbitration.

Torres v Torres, 314453 (August 19, 2014), lv dn ___ Mich ___ (2015). Parties submitted divorce case to arbitration. Evidence submitted to arbitrator revealed that

husband was entitled to USAF pension. Arbitrator's initial decision overlooked USAF pension. When wife brought this omission to arbitrator's attention, he acknowledged existence of unvested pension but refused to value or equitably divide it. As a result, award on its face improperly treated pension as husband's separate property. COA reversed Circuit Court's affirmance of award and remanded for reconsideration of the pension distribution.

Arbitrator failed to comply with arbitration agreement.

In ***Visser v Visser***, 314185 (July 15, 2014), parties agreed to arbitration in order to resolve issues relating to child custody, parenting time, child support, and property. Parties agreed that, MCL 600.5077(2), if child custody, child support, and/or parenting time were at issue, a court reporter would be hired to transcribe portion of arbitration affecting those issues. They agreed that arbitrator must adhere to MRE. After successfully mediating custody and parenting time issues, arbitration was held to decide child support and property issues. Without court reporter, and without adhering to MRE, arbitrator entered award and proposed judgment. Defendant argued arbitrator exceeded authority in failing to apply MRE and failing to use court reporter. Circuit Court ruled in favor of plaintiff, entered arbitrator's proposed judgment and denied defendant's motion to vacate award. COA held that because of arbitrator's failure to comply with arbitration agreement by neither utilizing MRE nor using court reporter, Circuit Court erred in refusing to vacate provision of award and proposed judgment concerning child support.

COA reverses Circuit Court order to disqualify arbitrator.

Thomas v City of Flint, 314212 (April 22, 2014). During course of arbitration, neutral arbitrator inadvertently sent e-mail to plaintiff's counsel that was intended for one of arbitrator's own clients. Plaintiff's counsel then requested neutral arbitrator to recuse herself and she declined. Circuit Court granted plaintiff's motion to disqualify neutral arbitrator. Plaintiff appealed. COA said arbitrator should be disqualified if, based on objective and reasonable perceptions, arbitrator has serious risk of actual bias, the appearance of impropriety standard is applicable to arbitrators; and arbitrators are not judges and not subject to Code of Judicial Conduct. Unintentional e-mail did not give rise to objective and reasonable perception that serious risk of actual bias existed. MCR 2.003(C)(1)(b). COA reversed Circuit Court's order granting motion to disqualify.

In concurrence's viewpoint, if plaintiff wished to challenge impartiality of neutral arbitrator, he was required to wait until after award was issued and file a motion to vacate. MCR 3.602(J)(2)(b).

Pre-existing tort claim commenced after domestic relations arbitration.

Chabiaa v Aljoris, 300390 (February 21, 2012). Under domestic relations arbitration agreement, arbitrator was to decide property division and support. After arbitration, Circuit Court entered judgment of divorce pursuant to award. The judgment provided it resolved all pending claims and closed the case. Subsequently, plaintiff filed

assault and battery complaint against defendant for events that preceded the arbitration. According to COA, scope of arbitration agreement did not include resolution of tort claims, and assault and battery cause of action could be brought in separate proceeding after domestic relations case and arbitration.

COA affirms Circuit Court orders favoring arbitration.

In the following cases COA affirmed orders ordering arbitration, confirming awards, or declining to vacate awards. ***Fadel v El-Akkari***, 321931 (October 15, 2015) (DRAA); ***Martinez v Degiulio***, 321616 (July 30, 2015) (DRAA); ***Ross v Ross***, 319576 (September 24, 2014); ***Kosiur v Kosiur***, 314841 (April 22, 2014); ***Pugh v Crowley***, 313471 (April 8, 2014); ***Yacisen v Woolery***, 308310 (May 30, 2013); ***Platt v Berris***, 297292 and 298872 (April 23, 2013); ***Suchyta v Suchyta***, 306551 (December 11, 2012); ***Vandekerckhoue v Scarfore***, 301310 (October 11, 2012); ***Bies-Rice v Rice***, 295631, 295634, 300271 (September 4, 2012) , lv den, ___ Mich ___ (2013); ***Kutz v Kutz***, 300864 (May 1, 2012); ***Turkal v Schartz***, 303574 (April 17, 2012); ***MacNeil v MacNeil***, 301849 (March 15, 2012); ***Suszek v Suszek***, 299167 (February 28, 2012); ***Armstrong v Rakecky***, 301423 (February 21, 2012); ***Bird v Oram***, 298288 (September 27, 2011); ***Souden v Souden***, 297676, 297677, 297678 (September 20, 2011) (remand for clarification); ***Kulongowski v Brower***, 293996 (November 9, 2010); ***Cipriano v Cipriano***, 289 Mich App 361; 808 NW2d 230 (2010), lv dn ___ Mich ___ (2012); ***v PHC of Mich, Inc***, 289044 (April 20, 2010); ***Crowley v Crowley***, 288888 (April 15, 2010); ***Considine v Considine***, 283298 (December 15, 2009); and ***Washington v Washington***, 283 Mich App 667; 770 NW2d 908 (2009).

III. MEDIATION

A. Michigan Supreme Court Decisions

MSA concerning parental rights.

In re Wangler/Paschke, ___ Mich ___ (November 6, 2015) (SC 149537) [Justice Markman dissenting], reversed ***In re Wangler/Paschke***, 305 Mich App 438 (May 27, 2014). The Supreme Court held the Circuit Court violated MCR 3.971(C)(1) by failing to satisfy itself that the mother's plea was knowingly, understandingly, and voluntarily made; and the manner in which the Circuit Court assumed jurisdiction violated the mother's due process rights.

In ***In re Wangler/Paschke***, 305 Mich App 438 (2014), parties entered into MSA. Respondent failed to comply with mediated ordered services. Pursuant to agreement, Circuit Court accepted her plea and took jurisdiction over minor children. Respondent's attorney agreed that MSA authorized court to take jurisdiction over children. Court said it was taking "formal jurisdiction" and authorized petitioner to file supplemental petition asking for termination of respondent's parental rights. On appeal, respondent argued her written plea that was incorporated into MSA was invalid and could not form basis for court to take jurisdiction over children. Court ordered parties to engage in mediation immediately after preliminary hearing wherein it found probable cause to authorize the petition and ordered temporary placement of children. During mediation, parties

negotiated MSA that was signed by all participants, including respondent. MSA set forth consequences of court's acceptance of respondent's admission plea.

Judge Gleicher's dissent indicated that before court may exercise jurisdiction based on parent's plea it must satisfy itself that 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 bypassed due process MCR protections, and Circuit Court never obtained jurisdiction.

Supreme Court denies leave to appeal in "pressure to settle" case.

Vittiglio v Vittiglio, 493 Mich 936; 825 NW2d 584 (2013), denied leave to appeal from ***Vittiglio***, 297 Mich App 391 (2012). In *Vittiglio* COA affirmed Circuit Court's holding that audio recorded MSA at mediation session was binding and "a certain amount of pressure to settle is fundamentally inherent in the mediation process." COA affirmed 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.

B. Michigan Court of Appeals Published Decisions

There do not appear to be any COA published domestic relations cases concerning mediation during the covered period.

C. Michigan Court of Appeals Unpublished Decisions

Child custody MSA not enforced.

Bono v Bono, 325331 (November 19, 2015). COA held Circuit Court abused its discretion by entering a MSA judgment of divorce, which included child custody provisions, without first considering statutory best interest factors. Child Custody Act requires Circuit Court to determine independently what custodial placement is in best interests of children, even if parties utilize ADR to come to an agreement regarding custody placement. *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004).

MSA not binding contract.

In split decision, ***Control Room Technologies, LLC v Waypoint Fiber Networks, LLC***, 320553 (April 28, 2015), held Circuit Court erred in concluding MSA was binding contract. COA held considering essential terms that were omitted from MSA, and circumstances surrounding its execution, the three-page handwritten MSA was so cursory in its treatment of complex matters that parties did not intend document to be binding contract. Circuit Court erred in concluding MSA was enforceable contract.

Dissent said MSA was sufficiently definite to be an enforceable contract. Agreement was not a three page document. It incorporated a 50 page plus document. The incorporated document provided essential terms for agreement.

Repeat challenges to MSA sanctionable.

Annis v Annis, 319577 (April 16, 2015), affirmed Circuit Court's finding that plaintiff's challenges to binding nature of MSA, even after Circuit Court found it enforceable, violated MCR 2.114(D)(2), and affirmed Circuit Court's awarding of sanctions for this violation.

Unsigned MSA not enforced.

Central Warehouse Operations, Inc v Riffell, 319183 (March 24, 2015). Parties negotiated oral settlement agreement with aid of "facilitator." Parties' attorneys were not present at that "meeting," and agreement was not reduced to writing. According to COA, while parties acknowledged some form of agreement was made, agreement was nothing more than agreement to agree and not enforceable settlement agreement.

COA sets aside MSA.

Heiden v Heiden, 318245 (February 26, 2015), vacated MSA. Before their marriage, parties signed "antenuptial agreement" describing husband's premarital personal injury lawsuit settlement as his separate property. Twenty-four years later, wife filed for divorce. According to COA, Circuit Court incorrectly ruled that antenuptial agreement applied only in event of death, not divorce. Matter then proceeded to mediation after this incorrect legal conclusion. Parties failed to consider during mediation whether disputed property belonged to husband alone or became part of marital estate. Parties reached MSA predicated on inaccurate description of their separate and marital property. Property division and spousal support award disparately favored wife. Judgment was entered reflecting this agreement. COA vacated property division and spousal support award in judgment and remanded to Circuit Court to set aside MSA. Circuit Court must accept that antenuptial agreement applies to this divorce proceeding.

Undisclosed pregnancy at mediation.

Cieslinski v Cieslinski, 319609 (November 13, 2014). held that Circuit Court should have set aside consent judgment when husband alleged that (1) wife deliberately withheld information that she was pregnant with another man's child before he signed consent judgment of divorce, and (2) knowledge of her pregnancy would have affected his decision to sign consent judgment because he would have been concerned about wife's ability to properly parent children. Circuit Court abused its discretion when it failed to hold evidentiary hearing after husband in essence alleged that wife fraudulently obtained consent judgment. *Kiefer v Kiefer*, 212 Mich App 176; 536 NW2d 873 (1995).

Incomplete MSA not enforced.

Kendzierski v Macomb Co, 316508 (September 23, 2014), held that signed MSA that resolved only damages issue but left unresolved other issues was not enforceable. According to COA, court cannot force parties to settle lawsuits and cannot make contract for parties where there is no contract. Plaintiffs failed to establish that contract to settle

dispute existed. Mere discussions and negotiation, including unaccepted offers, cannot be substituted for requirements of contract. Even if valid oral contract to settle dispute resulted during "facilitation," it was not enforceable because agreement was not made in open court and written evidence of agreement to settle case, subscribed by defendant or its attorney, did not exist. MCR 2.507(G).

MSA set aside by COA.

Hayes v Morris, 315586 (July 29, 2014). Parties were ordered to domestic relations mediation. MCR 3.216. Parties reached MSA that provided for largely equal division of marital estate. No judgment based on agreement was entered. Then husband died. In *Tokar v Albery*, 258 Mich App 350; 671 NW2d 139 (2003), parties, during divorce proceedings, submitted property issues to binding arbitration. After filing of award but before entry of judgment, husband died. *Tokar* held that trial court correctly denied motion to enforce award because "trial court retains ultimate control over a divorce action" and "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." Court mentioned two possible exceptions under which award could be enforced: (1) if entry of judgment would have been "ministerial" and (2) if decedent had acted in reliance on award. Court found that entry of judgment would not have been "ministerial" because, in part, there were issues of furnishings remaining and before the judgment of divorce was entered, parties had option to reconcile or stipulate to an agreement different from the award. The same reasoning held true in the present case. Court found no reliance by decedent. To show reliance, meaningful proof of conduct indicating parties in good faith believed they were divorced is required. Such reliance had not been shown in this case.

Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013). Circuit Court ordered parties to participate in mediation, which resulted in MSA concerning parental rights to minor children. Eventually mother did not comply with MSA and Court terminated her parental rights. COA said that contrary to mother's assertion, Circuit Court did not terminate her parental rights solely for her failure to comply with MSA. Circuit Court's decision was based on mother's conduct, which included but was not limited to her failure to comply, and which led to Circuit Court's assessment of the statutory termination factors. COA found it unnecessary to resolve whether defense of impossibility could render such an agreement void or voidable.

Post arbitration-mediation conduct of arbitrator-mediator.

Hartman v Hartman, 304026 (August 7, 2012), concerned same individual serving as arbitrator and mediator and post-arbitration/mediation conduct of arbitrator-mediator and defense counsel. Circuit Court ordered parties to mediation. When mediation failed, parties agreed to arbitrate using mediator as arbitrator. Arbitrator issued some awards covering minor issues. Before arbitration on major issues, parties agreed to again mediate utilizing arbitrator as mediator. This mediation failed. Parties then reached

settlement agreement on their own. At entry of judgment hearing, plaintiff stated that he had concerns about arbitrator acting as neutral. He did not ask to have settlement agreement set aside. The final judgment hearing was continued for four weeks. Plaintiff's counsel contacted arbitrator to inform arbitrator of the dates. Arbitrator informed plaintiff's counsel that arbitrator was going to be in Florida and staying at 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 remaining issues. Defense counsel refused the request.

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

COA affirmed Circuit Court's denial of plaintiff's motion to set aside settlement agreement and judgment of divorce. COA 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. ... .

Hartman is an interesting case concerning Circuit Court's refusal to set aside settlement agreement and judgment of divorce on basis of alleged apparent conduct committed by arbitrator-mediator, especially where, according to COA, "totality of the circumstances ... rises to a level that would have required the arbitrator to be removed from arbitrating or mediating the remaining matters."

The post-arbitration-mediation conduct in *Hartman* raises issues under several conduct guidelines for neutrals. Prior to February 1, 2013, Michigan Supreme Court SCAO Standards of Conduct for Mediators indicated:

> (4) Conflict of Interest ... (b) The need to protect against conflicts of interest also governs **conduct that occurs ... after the mediation**. A mediator must avoid the appearance of conflict of interest ... **after the mediation.** Without the consent of all parties, a mediator **shall not subsequently** establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that

would raise legitimate **questions** about the integrity of the mediation process. A mediator **shall** not establish a personal or intimate relationship with any of the parties that would raise legitimate **questions** about the integrity of the mediation process. Emphasis added.

Since February 1, 2013, Michigan Supreme Court SCAO Mediator Standards of Conduct Standards has indicated:

> **Standard III. Conflicts of Interest**
> A. A mediator should avoid a conflict of interest or the appearance of a conflict of interest **both during and after mediation**. A conflict of interest is a dealing or relationship that could reasonably be viewed as creating an **impression of possible** bias or as raising a **question** about the impartiality or self-interest on the part of the mediator. ...
> G. In considering whether establishing a personal or another professional relationship with any of the **participants after the conclusion of the mediation process** might create a **perceived** or actual conflict of interest, the mediator should consider factors such as time elapsed since the mediation, consent of the parties, the nature of the relationship established, and services offered. Emphasis added.

Model Standards of Conduct for Mediators (September 2005) of AAA, ABA's Section of Dispute Resolution, and ACR states:

> STANDARD III. CONFLICTS OF INTEREST ...
> F. **Subsequent to a mediation**, a mediator **shall** not establish another relationship with any of the participants in any matter that would raise **questions** about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations **following a mediation** in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships **might** create a **perceived** or actual conflict of interest. Emphasis added.

Code of Ethics for Arbitrators in Commercial Disputes (March 1, 2004) indicates:

> CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS. ...
> C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. **For a reasonable period of time after the decision of a case**, persons who have served as arbitrators **should** avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the **appearance** that they had been influenced in

the arbitration by the anticipation or expectation of the relationship or interest. … . Emphasis added.

It is not clear from *Hartman* whether plaintiff argued that his negotiating positions in reaching "settlement agreement" were influenced by arbitrator's prior arbitration decisions and/or mediator's viewpoints and comments. To degree there was a relationship between plaintiff's negotiating positions and the arbitration decisions and mediation process, question exists whether plaintiff was entitled to make settlement decisions in an environment without prior arbitration decisions and mediator comments that came from a neutral whose post arb-med conduct raised alleged apparent standards of conduct issues.

MSA evidenced parties' mutual intent.

Roe v Roe, 297855 (July 19, 2011), held that MSA evidenced mutual intent of parties to value retirement assets and was enforceable. Property settlement provisions in divorce judgment typically are final and cannot be modified by court.

MSA does not deprive court of its authority and obligations.

In re BJ, 296273 (January 20, 2011), held that MCR 3.216 domestic relations mediation is not binding but is subject to acceptance or rejection by parties. Parents' utilization of ADR does not deprive court of its Child Custody Act, MCL 722.23, authority and obligations.

Circuit Court cannot order PPO to mediation.

In ***Baker v Holloway***, 288606 (January 26, 2010) ("Suppressed"], respondent appealed Circuit Court order denying her motion to terminate *ex parte* PPO. Instead of having a hearing on merits of whether PPO should have been terminated, respondent was ordered to mediate her dispute with petitioner. Respondent claimed Circuit Court erred by requiring her to mediate because she was entitled to prompt hearing on merits of PPO. COA held that mediation may not be required as condition to having a hearing on merits of PPO. COA vacated order denying respondent's motion to terminate PPO and remanded for evidentiary hearing to determine whether PPO should be terminated.

Court rejects custody MSA.

In ***Roguska v Roguska***, 291352 (September 29, 2009), a domestic relations mediation, MCR 3.216, *et seq*, case involving custody, COA held that Circuit Court did not err in rejecting MSA concerning custody, finding that no custodial environment existed with respect to one of parties' children, and applied proper standard in evaluating custody factors. Defendant argued Circuit Court erred by rejecting MSA regarding custody. Parties negotiated MSA that was signed by mediator, both parties, and their attorneys. Circuit Court held hearing and heard testimony that MSA existed regarding custody, parenting time, property and child support. Parties stated that consent judgment was consistent with MSA. However, during hearing, plaintiff testified that she thought defendant was "lying" during mediation. Circuit Court rejected MSA regarding custody, and Court set a trial date. COA held that Circuit Court is not bound by parties' agreements regarding child custody. Regardless of existence of MSA, CCA, MCL 722.21

et seq, requires Circuit Court to determine independently custodial placement that is in best interests of children, because statutory best interest factors are paramount when court enters order affecting custody. Circuit Court did not act erroneously while exercising its discretion or applying law to set aside custody portion of agreement. Circuit Court's apparently hearing testimony concerning statements made during mediation might be considered in light of MCR 3.216(H)(8) which provides that:

> Statements made during the mediation ... may not be used in any other proceedings, including trial. Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties. This prohibition does not apply to (a) the report of the mediator under subrule (H)(6), (b) information reasonably required by court personnel to administer and evaluate the mediation program, (c) information necessary for the court to resolve disputes regarding the mediator's fee, or (d) information necessary for the court to consider issues raised under MCR 2.410(D)(3) or 3.216(H)(2).

MSA binding.

In ***Miller v Miller***, 282997 (March 24, 2009), a domestic relations case, parties signed MSA. Plaintiff moved to set aside MSA arguing she was tricked by her attorney, she misunderstood agreement, and agreement gave other party unconscionable advantage. Circuit Court denied motion and COA affirmed.

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