HOW DO JUDGES TREAT MEDIATED SETTLEMENT AGREEMENTS?

CONFLICT RESOLUTION SERVICES

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I. INTRODUCTION

This is a review of Michigan Supreme Court and Court of Appeals cases since 2009 concerning facilitative mediation.

II. MEDIATION

A. Michigan Supreme Court Decisions

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

B. Michigan Court of Appeals Published Decisions

"Pressure to Settle" in Mediation Discussed

In ***Vittiglio v Vittiglio***, ___ Mich App ___ (July 31, 2012) (Docket No 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C. Michigan Court of Appeals Unpublished Decisions

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

Hartman v Hartman, unpublished opinion of Michigan Court of Appeals, issued August 7, 2012 (Docket No 304026) (Donofrio, Ronayne Krause, and Boonstra), concerned the same individual serving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, unpublished opinion of the Michigan Court of Appeals, issued June 7, 2012 (Docket No 303398) (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. Mediation Agreement Evidenced Parties' Mutual Intent

Roe v Roe, unpublished opinion of the Michigan Court of Appeals, issued July 19, 2011 (Docket No 297855 (Talbot, Hoekstra, and Gleicher), held that the mediation

agreement evidenced the mutual intent of the parties to value retirement assets. The agreement was enforceable and binding. Property settlement provisions in a divorce judgment typically are final and cannot be modified by the court.

4. Mediation Resolution Does Not Deprive 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 the parents' utilization of alternative dispute resolution does not deprive the court of its Child Custody Act, MCL 722.23, authority and obligations.

5. 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 Circuit 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 mediate 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.

6. Court Rejects Mediation Custody Agreement

Roguska v Roguska, unpublished opinion of the Court of Appeals, issued September 29, 2009 (Docket No 291352) (Servitto, Fitzgerald, and Bandstra). In this domestic relations, MCR 3.216 *et seq*, case involving custody, the Court of Appeals held that the Circuit Court did not err in rejecting the parties' mediated agreement concerning custody of the children, finding that no custodial environment existed with respect to one of the parties' children, and applied the proper standard in evaluating the custody factors.

Defendant argued that the Circuit Court erred by rejecting the parties' mediated agreement regarding custody. The parties negotiated a mediation settlement agreement that was signed by the mediator, both parties, and their attorneys. The Circuit Court held a hearing and heard testimony that an agreement existed regarding custody, parenting time, property and child support. The parties stated that the consent judgment was consistent with the mediated agreement. However, during the hearing, plaintiff testified that she thought defendant was "lying" during the mediation. The Circuit Court rejected the mediated agreement regarding custody and set a trial date to resolve the same.

The Court of Appeals held that the trial court is not bound by the parties' agreements regarding child custody. Regardless of the existence of a mediated agreement, the Child Custody Act, MCL 722.21 *et seq*, requires a trial court to determine independently the custodial placement that is in the best interests of the children, because the statutory best interest factors are paramount whenever a court enters an order affecting child custody.

According to the Court of Appeals, the Circuit Court did not act erroneously while exercising its discretion to set aside the custody portion of the mediated agreement.

The Circuit Court's apparently hearing some testimony concerning statements made during the mediation might be considered in light of MCR 3.216(H)(8) which provided that:

> Statements made during the mediation, including statements made in written submissions, 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
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> (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).

7. Mediation Settlement Binding

Miller v Miller, unpublished opinion of the Court of Appeals, issued March 24, 2009 (Docket No 282997) (Cavanagh, Fort Hood, and Davis), was a domestic relations case. The parties signed a mediated settlement agreement. Plaintiff moved to set aside the settlement agreement arguing that she was tricked by her attorney, she misunderstood the agreement, and the agreement gave the other party an unconscionable advantage. The Circuit Court denied the motion. The Court of Appeals affirmed.

III. CONCLUSION

Covered decisions concerning mediation since early 2009 include the following.

1. *Vittiglio* is a reminder that in mediation there might be pressure to settle and a party trying to overturn a mediated agreement might be subject to sanctions.

2. *Unit 67, LLC*, *Roe*, and *Miller* held that mediation agreements are generally enforceable.

3. *In re BJ* and *Roguska* are reminders that mediation agreements cannot bind the court on child custody issues.

4. *Baker* clarified that not all cases can be ordered to mediation.

5. *Hartman* concerns the possible ramifications of the arbitrator-mediator taking a vacation in the defense attorney's home in Florida shortly after the arbitration-mediation.

About the Author

Lee Hornberger is an arbitrator and mediator in Traverse City, Michigan. He is a member of the Representative Assembly of the State Bar of Michigan, 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 American Arbitration Association, Federal Mediation and Conciliation Service, Financial Industry Regulatory Authority, Michigan Employment Relations Commission, National Arbitration Forum, and National Futures Association. He can be reached at 231-941-0746 or leehornberger@leehornberger.com .