MICHIGAN FAMILY LAW
ARBITRATION AND MEDIATION CASE LAW UPDATE

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INTRODUCTION

This article reviews some Michigan Supreme Court and Court of Appeals recent cases concerning arbitration and mediation of family law matters.

ARBITRATION

Supreme Court Decisions

1. Tape Recording of Domestic Relations Arbitration Hearing

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

2. Formal Hearing Format Not Required

Miller v Miller, 474 Mich 27 (2005), held that the Domestic Relations Arbitration Act, MCL 600.5070 *et seq*, does not require a formal hearing during arbitration concerning property issues similar to that which occurs in regular trial proceedings.

3. Court Independent Determination of Custody Factors

Harvey v Harvey, 470 Mich 186 (2004). Regardless of the type of alternative dispute resolution utilized, the Child Custody Act, MCL 722.21 *et seq*, requires the Circuit Court to independently determine what custody is in the best interests of the children.

Published Court of Appeals Decisions

1. Defendant's Motion To Vacate DRAA Arbitration Award Not Timely Filed

Vyletel-Rivard v Rivard, __ Mich App __ (2009). The Defendant 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 the Defendant's motion to vacate was not timely filed.

On March 28, 2008, the Defendant, pursuant to MCL 600.509(2), filed a motion to vacate "the arbitration awards" of November 13, 2007, and December 7, 2007, as to tort damages. A party has twenty-one days to file motion to vacate in domestic relations case. MCR 3.602 (J)(2).

The lesson of this case is to think very carefully before filing a second round of reconsideration motions rather than filing a notice of appeal. See generally *Moody v Pepsi-Cola Metro Bottling Co*, 915 F2d 201 (6th Cir 1990).

2. Domestic Relations Arbitration Award Upheld

Washington v Washington, 283 Mich App 667 (2009). In this Domestic Relations Arbitration Act, MCL 600.570 *et seq*, case, the Court of Appeals stated that a reviewing court may not review the Arbitrator's findings of fact concerning division of marital property.

The Court stated: "as the United States Court of Appeals for the Sixth Circuit declared, '[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.' See generally *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tenn Valley Auth v Tenn Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999)."

3. Right to Raise Domestic Violence Exclusion Waived

In ***Valentine v Valentine***, 277 Mich App 37 (2007), the issues included whether the Circuit Court's order to arbitrate was void by sending a case involving domestic violence allegations to arbitration when the parties did not waive the exclusion of the case from arbitration; and whether the Circuit Court erred in ruling that the exclusion/waiver provision only applies to victims of domestic violence.

There was neither a personal protection order nor an allegation of domestic violence or child abuse in the pre-arbitration court filings. The Defendant testified during the arbitration proceedings that the Defendant was the victim of domestic violence. The Court of Appeals did not determine

whether the Defendant's testimony could be construed as containing allegations of domestic violence. Rather, the Court of Appeals held that the Plaintiff waited too long to raise this issue. According to the Court of Appeals, the Plaintiff lost his right to set aside the judgment of divorce; and the Plaintiff's application to vacate the award was untimely because it was filed nearly two months after the award was issued and 40 days after clarifications were issued. The Plaintiff did not allege that the award was predicated on corruption, fraud, or other undue means. MCR 3.602(J)(2).

Unpublished Court of Appeals Decisions

1. DRAA Arbitrator May Consider Timely Reconsideration Motion

Considine v Considine, unpublished opinion of the Court of Appeals, issued December 15, 2009 (Docket No 283298). The Defendant filed a motion in Circuit Court to enforce the DRAA amended arbitration award. The Plaintiff filed a motion to vacate or modify the award. The Circuit Court granted the Defendant's motion to enforce and denied the Plaintiff's motion. On appeal, the Plaintiff argued that the Arbitrator exceeded the Arbitrator's authority and committed errors of law. The Court of Appeals affirmed the Circuit Court decision.

The Court of Appeals held that the Arbitrator had authority to consider a timely motion for reconsideration. MCL 600.5078(3). It was further held the reconsideration award was timely even though it was issued more than 21 days after the filing of the motion for reconsideration. *Id*.

2. Objections to Domestic Relations Arbitration Award Waived

Vulaj v Vulaj, unpublished opinion of the Court of Appeals, issued November 19, 2009 (Docket No 286334). The Court of Appeals held that the Plaintiff had waived the ability to argue that the Arbitrator failed to comply with the Domestic Relations Arbitration Act, MCL 600.5070 *et seq*. In light of the Plaintiff's affirmative statement that he was not objecting to the entry of the judgment proposed by the Plaintiff, the Circuit Court, after receiving testimony from the parties, signed the judgment of divorce. The Plaintiff argued on appeal that the Arbitrator violated the DRAA which requires transcription of the hearing during which child support and parenting time are addressed. MCL 600.5077(2).

MEDIATION

Supreme Court Decisions

Published Court of Appeals Decisions

Unpublished Court of Appeals Decisions

1. Court Rejects Mediation Custody Agreement

Roguska v Roguska, unpublished opinion of the Court of Appeals, issued September 29, 2009 (Docket No 291352). In this domestic relations mediation, 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 the 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 child custody factors.

The 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 divorce 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 divorce hearing, the Plaintiff testified that she thought the Defendant was "lying" during the mediation. The Circuit Court rejected the mediated agreement regarding custody, and the Court 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 (CCA), 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 or applying the law 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 provides 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),
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> (b) information reasonably required by court personnel to administer and evaluate the mediation program,

{c) in formation 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)."

2. Mediation Settlement Binding

Miller v Miller, unpublished opinion of the Court of Appeals, issued March 24, 2009(Docket No 282997), 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 and the Court of Appeals affirmed.

CONCLUSION

The Michigan appellate courts issued several important decisions concerning alternative dispute resolution of domestic relations cases in 2008 and 2009. Some of these decisions impacted on areas of law in addition to ADR. These decisions included:

1. *Vyletel-Rivard*, *id*; *Valentine*, *id*; *Considine*, *id*; and *Vulaj*, *id* (timeliness of filing jurisdictional and other documents); and
2. *Roguska*, *id* (court's rejection of mediated custody agreement).

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