Review of Michigan Appellate Decisions Since 2018 Concerning Mediation

By Lee Hornberger

This article reviews Michigan Court of Appeals decisions issued since 2018 concerning mediation and mediation settlement agreements (MSA). This article uses a short citation style rather than the official style for unpublished decisions. There were no Michigan Supreme Court decisions concerning mediation during this period.

Michigan Court of Appeals Published Decisions

Mediation fee is taxable cost.

Patel v Patel[1] affirmed the circuit court's award of the defendants' mediation expense as a taxable cost under MCR 2.625(A)(1). "The mediator's fee is deemed a cost of the action, and the court may make an appropriate order to enforce the payment of the fee." MCR 2.411(D)(4). MCR 3.216(J)(4).

Court of Appeals affirms Circuit Court enforcement of custody MSA.

Rettig v Rettig[2] is an extremely important case. In *Rettig* the parties signed a MSA concerning custody. Over the objection of one parent that the circuit court should have a hearing concerning the Child Custody Act's[3] best interest factors and whether there was an established custodial environment, the circuit court entered a judgment incorporating the MSA. The Court of Appeals affirmed. The Court of Appeals held although the circuit court is not necessarily required to accept the parties' agreements verbatim, the circuit court is permitted to accept them and presume at face value that the parties meant what they signed. The circuit court remains obligated to come to an independent conclusion that the parties' agreement is in the child's best interests, but the circuit court is permitted to accept that agreement where the dispute was resolved by the parents. The circuit court was not required to make a finding of an established custodial environment. In order to help make the MSA more bullet-proof, the MSA stated, **"This memorandum of understanding spells out the agreement that we have reached in mediation. This resolves all disputes between the parties and the parties agree to be bound by this agreement."** *Rettig* overruled *Vial v Flowers*[4] *sub silentio*.

Rettig was followed in ***Brown v Brown***[5] where the Court of Appeals affirmed the circuit court's adoption of a custody MSA.

Michigan Court of Appeals Unpublished Decisions

Court of Appeals affirms enforcement of recorded DR MSA.

Brooks v Brooks.[6] In *Brooks*, the Court of Appeals affirmed the circuit court's enforcement of a recorded MSA. Apparently, the mediator recited the MSA in open court. The parties agreed it was their agreement. The parties were sitting in the judge's jury room and outlined the agreement. The MSA was silent on the pension issue. The Court of Appeals remanded the case to the circuit court to determine the distribution, if any, of the wife's pension.

Court of Appeals affirms Circuit Court enforcement of domestic relations MSA even though domestic violence protocol not done.

Pohlman v Pohlman.[7] In a split decision, the Court of Appeals affirmed the circuit court's enforcement of a domestic relations MSA **even though there was no domestic violence protocol utilization**. Because plaintiff did not allege or show that she was prejudiced by the mediator's failure to screen for domestic violence, any noncompliance with MCR 3.216(H)(2) was harmless. MCR 3.216(H)(2). MCL 600.1035.

Judge Gleicher's dissent said "the trial court was obligated to hold a hearing to determine whether Jody was coerced into the settlement. Only by evaluating the proposed evidence in light of the statute and the court rule could the trial court make an informed decision regarding whether relief is warranted . . . . When there is a background of domestic violence, the reasons for a presumption against mediation do not magically evaporate because the parties use 'shuttle diplomacy.' That method may help diffuse immediate tensions, but it cannot undo years of manipulation and mistreatment."

Court of Appeals affirms dismissal of case with prejudice.

Pearson v Morley Companies Inc.[8] In *Pearson*, the Court of Appeals affirmed the circuit court's order dismissing with prejudice the plaintiff's hostile work environment lawsuit against the defendant employer as a sanction for the plaintiff's failure to comply with discovery and scheduling orders, **including "counsel's failure to adequately prepare for facilitatio[n]."**

Court of Appeals holds MSA invalid.

Dolan v Cuppori.[9] Spouses D___ and N___ owned property as tenants by the entirety. N___ was not a party to the lawsuit. There was a settlement agreement. The Court of Appeals held that the circuit court violated N___'s due process rights when it added her to the settlement agreement without her consent. The settlement agreement was invalid from the outset.

Court of Appeals reverses Circuit Court dismissal for failure to appear at mediation.

In ***Corrales v. Dunn***,[10] after case evaluation, the circuit court ordered mediation. Because of a communication glitch, the plaintiff failed to appear at the mediation session. As a result, the circuit court dismissed the case. The Court of Appeals reversed the circuit court's dismissal, stating that dismissal after over two years of litigation under the circumstances was manifest injustice. MCR 2.410(D)(3)(b)(i). **Lesson: Counsel should personally prepare the client before the mediation and personally make sure the client knows the time and place of the mediation.**

Non-signed or recorded MSA placed on record and agreed to is binding.

In ***Eubanks v. Hendrix***,[11] the plaintiff contended that the circuit court forced her to comply with an unenforceable MSA. The terms of the MSA were never reduced to a signed document or recorded by audio or video. MCR 3.216(H)(8). Any purported MSA could not, absent other valid proof of settlement, be a basis for a judgment of divorce. At a hearing, held one day after the mediation, the parties placed a partial agreement on the record. MCR 2.507(G). At this hearing which concerned the purported MSA, the circuit court stated its understanding that the "gist" of the agreement was that the parties were to continue with joint physical and legal custody and equal parenting time. The plaintiff agreed on the record with that statement. The circuit court found that the arrangement was in best interests of the child. The agreement placed on the record and agreed to by the plaintiff was binding on the plaintiff. **Lesson: All the parties should sign the MSA at the end of the mediation session.**

To settle or not to settle?

Smith v Hertz Schram, PC,[12] lv app pdg, was a legal malpractice action that arose after a post-judgment divorce proceeding. The malpractice case went to mediation. The mediator also served as a "discovery master." The wife did not go to the Family Court to challenge a discovery roadblock. There was discussion at the mediation about the value and future of a business. The wife decided to settle. Based on the post-mediation eventual sale of the business by the ex-husband, the ex-wife sued the defendants, who had represented her in the mediation, for malpractice. The circuit court granted summary disposition in favor of the defendants. The Court of Appeals in a split decision affirmed the circuit court's ruling dismissing the malpractice case against the defendants. Judge Jansen's dissent said the ex-wife's attorney should have advised the wife to reject the $65,000 offered in mediation and go to Family Court to pursue the discovery matter. Settlement should never have been a serious consideration. With respect to language in the settlement agreement that acknowledged that neither party had relied on any "representation, inducement, or condition not set forth in this agreement," the attorney should never have allowed it. The attorney should have had the wife sign a release, indicating it was her intention to enter into a settlement agreement despite her counsel's advice to the contrary.

Given the pending application for leave to appeal, we do not know how this case will end up. **Lesson: There should be good solid language in the MSA to help make the MSA bulletproof.**[13]

Post-MSA surveillance is okay.

In ***Hernandez v State Automobile Mutual Ins Co***,[14] the Court of Appeals reversed the circuit court's granting of plaintiff's motion to enforce a MSA. The MSA was signed by the plaintiff. The claims representative for the defendant indicated he would need approval from his superiors and the Michigan Catastrophic Claims Association (MCCA) before signing the agreement. The MSA stated "[t]his settlement is contingent on the approval of MCCA." The MCCA did not approve the MSA. The circuit court did not err in concluding there was a meeting of minds on the essential terms of the MSA. The MSA was properly subscribed as required by MCR 2.507(G). The MCCA approval of the MSA was a condition precedent to performance of the MSA. The defendant did not waive this condition by conducting surveillance on the plaintiff and submitting reports of this surveillance to the MCCA. **Lessons: Be careful of contingencies in the**

MSA. Remind relevant individuals of the possibility and significance of surveillance.

Court of Appeals affirms Probate Court non-approval of MSA.

In ***Peterson v Kolinske***,[15] the Court of Appeals affirmed the Probate Court's non-approval of a MSA. The MSA stated that only persons who signed it had agreed to its terms. It did not indicate that the appellant daughter agreed to its terms, agreed that the will was valid, or otherwise agreed to release claims against the estate. If contract language is clear and unambiguous, it must be construed according to its plain sense and meaning, without reference to extrinsic evidence. **Lessons: Get everyone's signature. Be careful when necessary people are absent.**

Court of Appeals affirms Circuit Court's enforcement of MSA.

In ***Krake v Auto Club Ins Assoc***,[16] the plaintiff was present at the mediation. She initially denied she had signed the MSA. She admitted she "pen[ned]" her signature on the MSA. She explained she signed "fake initials," and she had done so because her attorney told her the MSA was not a legally binding document. The plaintiff explained that she did not believe the MSA to be a final resolution of the case and the settlement amount was too low. The Court of Appeals affirmed the circuit court's enforcement of the MSA. **Lessons: People are unpredictable. Prepare for the worst.**

Party dies after signed MSA but before judgment.

Estate of James E. Rader, Jr.[17] After there was a signed MSA in a domestic relations case, one of the parties died before the entry of judgment. Because the settlement agreement was to be incorporated into the judgment of divorce, the agreement had no effect since the decedent died before the judgment could be entered. Entry of judgment was a condition precedent to enforcement of the settlement agreement. Because entry of judgment became impossible following decedent's death, the settlement agreement could not be incorporated or given effect as intended. **Lesson: Act quickly.**

About the Author

Lee Hornberger *is a former Chair of the State Bar's ADR Section, former Editor of* The Michigan Dispute Resolution Journal, *former member of the State Bar's Representative Assembly, and former President of the Grand Traverse-Leelanau-Antrim Bar Association. He is a member of Professional Resolution Experts of Michigan and a Diplomate Member of The National Academy of Distinguished Neutrals. He has received the ADR Section's George Bashara Award. He received a First Tier ranking in Northern Michigan for Arbitration by* U.S. News – Best Lawyers® *Best Law Firms in 2019 and 2020. He is in* The Best Lawyers of America *2018 and 2019 for arbitration, and 2020 for arbitration and mediation. He is on the 2016 to 2019 Michigan Super Lawyers lists for ADR.*

Endnotes

1 324 Mich App 631 (2018).

2 322 Mich App 750 (2018).

3 MCL 722.21 *et seq*.

4 COA No 332549 (September 22, 2016). In *Vial*, the Court of Appeals held that the circuit court failed to adequately consider the child's best interests before it entered a custody judgment of divorce. The Court of Appeals also held that the circuit court erred by not considering whether an established custodial environment existed.

5 COA No 343493 (November 27, 2018).

6 COA No 345168 (February 11, 2020).

7 COA No 344121 (January 30, 2020).

8 COA No 345547 (November 26, 2019).

9 COA No 345310 (September 12, 2019).

10 COA No 343586 (May 30, 2019).

11 COA No 344102 (May 23, 2019).

12 COA No 337826 (July 26, 2018), lv app pdg. In *Vittiglio v Vittiglio*, 297 Mich App 391 (2012), lv den 493 Mich 936 (2013), the Court of Appeals affirmed the circuit court's holding that an audio recorded MSA was binding and stated that a "certain amount of pressure to settle is fundamentally inherent in the mediation process."

13 Bullet proof language for a settlement agreement could include language such as: "… she understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. … [S]he understood the terms and would be bound by the settlement, and had the right to go to trial. … [I]t was her own choice and decision to settle … ." *Roth v Cronin*, COA No 329018 (April 25, 2017), lv den 501 Mich 910 (2017).

14 COA No 338242 (April 19, 2018).

15 COA No 338327 (April 17, 2018).

16 COA No 333541 (February 22, 2018), lv den 915 NW2d 356 (2018).

17 COA No 335980 (February 13, 2018), lv den 913 NW2d 326 (2018).