MICHIGAN MEDIATION CASE LAW UPDATE

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I. INTRODUCTION

This update reviews Michigan appellate cases issued since April 2015 concerning mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions. Prior cases back are reviewed at Michigan Mediation Case Law Update, *Labor and Employment Lawnotes* (Spring 2016), p. 20. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/186c8f91-1162-4d30-9e4a-e10a92bbb606/UploadedImages/pdfs/newsletter/spring2016.pdf

II. MEDIATION

A. Michigan Supreme Court Decisions

Supreme Court orders mediation.

City of Huntington Woods v City of Oak Park, 500 Mich 1224; 886 NW2d 635 (November 2, 2016). The Supreme Court directed the parties to participate in settlement proceedings and appointed Court of Appeals Chief Judge Michael J. Talbot as a mediator who could direct the parties to produce additional information that he believes will facilitate mediation. Additional information or comments made during these proceedings will be confidential and will not become part of record, except on motion by one of the parties. MCR 7.213(A)(2)(f); MCR 2.412(C). The mediator shall file a status report with the Supreme Court. If mediation results in a full or partial settlement, the parties shall file a stipulation to dismiss. MCR 7.318. Eventually the Supreme Court vacated 311 Mich App 96; 874 NW2d 214, 321414 (2015), and remanded the case to the Circuit Court. ___ Mich ___, 152035 (May 3, 2017). MCR 7.316(A)(9).

B. Michigan Court of Appeals Published Decisions

Other than Supreme Court leave to appeal cases that are cited as Supreme Court cases, there do not appear to have been any Michigan Court of Appeals published decisions concerning mediation during the review period.

C. Michigan Court of Appeals Unpublished Decisions

Mediation confidentiality.

Hanley v Seymour, 334400 (October 26, 2017). Communications received by an attorney from the defendant were not part of the mediation proceedings. The plaintiff was made aware of the communications at the conclusion of the mediation in which the plaintiff participated with the attorney. The attorney had received the documents before the mediation was conducted. There was no violation of MCR 2.412(C).

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Mediation and domestic violence.

Kenzie v Kenzie, 335873 (August 8, 2017). Attorney fees granted, in part, because the husband initiated an altercation with the wife following the mediation at which he called the police and accused the wife of domestic violence; and he obstructed the mediation process that would have allowed the case to reach settlement posture.

Spousal support language not in MSA.

Amante v Amante, 331542 (June 20, 2017). The plaintiff argued both counsel and the mediator forgot to include a provision barring spousal support in the settlement agreement. The plaintiff argued that under the plain language of the judgment of divorce, the dispute regarding a provision barring spousal support should have been decided by the arbitrator. Under the terms of the judgment of divorce, "any disputes regarding the judgment language" should be submitted to an arbitrator. The Circuit Court did not abuse its discretion in following the settlement agreement and entering the judgment of divorce and denying the plaintiff's motion for relief from the judgment.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), **lv app pdg**. "[S]he 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. She testified she understood the terms and would be bound by the settlement, and had the right to go to trial. Plaintiff further testified that it was her own choice and decision to settle pursuant to the terms that were placed on the record." *Roth* was a legal malpractice case in which the court held that the above comments made under oath by the plaintiff in the prior case were judicial estoppel which precluded the plaintiff from subsequently arguing that the settlement was not voluntary. The quoted language can be used in settlement agreements to help make the agreements enforceable.

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), **app lv pdg**. The plaintiff argued that the Circuit Court judge should have been disqualified because, as a mediator over the case, he would have had "personal knowledge of disputed evidentiary facts concerning the proceeding." The mediation scheduled for June 11, 2015, was cancelled on June 2, 2015. The judge never actually mediated the case. The plaintiff failed to show what personal knowledge, if any, the judge had of any disputed evidentiary facts concerning the proceeding. MCR 2.003(C)(1)(c).

Can a Circuit Court appoint a Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III, 328643 (January 17, 2017), lv dn ___ Mich ___ (2017). The defendant contended the Circuit Court lacked authority to appoint an independent attorney as a Discovery Master and to require the parties to pay the Master's fees; and the Circuit Court should have made a determination regarding the reasonableness of the Master's fees. The Court of Appeals held once the parties accepted the case evaluation award, the defendant lost the ability to appeal the earlier Discovery Master order. Can a Circuit Court appoint a Discovery Master? The authority of the court to appoint a Discovery Master is discussed at *ADR Quarterly* (May 2013), p . 5. https://higherlogicdownload.s3.amazonaws.comMICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/May13.pdf

CCA trumps custody MSA.

Vial v Flowers, 332549 (September 22, 2016). The Court of Appeals rejected the wife's contention that the parties had not entered into a MSA concerning custody. The December 2015 mediation resulted in a MSA. The Court of Appeals held that the Circuit Court failed to adequately consider the child's best interests before it entered a custody judgment in April 2016. The Court of Appeals said a party is bound by the party's signature on the custody MSA as long as the Circuit Court agrees that the MSA is in the best interests of the child. The MSA signed by the parties was binding on the parties subject to the Circuit Court doing a best interests analysis. When the parties enter into an otherwise binding custody agreement, the Circuit Court is not relieved of its obligation to examine the best interest factors. By entering a judgment of custody, the court implicitly acknowledges that it has (1) examined the best interest factors, (2) engaged in a profound deliberation as to its discretionary custody ruling, and (3) is satisfied that the custody order is in the child's best interests. An evidentiary hearing was not necessarily required given the custody MSA. The Court of Appeals indicated that the Circuit Court also erred by not considering whether an established custodial environment existed. Does this mean, if an established custodial environment exits, the parents cannot agree to an enforceable MSA that changes parenting time, "unless there is presented clear and convincing evidence that [the changes are] in the best interest of the child[?]" MCL 722.27(1)(c). If so, does this arguably mean that an MSA that changes parenting time is a prelude to litigation rather than the end or avoidance of litigation?

Attendance and authority at mediation session.

Howard v Glen Haven Shores Ass'n, 325812 (July 7, 2016). The Circuit Court properly refused to enforce a purported MSA where the defendant did not violate an order by not having the entire Board of Directors at the mediation; and it was known that settlement was subject to approval by the full Board.

MSA not enforced.

Coloma Emergency Ambulance, Inc v Timothy E Onderline, Ears, Inc, 325616 (2016) lv dn ___ Mich ___ 153839 (November 30, 2016). The parties participated in a mediation which resulted in all counsel signing a "Proposed Settlement" document, which referenced the future signing of additional documents. The Circuit Court held the document was not a binding contract. The Court of Appeals affirmed.

Domestic relations MSA enforced.

Kleinjan v Carlton, 328772 (January 19, 2016), enforced a domestic relations MSA. The Circuit Court did not err by entering an order based on the parties' signed, handwritten MSA,

despite the defendant's attempt to disavow the MSA. The defendant was bound by the terms of the signed, written MSA. MCR 3.216(H)(7). She cannot dispute the MSA based on a change in heart.

Custody MSA not enforced.

Bono v Bono, 325331 (November 19, 2015). The Circuit Court abused its discretion by entering a MSA judgment of divorce, which included custody, without first considering the best interest factors. The Child Custody Act requires the Circuit Court to determine what custodial placement is in the best interests of the children, even if the parties utilize alternative dispute resolution to reach an agreement regarding custody.

III. MCR AMENDMENTS CONCERNING MEDIATION

MCR 3.216 amended, effective September 1, 2017

"**MCR 3.216 Domestic Relations Mediation**

(3) **Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not submit a contested issue in a domestic relations action, including postjudgment proceedings, if the** parties are subject to a personal protection order or other protective order, or are involved in a child abuse and neglect proceeding. **The court may order mediation without a hearing if a protected party requests mediation.**

(H) Mediation Procedure

(2) **The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the state court administrative office as directed by the supreme court. ...**

Comments: The amendments of MCR 3.216 update the rule to be consistent with MCL 600.1035, 2016 PA 93, which allows a court to order mediation if a protected party requests it and requires a mediator to screen for the presence of domestic violence throughout the process."

MCL 600.1035 is discussed at *The ADR Quarterly* (July 2016), p. 12. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/July16.pdf

MCR 7.316, concerning mediation, amended effective September 1, 2017.

"**Rule 7.316 Miscellaneous Relief**

(A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers ...

(9) order an appeal submitted to mediation. The mediator shall file a status report with this Court within the time specified in the order. If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) with this Court pursuant to MCR 7.318. ...

Staff Comment: The amendment of MCR 7.316 explicitly provides that the Supreme Court may order an appeal to mediation. The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

MARKMAN, C.J. (dissenting). When the proposed amendment of MCR 7.316(A) was published for comment, I wrote a concurring statement raising questions, and expressing concerns, about the proposed amendment, which will allow this Court to "order an appeal submitted to mediation." 500 Mich 1224, 1225-1227 (2016). Following publication of the proposed amendment, the Appellate Practice Section of the State Bar indicated that it "shares in [my] concerns," while the Alternative Dispute Resolution Section offered point-by-point responses to these concerns. Although I certainly appreciate these responses, they do not alleviate my concerns. As a result of the concerns raised in my statement of November 30, 2016, I respectfully dissent from the adoption of the present amendment."

Justice Markman's viewpoint is reviewed in *The Michigan Dispute Resolution Journal* (Summer 2017), p. 3. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Summer17.pdf ■