Review of Michigan Appellate 2018-2019 *Decisions Concerning Mediation*

by: Lee Hornberger*

Almost every lawsuit that the parties cannot settle on their own will go to mediation at some point. It is therefore critical that attorneys understand the developing body of law around this important step in the litigation process. This article reviews Michigan Court of Appeals decisions issued in 2018 and 2019 concerning mediation and mediation settlement agreements (MSA). 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).

Court of Appeals affirms Circuit Court enforcement of custody MSA.

Rettig v. Rettig[2] is an extremely important case for those attorneys who practice domestic relations law. In *Rettig* the parties signed an MSA concerning custody. Over the objection of one parent that the Circuit Court should have a hearing concerning the Child Custody Act[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 by ***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Michigan Court of Appeals Unpublished Decisions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 reverses Circuit Court dismissal for failure to appear at mediation.

In ***Corrales v. Dunn,***[6] after case evaluation, the Circuit Court ordered mediation. Because of a communication glitch, the plaintiff failed to appear at the mediation. Therefore 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.

Unsigned, unrecorded MSA placed on record and agreed to is binding.

In ***Eubanks v. Hendrix,***[7] 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 that hearing, concerning 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,[8] 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.**[9]

Post-MSA surveillance is okay.

In ***Hernandez v. State Automobile Mutual Ins Co,***[10] the Court of Appeals reversed the Circuit Court's grant 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." 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). 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 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,***[11] 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 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,***[12] 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.[13] 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.**

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. 343586 (May 30, 2019).

7 COA No. 344102 (May 23, 2019).

8 COA No. 337826 (July 26, 2018), lv app pdg. In *Vittiglio v. Vittiglio,* 297 Mich. App. 391 (2012), lv dn 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."

9 Bulletproof 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 dn 501 Mich. 910 (2017).

10 COA No. 338242 (April 19, 2018).

11 COA No. 338327 (April 17, 2018).

12 COA No. 333541 (February 22, 2018), lv dn 915 N.W.2d 356 (2018).

13 COA No. 335980 (February 13, 2018), lv dn 913 N.W.2d 326 (2018).

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