FACILITATIVE MEDIATION
MICHIGAN 2010-2012 CASE LAW UPDATE

Lee Hornberger

Arbitration and Mediation Office of Lee Hornberger

I. INTRODUCTION

This article reviews Michigan Supreme Court and Court of Appeals cases since January 2010 concerning facilitative mediation law.

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

1. "Pressure to Settle" in Mediation Discussed

Vittiglio v Vittiglio, ___ Mich App ___ (July 31, 2012) (Docket No 303724 and 304823) (K F Kelly, Sawyer, and Ronayne Krause). In *Vittiglio*, 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." In addition, the Court of Appeals affirmed the Circuit Court's determination that plaintiff was liable for sanctions because plaintiff's motions were interposed 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C. Michigan Court of Appeals Unpublished Decisions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Hartman v Hartman, unpublished opinion of Michigan Court of Appeals, issued August 7, 2012 (Docket No 304026) (Donofrio, Ronayne Krause, and Boonstra), concerned the same individual serving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 the 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 Circuit Court's 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 the 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 enter mediation 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.

III. CONCLUSION

Michigan appellate courts have issued important decisions concerning facilitative mediation since early 2010. These decisions included the following.

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

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

3. *In re BJ* is a reminder 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 .