Michigan Mediation Case Law Update

By Lee Hornberger

Introduction

This update reviews Michigan appellate cases since 2009 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 For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

Michigan Supreme Court Decisions

Supreme Court Denies Leave to Appeal in "Pressure To Settle" Case

Vittiglio v Vittiglio, 493 Mich 936; 825 NW2d 584 (2013) (SC 145825, 145826), denied leave to appeal from *Vittiglio v Vittiglio,* 297 Mich App 391 (2012) (COA 303724, 304823). In *Vittiglio* COA affirmed circuit court's holding that audio recorded settlement agreement at mediation session was binding and "a certain amount of pressure to settle is fundamentally inherent in the mediation process." COA affirmed circuit court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and circuit court did not abuse its discretion in awarding costs and attorney fees.

Confidentiality In Mediation

Detroit Free Press Inc v Detroit, 480 Mich 1079 (2008) (SC 135841), held that circuit court did not abuse its discretion when it dissolved non-disclosure provision in prior order and permitted, with one redaction, disclosure of deposition. Statements made during mediation are confidential. MCR 2.411(C)(5). Although portions of deposition repeated statements made during mediation, city did not argue for redaction of this testimony. Because city did not argue for redaction, circuit court did not abuse its discretion in not ordering it.

Michigan Court Of Appeals Decisions

Mediated Agreement Not Binding Contract

In a split decision, *Control Room Technologies, LLC v Waypoint Fiber Networks, LLC,* 320553 (April 28, 2015), held that Circuit Court erred in concluding that mediated settlement agreement was binding contract. COA indicated essential terms were omitted from settlement agreement, and the three-page, hand-written settlement agreement was so cursory in its treatment of complex matters that the parties did not intend document to be binding contract.

Dissent indicated the settlement agreement was sufficiently definite to be an enforceable contract. The agreement was not a three-page document. It incorporated a 50-page-plus document which provided the essential terms for the agreement.

Repeated Challenges to Mediated Agreement Sanctionable

Annis v Annis, 319577 (April 16, 2015), affirmed circuit court's finding that plaintiff's repeated challenges to mediated settlement agreement violated MCR 2.114(D)(2), and affirmed circuit court's awarding of sanctions for this violation.

Unsigned Mediated Settlement Agreement Not Enforced

Central Warehouse Operations, Inc v Riffell, 319183 (March 24, 2015). Parties negotiated oral settlement agreement with aid of a "facilitator." Parties' attorneys were not present at that "meeting," and agreement was not reduced to writing. According to COA, while parties acknowledged some form of agreement was made, agreement was nothing more than agreement to agree and not an enforceable agreement.

Mediated Settlement Agreement Set Aside

Heiden v Heiden, 318245 (February 26, 2015), vacated mediation agreement. Before their marriage, parties signed "antenuptial agreement" describing husband's premarital personal injury lawsuit settlement as his separate property. Twenty-four years later, wife filed for divorce. According to COA, circuit court incorrectly ruled that antenuptial agreement applied only in event of death, not divorce. Matter proceeded to mediation after circuit court's incorrect legal ruling. Parties failed to consider during mediation whether disputed property belonged to husband alone or became part of marital estate. Parties reached mediation agreement predicated on inaccurate description of their separate and marital property. Property division and spousal support award disparately favored wife. Judgment was entered reflecting this agreement. COA vacated property division and support award in judgment and remanded to circuit

court to set aside mediation agreement. Circuit court must accept that antenuptial agreement applies to this divorce proceeding.

Undisclosed Pregnancy At Mediation

Cieslinski v Cieslinski, 319609 (November 13, 2014), held that circuit court should have set aside consent judgment when husband alleged that (1) wife deliberately withheld information that she was pregnant with another man's child before he signed consent judgment of divorce, and (2) knowledge of her pregnancy would have affected his decision to sign consent judgment because he would have been concerned about wife's ability to properly parent children. Circuit Court abused its discretion when it failed to hold evidentiary hearing after husband in essence alleged that wife fraudulently obtained consent judgment.

Incomplete Mediated Agreement Not Enforced

Kendzierski v Macomb Co, 316508 (September 23, 2014), held that signed mediated settlement agreement that resolved only damages issue but left unresolved other issues was not enforceable. According to COA, court cannot force parties to settle lawsuits and cannot make contract for parties where there is no contract. Mere negotiation, including unaccepted offers, cannot be substituted for requirements of contract. Even if valid oral contract to settle dispute resulted during "facilitation hearing," it was not enforceable because agreement was not made in open court and written evidence of agreement to settle case, subscribed by defendant or its attorney, did not exist. MCR 2.507(G).

Mediated Settlement Agreement Enforced

In *Faustina v Town Center,* 311385 (August 7, 2014), agreement was reached at mediation. When plaintiff failed to comply with agreement, plaintiff testified at hearing that she signed the agreement, but her medical bills, which she had tried to show the attorneys, were not taken into account. Circuit court held that settlement agreement was binding, ordered plaintiff to sign release of all claims, and ordered that defendants were not required to turn over the settlement checks until plaintiff signed a release, and dismissed case with prejudice. Since there was meeting of minds as to essential terms, COA held there was no abuse of discretion in circuit court's order enforcing agreement.

Mediated Agreement Set Aside

Hayes v Morris, 315586 (July 29, 2014). Parties were ordered to domestic relations mediation. MCR 3.216. Parties reached settlement that provided for largely equal division of marital estate. No judgment based on agreement was entered. Then husband died. In *Tokar v Albery,* 258 Mich App 350; 671 NW2d 139 (2003), parties, during divorce proceedings, submitted property issues to binding arbitration. After filing of award but before entry of judgment, husband died. *Tokar* held that trial court correctly denied motion to enforce award because "trial court retains ultimate control over a divorce action" and "arbitration award, standing alone, does not have full force and effect unless and until the trial court enters a judgment of divorce based on that award." Court mentioned two possible exceptions under which award could be enforced: (1) if entry of judgment would have been "ministerial" and (2) if decedent had acted in reliance on award. Court found that entry of judgment would not have been "ministerial" because, in part, there were issues of household furnishings remaining and "before the judgment of divorce was entered, the parties had the option to reconcile or stipulate to an agreement entirely different from the arbitration award." The same reasoning held true in the present case. Court found no reliance by decedent, stating that, to show reliance, "[m]eaningful proof of conduct indicating the parties themselves in good faith believed they were divorced is required." Such reliance had not been shown in this case.

Mediated Agreement Concerning Parental Rights

In *In re Wangler/Paschke,* 305 Mich App 438, COA 318186 (May 27, 2014) (Hoestra and Sawyer [majority]; Gleicher [dissent]), lv gtd *In re Wangler/Paschke,* ___ Mich ___, (April 1, 2015) (SC 149537), parties entered into mediated agreement. Respondent failed to comply with mediated ordered services. Pursuant to agreement, circuit court accepted her plea and took jurisdiction over minor children. Respondent's attorney agreed that mediation agreement authorized court to take jurisdiction over children. Court stated it was taking "formal jurisdiction" and authorized petitioner to file supplemental petition asking for termination of respondent's parental rights. On appeal, respondent argued that her written plea that was incorporated into mediation agreement was invalid and could not form basis for court to take jurisdiction over children. Court ordered parties to engage in mediation immediately after preliminary hearing wherein it found probable cause to authorize the petition and ordered temporary placement of children. During mediation, parties negotiated agreement that was signed by all participants, including respondent. Agreement set forth consequences of court's acceptance of respondent's plea of admission.

Judge Gleicher's dissent indicated that before court may exercise jurisdiction based on parent's plea it must satisfy itself that parent knowingly, understandingly, and voluntarily waived certain rights. MCR 3.971(C)(1). No dialogue between court and parent had occurred. The mediation employed as a substitute for the adjudicative trial improperly bypassed due process protections in court rules, and circuit court never obtained jurisdiction.

Mediation In Parental Rights Case

In re Vanalstine, Minors, 312858 (April 11, 2013). Circuit court ordered parties to participate in mediation, which resulted in mediation agreement concerning parental rights to minor children. Mother did not comply with agreement and court terminated her parental rights. COA indicated that contrary to mother's assertion, circuit court did not terminate her parental rights solely for her failure to comply with agreement. Circuit court's decision was based on mother's conduct, which included but was not limited to her failure to comply, and which led to circuit court's assessment of the statutory termination factors. COA found it unnecessary to resolve whether defense of impossibility could render such an agreement void or voidable.

Post Arbitration-Mediation Conduct of Arbitrator-Mediator

Hartman v Hartman, 304026 (August 7, 2012), concerned same individual serving as arbitrator and mediator and post-arbitration/mediation conduct of arbitrator-mediator and defense counsel. When mediation failed, parties agreed to arbitrate using mediator as arbitrator. Arbitrator issued some awards covering minor issues. Before arbitration on major issues, parties agreed to again mediate utilizing arbitrator as mediator. This mediation failed. Parties then reached settlement agreement on their own. At entry of judgment hearing, plaintiff stated that he had concerns about arbitrator acting as neutral. He did not ask to have settlement agreement set aside. The final judgment hearing was continued for four weeks. Plaintiff's counsel contacted arbitrator to inform arbitrator of the dates. Arbitrator informed plaintiff's counsel that arbitrator was going to be in Florida and staying at 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 remaining issues. Defense counsel refused the request.

Plaintiff filed motions to remove arbitrator, have new arbitrator appointed, and obtain relief from settlement agreement. Defendant argued that awards were moot because settlement had been reached. Defense counsel argued that what occurred between himself and arbitrator was hospitality and that numerous attorneys, including judges, had stayed at defense attorney's Florida home. Circuit court denied plaintiff's motion, stating that there was no appearance of impropriety because parties ultimately reached settlement agreement and trip to Florida occurred 30 days after mediation. A judgment of divorce was entered. Circuit court held that there was no evidence of clear or actual bias by arbitrator and no evidence to prove that what occurred between arbitrator and defense counsel rose to level of clear actual partiality.

COA affirmed circuit court's denial of plaintiff's motion to set aside settlement agreement and judgment of divorce. COA stated that:

> The totality of the circumstances ... 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. ... .

Circuit Court Can Enter Judgment on Mediation Agreement

Unit 67, LLC v Hudson, 303398 (June 7, 2012), affirmed circuit court entry of consent judgment because defendant had agreed to terms of property consent judgment and mediator did not engage in fraudulent conduct.

Mediation Agreement Evidenced Parties' Mutual Intent

Roe v Roe, 297855 (July 19, 2011), held that mediation agreement was enforceable that evidenced mutual intent of parties to value retirement assets.

Mediation Resolution Does Not Deprive Court of Its Authority and Obligations

In re BJ, 296273 (January 20, 2011), held that MCR 3.216 domestic relations mediation is not binding but is subject to acceptance or rejection by parties. Parents' utilization of mediation does not deprive court of its Child Custody Act, MCL 722.23, authority and obligations.

Circuit Court Cannot Always Order Mediation

In *Baker v Holloway*, 288606 (January 26, 2010), respondent appealed circuit court's order denying her motion to terminate petitioner's *ex parte* PPO. Instead of having a hearing on merits of whether PPO should be terminated, respondent was ordered to mediate her dispute with petitioner. Respondent claimed circuit court erred by requiring her to mediate because she was entitled to prompt hearing on merits of PPO. COA held that mediation may not be required as condition to having a hearing on merits of PPO. COA vacated order denying respondent's motion to terminate PPO and remanded for hearing to determine whether PPO should be terminated.

Court Rejects Mediation Custody Agreement

In *Roguska v Roguska*, 291352 (September 29, 2009), COA held that circuit court did not err in rejecting mediated agreement, finding that no custodial environment existed concerning one of parties' children, and applied proper standard in evaluating custody factors. Defendant argued that circuit court erred by rejecting mediated agreement regarding custody. Parties negotiated agreement that was signed by mediator, both parties, and their attorneys. Circuit Court heard testimony that agreement existed regarding custody, parenting time, property and child support. Parties stated that consent judgment was consistent with mediated agreement. During hearing, plaintiff testified that she thought defendant was "lying" during mediation. Circuit Court rejected mediated agreement. COA held that circuit court was not bound by parties' agreement regarding custody. Regardless of existence of mediated agreement, Child Custody Act (CCA), MCL 722.21 *et seq*, requires circuit court to determine independently the custodial placement that is in best interests of children. Circuit court did not act erroneously while exercising its discretion or applying law to set aside custody portion of agreement. ■

About the Author

Arbitrator and Mediator ***Lee Hornberger*** *received the George N. Bashara, Jr. Award in recognition of exemplary service from the State Bar's ADR Section, is a member of the State Bar's Representative Assembly and ADR Section Council, editor of The ADR Quarterly, chair of the ADR Committee of the Grand Traverse-Leelanau-Antrim Bar Association, and a former president of the GTLA Bar Association.*

Michigan's Sentencing Guidelines After *Lockridge*

By William L. Cataldo and Josh Van Laan

On July 29, 2015, the Michigan Supreme Court declared a portion of our sentencing guidelines statutes unconstitutional.[1] In the five-to-two decision by Justice McCormack, the Court's majority determined that Michigan's sentencing statutes effectively create a mandatory sentencing scheme that requires the sentencing courts to score offense variables ("OVs") that increase the mandatory minimum sentence using facts not admitted by the defendant or determined by a jury beyond a reasonable doubt. Relying on the United States Supreme Court decisions in *Apprendi*[2] and *Alleyne*[3], our Supreme Court ruled that Michigan's sentencing scheme violates the constitutional right to a jury trial established by the Sixth Amendment.

In light of that conclusion, and guided primarily by the United States Supreme Court decision in *Booker*,[4] the *Lockridge* Court opted to remedy the constitutional flaws in Michigan's sentencing guidelines by: (1) severing MCL 769.34(2) to the extent that it makes mandatory a minimum sentencing range calculated using judicially-found facts; (2) striking down the requirement set forth in MCL 769.34(3) that obligates the sentencing courts to articulate substantial and compelling reasons for departing from the guidelines; and (3) severing or striking down, as necessary, any part of any other statute to the extent that it refers to "mandatory" guidelines or to "departures" from the guidelines. Combining those remedies, the Court has therefore effectively *Booker*-ized our sentencing laws, rendering the guidelines to be "advisory" only.

Despite the advisory nature of the guidelines, the *Lockridge* Opinion expressly mandates that the courts continue to determine the applicable sentencing guidelines range in each case, and that they do so in the same manner as before the Court's decision. And while not bound by that guideline range, the sentencing courts are obligated