MEDIATION MATTERS

Post Judgment Mediation

By Joseph Hohler III

In most family law cases, judges are loathe to make decisions. Pre-judgment, this is easy—avoiding decisions is baked into the court rules. Mediation is mandatory in nearly every case,[1] and many circuits schedule settlement or conciliation conferences at some point for the express purpose of guiding resolution, even if on a temporary basis.[2] In this way, because everything about it is designed to *avoid* litigation, pre-judgment litigation hardly acts like litigation at all. This is as it should be, as the parties are usually more knowledgeable about their own issues than the court and *should* make decisions for themselves.

Post-judgment, though, is entirely different. Here is where all notions of conciliation conferences, settlement conferences, and mandatory mediation go out the window, leaving the focus on having the trial so determinedly avoided before.[3]

In the circuits I practice in most regularly, just one of them puts up any roadblock on the way to a contested hearing in post-judgment matters, which is a meeting with an intake specialist. But, given the specialist has no power to do anything, they are a dog with no teeth. Moreover, it is not universally applied. Rather, it is reserved almost exclusively for pro per litigants, as motions filed by an attorney almost always go straight onto the court's, or referee's, docket for that initial 15-minute hearing. If the proper grounds are shown there, it's onto the evidentiary hearing without stopping for anything else.

Anything, that is, except time. After all, while the initial 15-minute hearing might be held soon after filing the motion, the evidentiary hearing might not be scheduled for any sooner than three months out. Frequently it is four. Any sooner and you've witnessed a miracle.

In most cases this sort of scheduling delay is unacceptable, because in family law most issues are too pressing to be put off. And yet, waiting is exactly what happens, as if the delay is meant to give the parties a chance to accept inertia and give up their complaints before the court can do anything about them. Or, to make the controversy so stale by the time it's heard it doesn't matter *what* the court does.

This delay is unacceptable, but it exists because the court tends to treat pre- and post-judgment matters differently, even as a reading of the appropriate rules makes no distinction between pre- and post-judgment matters.[4] Therein is the solution – rather than treat them differently, the court could explicitly require at least an attempt at mediation in every case. Post-judgment could see a requirement that the moving party make some attempt at mediation before a contested hearing can be heard. Yes, this might delay the initial hearings, but the potential benefit to the court calendar would be astounding if even 20% of these cases settled early.

Consider the benefits:

- For litigants who actually *need* contested hearings, they will no longer be made to wait several months before their hearings are held, as other cases settle out or were never scheduled at all, freeing up the court calendar.
- Mediation is cheaper, because the cost of sending a case through a half day of mediation does not carry the same

expense as preparing for, and running, a half day hearing. Moreover, it removes the burden on witnesses of having to appear.

- Litigants are generally happier when they solve their *own* problems, without the need for corrosive testimony and opposition, even when the outcome is identical to what the court would order.

Certainly, requiring mediation is not a panacea. Many disputes, and parties, are not appropriate for mediation for various reasons, and many cases *need* that delay in scheduling to conduct discovery. In the latter cases, mediation without discovery would be pointless. One obvious necessity in requiring mediation post-judgment would be vigilance by the court in identifying cases inappropriate for mediation. For pro per litigants, this might simply be a phone screening, similar to the ones performed by local dispute resolution centers. For represented litigants, counsel could act as the screening component, codifying the de facto role they already play.

Certainly, there will be room for abuse in this system — there is the potential for abuse in *any* system. However, properly imposed sanctions would solve that. Even so, the potential abuse seems an acceptable side effect to the benefits of speeding up an otherwise slow process.

About the Author

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Endnotes

1 MCR 3.216, MCL 552.502(m).

2 Though conciliation conferences seem built to provide temporary relief in custody cases, experience says these temporary orders usually become permanent by default, as the parties acclimate to them and don't have the initiative to challenge them.

3 Call the hearing in post-judgment matters anything you want, but the reality is they are a trial, the same as any other.

4 MCR 3.216(A)(1): "All domestic relations cases, as defined in MCL 552.502(m), and actions for divorce and separate maintenance that involve the distribution of property are subject to mediation under this rule, unless otherwise provided by statute or court rule." (Emphasis Added). MCL 552.502(m): "'Domestic relations matter' means a circuit court proceeding as to child custody, parenting time, child support, or spousal support, that arises out of litigation under a statute of this state, including, but not limited to…"