

AUSTIN APPEALS COURT DECISION IMPLIES THAT MEDIATION AGREEMENT AFFECTING TERMINATION OF PARENTAL RIGHTS REQUIRES EXPRESS, COMPLETE COMPLIANCE

By Isaac Villarreal*

Recently, the Austin Court of Appeals issued a memorandum opinion, in *Bunton v. Texas Dept. of Family and Protective Services*,¹ establishing the premise that substantial performance of a mediated settlement agreement will not suffice to preclude consequences of non-compliance.²

Toni Bunton appealed a Texas trial court's termination of her parental rights to her three children.³ After receiving a report that Darrell Allen, Bunton's then-boyfriend and father of one of her children, broke into Bunton's home and threatened her with a knife in view of the children, the Department of Family and Protective Services ("Department") removed the children from the home, citing concerns over the history of domestic violence between Bunton and Allen and the children's living environment in the home.⁴

The Department developed a plan to reunite Bunton with her children that required Bunton to attend therapy, anger management classes, and supervised visitations with her children.⁵ However, according to the Department caseworker assigned to the case, Bunton missed "40-50 percent of her visits" with the children as well as several therapy sessions.⁶ On October 25, 2005, Bunton voluntarily signed an irrevocable affidavit of relinquishment of parental rights, but the affidavit was not filed at that time.⁷

Instead of filing the affidavit, on November 5, 2005, Bunton and the Department entered into a Mediated Settlement Agreement in which the Department agreed to forestall action on the affidavit of relinquishment of Bunton's parental rights in favor of the plan of reunification, provided that Bunton comply with the requirements of the mediated settlement agreement.⁸ Under the agreement, Bunton was required to:

1. obtain housing approved by the Department by or before February 1, 2006, and provide the Department proof of a lease lasting at least six months;
2. attend visitation with the children once a week for a minimum of one hour each week, obtain transportation to the visits, and call the caseworker 24 hours in advance of each visit to confirm her attendance;

3. attend individual therapy with a therapist approved by the Department once a week beginning the week of November 15, 2005, until successful discharge from therapy;
4. maintain employment and provide actual proof of employment to the Department in writing from her employer; and
5. attend family therapy with A.B. (one of her children) once she had established housing.⁹

Bunton and the Department agreed that if Bunton did not perform the required actions, the Department would file Bunton's affidavit of relinquishment and proceed to terminate her parental rights.¹⁰ Bunton violated the terms of the agreement by failing to obtain housing approved by the Department and by missing several visits with the children as well as therapy sessions. As a result, the Department filed suit to terminate Bunton's parental rights to the children. On May 22, 2006, after hearing testimony from several witness and reviewing the mediated settlement agreement and Bunton's affidavit of relinquishment of parental rights (which had been properly admitted into evidence), the trial court found by clear and convincing evidence that Bunton had voluntarily signed an irrevocable affidavit of relinquishment of parental rights and that such termination was in the best interest of the children.¹¹

On appeal, Bunton argued that the trial court erred by terminating her parental rights because the evidence was legally and factually insufficient to establish that she "failed to substantially comply with the terms of the mediated settlement agreement."¹²

On review, the Austin Court of Appeals considered several undisputed facts, including that under the mediated settlement agreement, the Department would file Bunton's signed affidavit of relinquishment and proceed to termination if Bunton:

1. failed to obtain Department-approved housing by February 1, 2006;

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2. missed two visits with her children;
3. was unsuccessfully discharged from individual therapy;
4. was unemployed at any time after November 4, 2005, for 30 consecutive days; and
5. failed to attend or participate in individual or family therapy.¹³

The appeals court noted that it was undisputed that Bunton failed to obtain Department-approved housing by February 1, 2005 and that she missed two visits with her children and two individual therapy sessions.¹⁴ However, Bunton's contention was that she "substantially complied" with the terms of the mediated settlement agreement because she obtained housing on February 9, 2005, shortly after the February 1 deadline, and that the two missed visits with her children were not her fault.¹⁵ She also argued that although she missed two therapy sessions, two misses out of thirty sessions should not be considered significant and should not affect her contention that she substantially complied with the requirements of the mediated settlement agreement.¹⁶

Bunton asserted that substantial compliance with the terms of the mediated settlement agreement should have prevented the Department from pursuing termination with the affidavit of relinquishment (she proffered this argument at the termination hearing and again at the hearing on her motion for new trial).¹⁷ The Department, on the other hand, argued that Ms. Bunton did not comply with the express terms of the mediated settlement agreement and that the mediated settlement agreement did not provide that substantial compliance would be sufficient.¹⁸

The appellate court explained that Texas law clearly establishes that a trial court has no authority to enter any judgment that varies from the terms of a mediated settlement agreement.¹⁹ Despite the established law and, according to the appellate court, the clear absence of any language allowing for substantial compliance, Bunton asked the Austin Court of Appeals to find as a matter of law that substantial compliance with the terms of the mediated settlement agreement was sufficient.²⁰

The court noted that a similar argument was advanced in *In re D.H.L.*²¹ In that case, the trial court entered an order requiring the parents of the child to comply with the Department's service plans and warned them that their failure to "fully comply" with the court's order might result in the termination of their parental rights.²² The Department's service plan required the parents to perform certain actions, including weekly visits with the child and attendance at counseling.²³ After the parents missed numerous visits with the child and counseling sessions, their parental rights were terminated based upon the trial

court's finding that they failed to comply with a court order.²⁴ On appeal, the parents argued they had "substantially complied" with the court's order by completing most, but not all, of the detailed provisions of the Department's service plan.²⁵ The *D.H.L.* court determined the substantial compliance argument failed to negate the fact that the parents missed numerous visits with the child and counseling sessions.²⁶ The court further concluded, "[m]ore importantly, neither party has provided, and we have not found, any legal authority for the premise of their arguments that 'substantial compliance' renders undisputed evidence of a failure to comply somehow insufficient to support a trial court's finding."²⁷

The Austin Court of Appeals ultimately declined to address the "substantial compliance" issue as a matter of law.²⁸ Instead, the court held, "even if substantial compliance were enough, the evidence is conclusive that Bunton did not substantially comply with the terms of the agreement in [the] case."²⁹ The court also concluded that despite the Bunton children's desire to return home with their mother, termination was in each child's best interest.³⁰

Despite the court's decision not to address the issue relating to the legal effect of "substantial compliance" with a mediated settlement agreement, one could infer that the court's concerted effort to explain the holding in *In re D.H.L.*³¹ would lead to the conclusion that "substantial compliance" with a mediated settlement agreement *will not* suffice to preclude consequences of non-compliance unless the mediated settlement agreement expressly provides that "substantial compliance" will be sufficient. In such case, a party would still be required to establish that it has substantially complied with an agreement and that such compliance is consistent with the terms of the agreement. Until a case that properly establishes "substantial compliance" absent any language allowing for such compliance is raised before a Texas Court of Appeals, the question lingers... Is substantial compliance sufficient?



**Isaac Villarreal is a third-year law student at Thurgood Marshall School of Law at Texas Southern University. He is the Editor-in-Chief of the Thurgood Marshall Law Review and an employee of Ashby Crinion LLP in Houston, where he will practice as an associate attorney upon completion of his law degree and passing the Texas Bar Exam. He holds a mediation certificate, a*

M.A with a major in Legal Studies, and a B.A with a major in English from Southwest Texas State University (now Texas State) in San Marcos, Texas.

ENDNOTES

- 1 Bunton v. Tex. Dept. of Family & Protective Servs., No. 03-06-00329-CV, 2007 WL 1451757 (Tex. App.—Austin May 16, 2007, no pet.).
- 2 *Id.* at *3-*4.
- 3 *Id.* at *1.
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*

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tion of court appointed experts.

Third, the court noted that case law from the Fifth Circuit and other circuits did not support the taxation of mediation fees as cost under 28 U.S.C. § 1920. Once again, providing an example of case law, the court referred to *Mota*, holding that mediation fees were not taxable costs under 28 U.S.C. § 1920.¹⁸

Concluding, the court held that the district court abused its discretion in awarding mediation expenses as taxable costs to Defendants under 28 U.S.C. § 1920 in the ERISA action because mediation fees were not explicitly authorized by 28 U.S.C. § 1920, and because the Fifth Circuit's decision in *Gaddis* did not support the district court's award of mediation fees as taxable costs. The appellate court vacated the award of mediation fees as taxable costs under 28 U.S.C. § 1920.



Walter Clark Martin IV is a native Texan from Houston. He received a Bachelor of Public Administration degree from Texas State University-San Marcos. In December 2007, he received a Master of Arts Degree with a major in Legal Studies at the same university. He plans to attend law school at South Texas College of

Law and hopes to become an asset to the legal community.

ENDNOTES

- ¹ 29 U.S.C. §§ 1001-1461.
- ² *Cook Children's Med. Ctr. v. New Eng. PPO Plan of Gen. Consol. Mgmt., Inc.*, 491 F.3d 266 (5th Cir.2007).
- ³ *Id.* at 271.
- ⁴ *Id.* at 274.
- ⁵ 261 F.2d 512 (5th Cir.2001).
- ⁶ *Cook Children's Med. Ctr.*, 491 F.3d at 274.
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.* at 275.
- ¹⁰ 381 F.3d 444 (5th Cir.2004).
- ¹¹ *Cook Children's Med. Ctr.*, 491 F.3d at 275.
- ¹² 482 U.S. 437 (1987).
- ¹³ *Cook Children's Med. Ctr.*, 491 F.3d at 275.
- ¹⁴ *Id.* at 276.
- ¹⁵ *Id.*
- ¹⁶ *Id.* (citing *Black's Law Dictionary* 1003 (8th ed.2004)).
- ¹⁷ *Id.* (citing Unif. Mediation Act § 2(1) (2001)).
- ¹⁸ *Id.* at 277.

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⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *2.

¹³ *Bunton*, 2007 WL 1451757 at *2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *3 (citing *In the Interest of R.B.*, 200 S.W.3d 311,314 (Tex. App.—Dallas 2006, pet. denied); *Garcia-Udall v. Udall*, 141 S.W.3d 323, 332 (Tex. App.—Dallas 2004, no pet.).

²⁰ *Bunton*, 2007 WL 1451757 at *3.

²¹ *Id.* (citing, *In re D.H.L.*, No. 04-04-00876-CV, 2005 Tex. App. LEXIS 9288, at *6 (Tex. App.—San Antonio November 9, 2005, no pet.).

²² *Id.*

²³ *Id.*

²⁴ *Id.* (citing *In re D.H.L.*, 2005 Tex. App. LEXIS 9288, at *4).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *3-*4 (citing examples of non compliance, such as *Bunton's* failure to keep food or electricity in and for her rented apartment).

³⁰ *Id.* at *4.

³¹ *In re D.H.L.*, No. 04-04-00876-CV, 2005 Tex. App. LEXIS 9288, at *6 (Tex. App.—San Antonio November 9, 2005, no pet.).

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Many mediators will never utilize those principles so Ury has, in my opinion, done us all a favor by synthesizing the approach.

This book invites leisurely reading and integration. It encourages mediators and negotiators to look carefully at a three-step process, the last part dealing with the aftermath of saying No and not backing down. Some mediators will not find the book immediately useful, particularly those who have a style that is more directive or even evaluative. I believe, however, that there are useful tips for all of us.



* *Kay Elliott, J.D., LL.M.*, has arbitrated and mediated over 1,800 cases since 1980. She has taught in and coordinated ADR graduate programs at Texas Woman's University and Texas Wesleyan School of Law since 1990, where she has coached championship negotiation and mediation advocacy teams. She is ACR Dallas President, Council Member of TMTR, Board Member of TMCA, and a frequent contributor to ADR publications and seminars. Kay co-edited the *SBOT-ADR Handbook (2003)* with Frank Elliott.