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When are mediation agreements admissible in court?

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Generally, no evidence of anything said and no writing prepared in the course of a mediation is admissible in any civil or family court action in California. Under the Evidence Code, "No writing ... prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." Section 1119(b).

However, exceptions exist with regard to certain writings, as demonstrated in the 2nd District Court of Appeal case *Marriage of Daly and Oyster*, 2014 DJDAR 9961 (July 29, 2014).

Joanne Daly and David Oyster separated in 2004 after a 23-year marriage. In 2005, Daly filed a petition for dissolution of marriage in superior court. The petition was never served on Oyster and no other documents were ever filed by either party. However, the parties attended mediation, and in 2006 entered into a "proposed stipulated judgment" that resolved all issues regarding child custody and support, spousal support, and the division of the community property.

The terms of the stipulated judgment provided, in part, that it constituted a "marital settlement agreement which will be conformed as a Stipulated Judgement [sic] of the court." Another provision stated that it "shall be the operable court judgment with relation to the Stipulated Judgment for Dissolution of Marriage." It also stated that the court would "reserve[] jurisdiction to supervise the payment of any obligation ordered paid or allocated in this Stipulated Judgment; supervise the execution of any documents required or reasonably necessary to carry out the terms of this Judgment; and supervise the overall enforcement of this Judgment."

The stipulated judgment was never filed in the 2005 dissolution action, and in 2011 the superior court dismissed Daly's divorce petition for lack of prosecution. Two weeks later, Daly filed a second petition for dissolution and moved to have the stipulated judgment entered as a judgment, nunc pro tunc, in the dismissed proceedings, and also incorporated into a judgment in the 2011 dissolution action. Oyster argued that the 2006 stipulated judgment was not a final agreement and that some of the obligations under the judgment had never been performed. He also contended that a stipulated judgment created only for the 2005 dissolution action cannot become the basis for a judgment in the subsequent 2011 dissolution action.

The trial court denied the motions and set the matter for trial. At trial, Oyster objected to the admission of the stipulated judgment on the grounds that it was protected by Section 1119. The trial court, however, concluded that the stipulated judgment was an enforceable martial settlement agreement. The trial court entered a "judgment on reserved issues" based upon the stipulated judgment, specifically finding that the stipulated judgment was an enforceable contract and judgment was to be entered based on that contract.

On appeal, Oyster argued again that the stipulated judgment was inadmissible under Section 1119. The Court of Appeal disagreed, noting the exceptions outlined in Section 1123, which provides: "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter *if* the agreement is signed by the settling parties *and* any of the following conditions are satisfied: (a) The agreement provides that it is admissible or subject to disclosure, or words to that effect. (b) The agreement provides that it is enforceable or binding or words to that effect. (c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure. (d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute." (Emphasis added).

The Court of Appeal found that the judgment provided " words to [the] effect" that it was admissible because (1) the parties agreed the stipulated judgment would be the "operable" judgment, *and* (2) the court would "reserve jurisdiction to supervise," among other specific provisions of the judgment, the overall enforcement of the judgment. "Use of such language," the court held, "clearly reflected the parties' agreement that the stipulated judgment be subject to disclosure and be enforceable. The parties agreed the court would enforce the document, which it could not do unless the document was disclosed to it. It was therefore admissible...."

Additionally, the Court of Appeal rejected Oyster's contention that a judgment created for the 2005 case could not be used in a subsequent case, stating, "It seems apparent that the parties intended by the agreement simply to settle their divorce. Such a settlement by its nature recognizes the termination of a relationship and effects the parties' final separation and independence by disjoining and fixing property and other rights going forward in perpetuity. Nothing suggests the parties here intended that separation and independence not occur — and the settlement agreement become null — if the divorce took longer than five years."

As a practical matter, the *Daly and Oyster* case makes it abundantly clear that not all writings prepared for mediation, prepared in the course of mediation, or prepared pursuant to mediation are inadmissible under Section 1119. In fact, family law attorneys are cautioned not to include certain specific terms in their mediation agreements which would make them subject to disclosure in court — if, in fact, that is not the intention of the parties.

Including language in a mediation agreement "to the effect" that it is or will be enforceable by the court, or that the parties agree to be bound by the terms of the agreement, may render exempt such mediation agreements under Section 1123 from the confidentiality protections of Section 1119. It would behoove all family law practitioners to make certain that, if they want their agreements reached at mediation to remain confidential, they not include language which would, in any way, imbue the court with the power to enforce the agreement or supervise any term or provision of the agreement. Doing so may result in the agreement being admissible in court at a later proceeding.

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