STATE OF MICHIGAN

COURT OF APPEALS

SHEILA HARVEY, Plaintiff-Appellant, v HARRY LOUIS HARVEY Defendant-Appellee.	FOR PUBLICATION June 24, 2003 9:25 a.m. No. 244950 Oakland Circuit Court LC No. 00-632479-DM Updated Copy August 15, 2003

Before: Murray, P.J., and Neff and Talbot, JJ.

NEFF, J.

Plaintiff Sheila Harvey appeals as of right an order granting defendant Harry L. Harvey sole legal and physical custody of the parties' two minor children following entry of the parties' consent judgment of divorce. We reverse and remand.

I

Plaintiff filed a complaint for divorce in February 2000. The issues of property settlement, child custody, child support, and parenting time were disputed. On the date scheduled for trial, April 23, 2001, the parties appeared and agreed on the record to binding arbitration regarding the marital property and to a friend of the court decision regarding parenting time. With respect to the latter issue, the parties stipulated that testimony would be taken before the friend of the court, and that the referee's decision would be binding. The trial court inquired whether there were issues regarding child support, custody, and spousal support that might also be appropriately resolved by a friend of the court referee. Counsel responded that issues of custody and parenting time were before the friend of court, and, depending on the outcome, there may be an issue regarding child support.[1] The court set a trial date of May 7,

[1] Under the court's interim order, the parties shared legal custody of the minor children and defendant had specific parenting time and paid child support.

2001, and indicated that the case would proceed to trial unless the court was presented an order in the interim that removed the other remaining issues from the court's consideration.[2]

On May 15, 2001, the trial court entered a consent order, approved by both parties' counsel, for (1) binding arbitration to settle all property matters,[3] and (2) an evidentiary hearing and binding decision by the friend of the court referee regarding issues of custody, parenting time, and child support. The order expressly provided that the decision of the friend of the court referee "shall not be reviewable by the trial court."

On September 13, 2002, following an investigation by the friend of the court and a three-day evidentiary hearing, the friend of the court filed its findings and a proposed order awarding defendant sole legal and physical custody of the parties' two minor children. Plaintiff objected to the friend of the court's findings and the proposed order on procedural and substantive grounds, and alleged that she was denied the effective assistance of counsel. Plaintiff filed a motion in propria persona for an emergency stay of proceedings and denial of entry of the proposed order pending a new evidentiary hearing or review by this Court. On October 2, 2002, the court entered the child-custody and parenting-time order as proposed by the friend of the court. Plaintiff subsequently retained new counsel and filed a motion for a hearing de novo and to set aside the child-custody order. The trial court denied the motion on the basis of plaintiff's stipulation to a binding friend of the court decision and the related consent order.

II

Plaintiff argues that the trial court erred in denying her motion for review of the friend of the court's findings because the parties' agreement to be bound by the referee's decision did not meet the requirements for binding arbitration under the recently enacted statute governing domestic-relations arbitration, MCL 600.5070 *et seq*. Plaintiff contends that she is entitled either to the statutorily mandated review of binding arbitration awards in domestic-relations matters under MCL 600.5080 or, in the alternative, to review do novo of the friend of the court findings pursuant to MCL 552.507(5). We conclude that plaintiff is entitled to a hearing de novo of the child-custody findings and recommendation.

A

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[2] The trial court stated, "If I have an order that removes all of the issues from this Court to be determined by arbitration as to property and Friend of the Court, as to the other issues, that will be fine, but otherwise if I'm going to try any part of it, I might as well try it all, so if you can't agree to that and get me an order by May 7th when you come back on May 7th, we'll just go to trial."

[3] Binding arbitration of the marital-property issue was conducted pursuant to a subsequent arbitration agreement signed by the parties and is not at issue on appeal.

This Court reviews for clear legal error the trial court's choice, interpretation, or application of the existing law in child-custody matters. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). "To expedite the resolution of a child custody dispute by prompt and final adjudication, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. A trial court's decision whether to set aside a consent judgment is reviewed for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 763; 630 NW2d 646 (2001).

B

With the enactment of 2000 PA 419, effective March 28, 2001, domestic-relations arbitration is now governed by the specific statutory scheme set forth in MCL 600.5070 *et seq*. MCL 600.5070(1) provides:

> This chapter provides for and governs arbitration in domestic relations matters. Arbitration proceedings under this chapter are also governed by court rule except to the extent those provisions are modified by the arbitration agreement or this chapter. This chapter controls if there is a conflict between this chapter and chapter 50.[4]

The act does not apply to arbitration in a domestic-relations matter if, before the effective date of the act, the court entered an arbitration order and all the parties executed the arbitration agreement. MCL 600.5070(2).

In this case, the court entered an order on May 15, 2001, which was approved by the parties' counsel and provided, in pertinent part:

> 7. Issue of custody, parenting time and child support shall be referred to the Oakland County Friend of Court for an Evidentiary Hearing in front of a Referee.
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> 8. The decision of the Referee, after hearing, shall be binding on the parties and shall not be reviewable by the trial court. The Appellate rights to the Court of Appeals are again preserved.

Because the court's order was entered after the effective date of the domestic relations arbitration act, it did not fall within the exclusion of MCL 600.5070(2), and thus the act governs any agreement between the parties for arbitration.

C

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[4] Chapter 50, MCL 600.5001 relates to arbitrations.

Under the new arbitration scheme, parties to an action for divorce may stipulate to binding arbitration with respect to the issues of child custody and parenting time. MCL 600.5071. However, the act sets forth detailed mandatory requirements for binding domestic-relations arbitration, which in this case were not met: (1) information of rights and domestic violence exclusion and waiver, MCL 600.5072; (2) arbitrator qualifications and appointment, MCL 600.5073; (3) arbitrator's powers and duties, MCL 600.5074; (4) disqualification of arbitrator, MCL 600.5075; (5) meeting with arbitrator and order for material information, MCL 600.5076; (6) record of arbitration hearing, MCL 600.5077; (7) awards, errors, or omissions, MCL 600.5078; and (8) enforcement, filing, and sanctions, MCL 600.5079.

The consent order in this case directed that the issues of custody, parenting time, and child support be referred to the friend of the court for an evidentiary hearing before a referee and that the decision of the referee would be binding could not be reviewed by the circuit court. The dissent concludes that an agreement for a binding decision by a friend of the court referee does not fall within the statutory mandate of the domestic-relations arbitration act, noting that arbitration moves a dispute to a different forum, whereas a hearing and a binding decision before the friend of the court does not. We view this as a distinction without a difference.

With regard to the scope of the domestic relations arbitration act, the statute states that it provides for and governs arbitration in domestic-relations matters. MCL 600.5070(1). The act is comprehensive in nature. It provides:

> Parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or to a postjudgment proceeding related to such an action, may stipulate to binding arbitration by a signed agreement that specifically provides for an award with respect to 1 or more of the following issues:
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> (a) Real and personal property.
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> (b) Child custody.
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> (c) Child support, subject to the restrictions and requirements in other law and court rule as provided in this act.
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> (d) Parenting time.
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> (e) Spousal support.
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> (f) Costs, expenses, and attorney fees.
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> (g) Enforceability of prenuptial and postnuptial agreements.
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> (h) Allocation of the parties' responsibility for debt as between the parties.
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> (i) Other contested domestic relations matters. [MCL 600.5071.]

The act further provides in MCL 600.5072:

(1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:

(a) Arbitration is voluntary.

(b) Arbitration is binding and the right of appeal is limited.

(c) Arbitration is not recommended for cases involving domestic violence.

(d) Arbitration may not be appropriate in all cases.

(e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

(f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

(g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

(h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.

(i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration.

(2) If either party is subject to a personal protection order involving domestic violence or if, in the pending domestic relations matter, there are allegations of domestic violence or child abuse, the court shall not refer the case to arbitration unless each party to the domestic relations matter waives this exclusion. A party cannot waive this exclusion from arbitration unless the party is represented by an attorney throughout the action, including the arbitration process, and the party is informed on the record concerning all of the following:

(a) The arbitration process.

(b) The suspension of the formal rules of evidence.

(c) The binding nature of arbitration.

(3) If, after receiving the information required under subsection (2), a party decides to waive the domestic violence exclusion from arbitration, the court and the party's attorney shall ensure that the party's waiver is informed and voluntary. If the court finds a party's waiver is informed and voluntary, the court shall place those findings and the waiver on the record.

(4) A child abuse or neglect matter is specifically excluded from arbitration under this act.

The act, as previously noted, details lengthy, specific requirements for the conduct of arbitration, culminating in a limitation on the parties' right of review of an arbitration decision. With regard to vacation or modification of an award concerning child support, custody, or parenting time, MCL 600.5080 provides:

(1) Subject to subsection (2), the circuit court shall not vacate or modify an award concerning child support, custody, or parenting time unless the court finds that the award is adverse to the best interests of the child who is the subject of the award or under the provisions of section 5081.

(2) A review or modification of a child support amount, child custody, or parenting time shall be conducted and is subject to the standards and procedures provided in other statutes, in other applicable law, and by court rule that are applicable to child support amounts, child custody, or parenting time.

(3) Other standards and procedures regarding review of arbitration awards described in this section are governed by court rule.

With regard to the grounds, standards, and procedures for vacation or modification of an arbitration award, MCL 600.5081 provides:

(1) If a party applies to the circuit court for vacation or modification of an arbitrator's award issued under this chapter, the court shall review the award as provided in this section or section 5080.

(2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:

(a) The award was procured by corruption, fraud, or other undue means.

(b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.

(c) The arbitrator exceeded his or her powers.

(d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

(3) The fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

(4) An application to vacate an award on grounds stated in subsection (2)(a) shall be made within 21 days after the grounds are known or should have been known.

(5) If the court vacates an award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement or, if there is no such provision, by the court. If the award is vacated on the grounds stated in subsection (2)(a) or (c), the court may order a rehearing before the arbitrator who made the award.

(6) Other standards and procedures relating to review of arbitration awards described in subsection (1) are governed by court rule.

In the alternative, domestic-relations matters may be referred to the friend of the court for a recommended decision without the strictures attendant to binding arbitration; however, once the referee's recommendation is issued, a party has a statutory entitlement to a hearing de novo before the circuit court:

> The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party under subsection (4), except that a request for a de novo hearing concerning an order of income withholding shall be made within 14 days after the recommendation of the referee is made available to the party under subsection (4). [MCL 552.507(5).]

Given the clear differences in the Legislature's requisites under these separate statutory schemes, the protections afforded the parties, and their rights of review, we conclude that an agreement for a binding decision in a domestic-relations matter with no right of review in the court, as in this case, is without statutory support under either scheme. Our review of the legislative analyses for the domestic-relations arbitration act further convinces us that the Legislature intended to bring within the purview of the act,[5] agreements and orders for binding decisions in domestic-relations matters that deny a party a right of judicial review:

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[5] Legislative history may be helpful in ascertaining the reason for an act and the meaning of its provisions. *DeVormer v DeVormer*, 240 Mich App 601, 606-608; 618 NW2d 39 (2000). In this
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> Arbitration is a process in which the parties agree to submit certain issues, or an entire dispute, to a neutral third party who will hear each side and render an opinion that is binding upon the parties. . . .
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> Arbitration and mediation are the subject of both Michigan statute and court rules, including a court rule that allows domestic relations matters to be mediated (MCR 3.216). The arbitration of domestic relations cases, however, is not specifically addressed. . . . In practice, however, domestic relations matters are being arbitrated, and in 1995 the Michigan Court of Appeals held that binding arbitration is appropriate to resolve property distribution issues, child support disputes, and child custody determinations (*Dick v Dick*, 210 Mich App 576[;534 NW2d 185 (1995)]). Therefore, many people believe that Michigan should enact statutory guidelines to govern the arbitration of domestic relations disputes. [Senate Fiscal Analysis, HB 4552 and HB 4615, December 13, 2000, p 1.]
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> Similarly:
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> While many feel that arbitration can be a useful tool to deal with domestic relations matters, the lack of adequate guidelines limits the full and effective use of this tool. Without rules relating to domestic situations, many do not use arbitration as a means of settling a domestic dispute, and without more specific rules to protect the participants, many would argue that arbitration should not be used to settle such disputes. Legislation has been introduced that would put guidelines for domestic relations arbitration into statute. [House Legislative Analysis, HB 4552 and HB 4615, October 19, 2000, p 1.]

The legislative analyses evince an intent to develop a comprehensive statutory framework, specific to domestic-relations disputes, that affords specific protections to the participants. With such protections and guidelines, it is appropriate to limit any subsequent right of review. In our view, by including circumstances such as the present case within the ambit of the statutory arbitration framework, the Legislature has wisely sought to minimize the legal quagmires that attend parties' attempts to undo their commitment to a binding domestic-relations decision by a neutral third party.[6]

Because the statutory requirements for binding arbitration were not met in this case, plaintiff is not subject to the limitations for review of binding arbitration of child custody and parenting time, MCL 600.5080. See *Dick*, *supra* at 576, 589 (agreements to arbitrate must

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case, we cite the legislative analyses in response to the dissent's conclusion that the statute does not define what constitutes "arbitration," and therefore the historical use of arbitration controls.

[6] The result reached by the dissent denies a party in a domestic-relations case the right of review of the friend of the court decision, the equivalent of a waiver of a legal right, with no information concerning the effect of such waiver. This result is anomalous in light of the domestic-relations arbitration act, and it effectually defeats the act, which affords detailed protections before such right of review is relinquished.

conform to the applicable court rule and statute). Moreover, the consent order for a binding friend of the court decision, subject only to the review of this Court, is without basis in the law, and is void. See *id.* at 580. Consequently, the trial court abused its discretion in failing to set aside the consent order for binding resolution of child custody and parenting time.

D

The Child Custody Act, MCL 722.21 *et seq*., governs child-custody disputes, and the trial court has continuing jurisdiction over proceedings relating to child custody, child support, or parenting time. MCL 722.26(1) and 722.27(1); *Phillips v Jordan*, 241 Mich App 17, 21-24; 614 NW2d 183 (2000). A child-custody dispute may be submitted to a friend of the court referee for hearing, MCL 552.507(2)(d), and the referee's report and recommendation may be submitted to the court, MCL 552.507(2)(c). If either party objects to the referee's report, the trial court must hold a hearing de novo. MCL 552.507(5); MCR 3.215(E)(3)(b); *Cochrane v Brown*, 234 Mich App 129, 133-134; 592 NW2d 123 (1999).

The trial court committed clear legal error in entering the friend of the court's proposed order on the basis that the recommendation was a binding decision. In the absence of any review by the trial court, as discussed above, and in the absence of a valid agreement for binding arbitration or an otherwise valid waiver of procedural requirements, plaintiff was improperly denied a hearing regarding her objections to the friend of the court's findings and recommendation. MCL 552.507(5); *Cochrane, supra*. Plaintiff is entitled to a hearing de novo by the trial court.

If a trial court improperly adjudicates a child-custody dispute, and the impropriety is not harmless, the appropriate remedy is to remand for reevaluation. *Fletcher v Fletcher*, 447 Mich 871, 882, 889 (Brickley, J.), 900 (Griffin, J.); 526 NW2d 889 (1994); *Foskett*, *supra* at 12. In this case, given the change in custody, we cannot conclude that the error was harmless.

We vacate the October 2, 2002, order granting defendant sole legal and physical custody of the minor children and remand for a hearing after the parties have an opportunity to raise objections to the report. The trial court may consider the friend of the court's report as an aid to understanding the issues to be resolved. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989).

III

In light of our disposition remanding this case to the trial court for a hearing de novo, we do not address plaintiff's remaining argument that the order changing custody was adverse to the children's best interests.

Reversed and remanded. We do not retain jurisdiction.

Talbot, J., concurred.

/s/ Janet T. Neff
/s/ Michael J. Talbot