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.

MURRAY, P.J. *(dissenting).*

The issue presented in this case is whether the trial court's May 14, 2001, "consent order for binding arbitration *and* for friend of the court referee evidentiary hearing" (consent order) (emphasis added) is void because it is undisputed that before entry of the consent order the parties did not comply with Michigan's relatively new domestic relations arbitration act, MCL 600.5070 *et seq*.[1] Because the majority opinion incorrectly concludes that the consent order was an "arbitration agreement" with respect to the custody provision, and because the parties have discretion to decline or seek a hearing de novo provided by statute before that hearing took place, I respectfully dissent.

I. Material Facts

The consent order, the terms of which were placed on the record in the presence of both parties, is signed by both parties' counsel "as to form and content." The consent order contains eight paragraphs, the first six of which deal with the appointment of an arbitrator, the rules that govern the arbitration, and the parties' agreement that "*the subject of the Arbitration shall be settlement of all property matters* necessary for the entry of the judgment of divorce in this matter." (Emphasis added.)[2] Paragraphs seven and eight of the consent order address the parties' agreement regarding the issues of "custody, parenting time and child support," which the parties agreed "shall be referred to the Oakland County Friend of the Court for an Evidentiary Hearing in front of a Referee." As noted by the majority, the parties agreed in paragraph eight that "the

[1] It is undisputed, however, that before arbitrating the property issues the parties did enter into a written arbitration agreement.

[2] Neither party raised any issue on appeal relative to the property arbitration.

decision of the Referee, after hearing, shall be binding on the parties and shall not be reviewable by the trial court." The parties further agreed, however, that "the Appellate rights to the Court of Appeals are again preserved."

The language of the consent order is quite clear and straightforward. The parties agreed to binding arbitration only with respect to *property issues*. With respect to custody, parenting time, and child-support issues, the parties agreed to separately refer those issues to the friend of the court for an evidentiary hearing and binding decision. Thus, rather than submitting their custody dispute to an "arbitrator," the parties instead opted to have a statutorily authorized friend of the court referee determine their custody dispute.

The parties eventually presented their evidence to a friend of the court referee. The hearing took place over the course of three nonconsecutive days. Less than two weeks from the conclusion of the hearing, the referee issued a thorough, ten-page opinion. In that opinion, the referee made detailed findings of fact and applied those facts to the twelve "best interest" factors within the Child Custody Act, MCL 722.23. The referee recommended that defendant be awarded sole legal and physical custody of the minor children, with plaintiff receiving significant parenting time. The referee's opinion and recommendation was submitted to the trial court.

Once the recommendation was submitted to the trial court, plaintiff filed a motion requesting a hearing de novo in circuit court. However, that motion was denied on the basis of the consent order signed by the parties. Accordingly, the court entered a custody and parenting time order on October 1, 2002, specifically indicating that no objections to the recommendation had been filed within twenty-one days of its filing with the circuit court. Plaintiff now appeals that decision, arguing several reasons why the court should have ignored the parties' agreement and held a hearing de novo.

II. Analysis

A. Domestic-Relations Arbitration

On March 28, 2001, Michigan's domestic relations arbitration act (DRA) went into effect. 2000 PA 419. The new chapter, 50B, "provides for and governs arbitration in domestic relations matters." MCL 600.5070(1). Although there is no statutory definition of what type of proceeding constitutes an "arbitration," the statute specifies that parties can stipulate to arbitrate virtually any issue that normally arises in a domestic-relations case. MCL 600.5071. With respect to who can sit as an arbitrator, the statute provides that the arbitration "may be heard by a single arbitrator or by a panel of 3 arbitrators," and that a court must appoint the selected person(s) provided that person consents and meets the statutory qualifications. MCL 600.5073(1). Those qualifications include that the proposed arbitrator be a licensed attorney with not less than five years of expertise in domestic-relations law, and who has training handling domestic-relations matters involving domestic violence. MCL 600.5073(2)(a)-(c). The statute also provides that the friend of the court, an alternative dispute resolution clerk, or other designee may make available a list of qualified arbitrators, outlining their experience and qualifications. MCL 600.5073(3).

Plaintiff argues, and the majority agrees, that every agreement to have a binding custody decision made by someone other than a circuit judge is subject to the requirements set forth within the DRA. Because the parties agreed not to seek circuit court review of this case, plaintiff argues that the parties' agreement needed to comply with the act's requirements, in particular, the disclosure provisions. Although plaintiff's argument would certainly be correct if this case involved a true arbitration, it is incorrect as applied to a decision by a friend of the court referee.

As previously noted, the DRA does not contain a definition of what constitutes "arbitration," although given the historical use of arbitration in this state, it is beyond dispute that an "arbitration" results from the parties agreement to have a private individual outside the judicial system resolve their dispute. See, e.g., *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996), citing both *Kaleva-Norman-Dickson School Dist No 6 v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 587; 227 NW2d 500 (1975), and *Horn v Cooke*, 118 Mich App 740, 744; 325 NW2d 558 (1982). Accord *Dick v Dick*, 210 Mich App 576, 587; 534 NW2d 185 (1995) ("Yet, if the parties agree to binding arbitration, they effectively move the dispute to a different forum.") The friend of the court, however, is part of the judicial system and is not a different forum, and for that reason plaintiff's argument misses the mark.[3]

The office of the friend of the court is a statutorily created entity that is headed by the "friend of the court," a statutorily created position. See MCL 552.503(1), (3) and (4); MCL 552.523. Although the friend of the court has many statutory functions to perform, see, generally, MCL 552.505, the function relevant to this case is the referee system. Pursuant to MCL 552.507(1), the chief circuit judge may appoint either the friend of the court or a licensed attorney to serve as a referee. *Id.* Referees are given significant duties, some of which include the ability to decide motions (except those involving spousal support), hold evidentiary hearings on contested issues, and make findings of fact, recommendations, and proposed orders. MCL 552.507(2)(a)-(f). Once a recommendation and proposed order are issued, they are submitted to the parties and the circuit court. The court will adopt the order unless either party, within twenty-one days, objects to the recommendation and requests a hearing de novo on the issues. MCL 552.507(4) and (5); MCR 3.215(E).

Accordingly, the friend of the court referee is an integral part of the judicial system created by the Legislature to assist the circuit court in handling domestic-relations cases. See *Marshall v Beal*, 158 Mich App 582, 590-591; 405 NW2d 101 (1986). The parties or court may, by statute and court rule, refer virtually any matter related to child custody, parenting time, or child support to the friend of the court for an initial determination. Thus, the parties' agreement in this case to have the custody issues decided by the referee was not an agreement to submit the matter to a private arbitrator acting outside the judicial system. *Beattie, supra.* Surely, if the

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[3] In concluding that the act applies in this case, the majority relies in part on legislative analyses of the act. However, there is no need to resort to any legislative history in the absence of a finding that the act is ambiguous, and the majority made no such finding. *Detroit Edison Co v Celadon Trucking Co*, 248 Mich App 118, 121-122; 638 NW2d 169 (2001). Moreover, the value of legislative analysis is highly questionable. *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

Legislature intended the friend of the court or its referees to be included as qualified arbitrators under the act, it would have said so explicitly. The Legislature was obviously cognizant of its own creation (the friend of the court and its referees), not only because the Legislature is presumed to be aware of its prior enactments, *Shirilla v Detroit*, 208 Mich App 434, 439; 528 NW2d 763 (1995), but also because there is a specific reference to the friend of the court in the act. MCL 600.5073(3). For these reasons, I would hold that the parties' agreement did not constitute an "arbitration agreement," because they did not agree to have this custody dispute resolved outside the judicial system.

B. Hearing De Novo

The next question is whether the parties were legally entitled to exercise their discretionary right to invoke the circuit court's jurisdiction for a hearing de novo before the friend of the court hearing took place. A review of the statute and case law suggests that they were clearly able to do so.

The statute at issue, MCL 552.507(5), contains a provision requiring the court to conduct a hearing de novo on any matter that was the subject of a referee hearing, but only if the parties make such a request or the court does so on its own motion:

> 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). [Emphasis added.]

Thus, unless the court conducts a hearing de novo on its own motion (which did not occur in this case), the only avenue for the court to hold such a hearing is if the parties make a request for such a hearing.[4] The Legislature, therefore, placed in the hands of the parties themselves the option of having a friend of the court referee decision reviewed by a circuit court.

Likewise, the court rule governing domestic-relations referees, MCR 3.215, contains procedures and specifications for referee hearings, including the procedure for circuit court review of those hearings. Specifically, as with the statute, MCR 3.215(E)(3) grants *a party* discretion to seek judicial review of any matter that was the subject of a referee hearing. That rule specifically provides that a party may obtain a judicial hearing on any matter that was the subject of a referee hearing by filing a written objection and a notice of hearing within twenty-one days of the referee's recommendation. Only after the submission of a written request by a party must the court hold a hearing within twenty-one days after the written objection is filed.

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[4] The parties must also comply with all the statutory requirements or they lose their right to obtain a hearing de novo. *Cochrane v Brown*, 234 Mich App 129, 132-133; 592 NW2d 123 (1999); *Constantini v Constantini*, 171 Mich App 466, 468-469; 430 NW2d 748 (1988).

MCR 3.215(E)(3) and (F). Thus, both the statute and the court rule grant the parties discretion to seek review of a friend of the court referee determination in the circuit court. *Id.*

In the instant case, the consent order signed by counsel for the parties was nothing more than a reflection of the parties' decision not to exercise their right to request a hearing de novo before the circuit court, albeit the decision was made before the referee hearing. The statute and the court rule grant the parties the ability to make this decision, and there is nothing in the statute, court rule, or case law prohibiting them from exercising that discretion before the hearing takes place.[5]

Indeed, in *Balabuch v Balabuch*, 199 Mich App 661; 502 NW2d 381 (1993), this Court specifically upheld a parties' consent order, entered into *before* the friend of the court hearing, which provided that the friend of the court decision on child support would be binding. In that case we held:

> Before the matter was submitted to the friend of the court for hearing and recommendation, both parties signed an order stating the decision of the friend of the court referee would be binding. Thus, contrary to defendant's assertions, the court did not improperly delegate its discretion in setting child support to the friend of the court. Instead, the court properly enforced an agreement reached by the parties. Absent a showing of some factors such as duress or fraud, defendant is bound by the parties' agreement to accept the recommendation of the friend of the court referee. See *Draughn v Hill*, 30 Mich App 548; 186 NW2d 855 (1971). [*Id.* at 662.]

In this case, because plaintiff has not asserted that the agreement was reached through duress or fraud, it was a valid agreement and was properly enforced by the trial court. *Balabuch, supra.*[6]

As noted by the *Balabuch* Court, enforcing the parties' agreement to forego a hearing de novo does not run afoul of those cases holding that a court cannot abdicate its responsibility to decide custody issues. In those cases, the circuit court, in some manner, simply "rubber stamped" a friend of the court recommendation without the exercise of any independent judgment when conducting a hearing de novo. See, e.g., *Campbell v Evans*, 358 Mich 128, 130-132; 99 NW2d 341 (1959) (On review de novo, the circuit court refused to review a friend of the court hearing transcript and refused to take evidence, and instead simply denied the motion). Those cases, however, are premised on the fact that a hearing de novo, not review, is required if

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[5] This rationale does not run afoul of *Phillips v Jordan*, 241 Mich App 17; 614 NW2d 183 (2000), as that case holds that in a postjudgment change of custody, the court must make an independent determination that the proposed change (agreed to by the parties) is in the "best interest of the child" through a review of the child-custody factors. *Id.* at 21-22. However, the rationale of *Phillips* does not apply to this case because the parties were addressing the initial custody decision to be contained in the judgment of divorce. *Id.* at 22 n 1. See also *Dick, supra* 584-585; *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994).

[6] Being the first published decision addressing this issue since November 1, 1990, *Balabuch* is binding on this Court. MCR 7.215(C)(2) and (J)(1).

a party seeks circuit court review of the friend of the court recommendation. *Marshall*, *supra* at 591. Hence, when a proper request is submitted, the circuit court must make an independent decision on the issues presented, and cannot simply adopt a recommendation without independent analysis and perhaps the taking of additional testimony and evidence. In the instant case, the parties agreed to forego the hearing de novo, and, therefore, the circuit court never had the opportunity to improperly apply the hearing de novo provision as in *Campbell* and subsequent cases.

Because the trial court properly enforced the agreement and did not conduct a hearing de novo, the remaining question for this Court to decide is whether the referee's custody decision should be upheld. In my view, under the standard of review applicable to such decisions, see *Phillips*, *supra* at 20, the referee's decision should be affirmed.

/s/ Christopher M. Murray