

STATE OF MICHIGAN
COURT OF APPEALS

FAYE STOLL,

Plaintiff-Appellee,

v

STEVEN STOLL,

Defendant-Appellant.

UNPUBLISHED

September 29, 1998

No. 210677

Macomb Circuit Court

LC No. 95-000358 DM

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right the custody provisions of the trial court's judgment of divorce, as well as the arbitrator's award that resulted in those custody provisions. We affirm.

Plaintiff filed for divorce in 1995. Both parties desired custody of the couple's two minor children and following a number of motions and orders and a conference with the parties, the trial court ordered that the matter of custody of the minor children, among other things, be placed into binding arbitration. Subsequently, the arbitrator issued an opinion awarding joint legal custody to plaintiff and defendant and granting physical custody of the minor children to plaintiff and liberal rights of visitation to defendant. The arbitrator based the custody award on his findings with regard to the "best interest" factors enumerated in MCL 722.23; MSA 25.312(3). While he found the parties to be equal with regard to all but two of the factors, he found that factor (b) weighed in favor of plaintiff, and that factor (c) weighed slightly in favor of defendant. He found for plaintiff under factor (b), which addresses "[t]he capacity and disposition of the parties involved to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any," based, at least in part, on the fact that she had been the children's primary caregiver from birth. He found that defendant slightly prevailed on factor (c), which addresses "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care . . . and other material needs," MCL 722.23(c); MSA 25.312(3)(c), because he made a higher salary than plaintiff, noting that because plaintiff had elected to serve as the children's primary caregiver, her earning capacity had been limited.

Defendant first argues on appeal that the arbitrator found against the great weight of the evidence with regard to factor (b) and committed a palpable abuse of discretion in awarding custody to plaintiff. Because the custody decision in this case was the result of binding arbitration, the provisions of MCR 3.602 apply. MCL 600.5021; MSA 27A.5021, MCR 3.602(A); *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991); *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995). Although defendant acknowledges that the standard of review for an arbitration award is set forth in MCR 3.602(J)(1), he argues error in the arbitrator's analysis of factor (b) and abuse of discretion in his ultimate decision under the standard set forth in *Fletcher v Fletcher*, 447 Mich 871, 876-877; 526 NW2d 889 (1994), which is the standard under which this Court reviews a trial court's analysis of the "best interest" factors of the Child Custody Act. Under that standard, findings of fact are reviewed to determine if they were against the great weight of the evidence and the decision as to whom will receive custody is reviewed for a palpable abuse of discretion. *Id.* at 877. However, because an arbitrator's award is reviewed only under those criteria established by MCR 3.602(J)(1), we find that it is not subject to vacation based on findings of fact against the great weight of the evidence or a palpable abuse of discretion.

Defendant's second argument on appeal is that the arbitrator committed a clear error of law in his evaluation of the parties with regard to factor (b), thus exceeding his authority in granting custody to plaintiff. Pursuant to MCR 3.602(J)(1)(c), an arbitration award will be vacated if the arbitrator exceeded his powers. An award will be vacated on the basis that an arbitrator exceeded his powers through an error of law if it clearly appears on the face of the award or in the reasons stated for the decision that the arbitrator, because of an error of law, was led to a wrong conclusion, and but for that error, a substantially different award would have been made. *Gordon Sel-Way, supra* at 497; *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

Defendant argues specifically that he was disqualified from obtaining custody because he is the primary economic provider for the children. He contends that this constitutes error by the arbitrator because he relied on the parties' past roles with regard to the children in making his decision. Furthermore, he argues, had the arbitrator evaluated the parties correctly under factor (b), he would have found them equal, and defendant would have obtained custody, because he prevailed on factor (c). Therefore, a substantially different award would have been made.

We find that the arbitrator did not commit clear legal error with regard to his evaluation of the parties under factor (b). He made a finding of fact which did not "disqualify" defendant from obtaining custody of his children any more than his finding that defendant could generate more income disqualified plaintiff from obtaining custody. Those findings do not constitute error because they are based, at least in part, on the parties' past roles. Furthermore, had the arbitrator found the parties to be equal with regard to factor (b), it is not at all clear that a substantially different award would have been made. As we have recently stated, "the statutory best interests factors need *not* be given equal weight." (Emphasis in original.) *McCain v McCain*, 229 Mich App 123, 131; ___ NW2d ___ (1998). Therefore, we find that the arbitrator did not exceed his authority in granting custody of the minor

children to plaintiff and the trial court did not err in incorporating that decision into the judgment of divorce.

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Martin M. Doctoroff