STATE OF MICHIGAN

COURT OF APPEALS

CAROL M. KUSZEWSKI,

Plaintiff-Appellee,

v

JOSEPH G. KUSZEWSKI,

Defendant-Appellant.

UNPUBLISHED
May 14, 1999

No. 207297
Oakland Circuit Court
LC No. 95-497781 DO

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of separate maintenance entered on September 3, 1997. The judgment was entered pursuant to an arbitration award issued July 15, 1997. On September 10, 1997, defendant filed motions to vacate or reconsider the arbitration award and to set aside the judgment of separate maintenance. On October 15, 1997, the trial court denied defendant's motions. We affirm.

Defendant contends that the trial court erred in holding that his motion to set aside the arbitration agreement was untimely absent further action by the arbitrator, arguing that this conclusion ignored a provision of the arbitration agreement permitting him to file a motion to vacate the award within twenty-one days of his approval of the form of proposed judgment. We disagree. An arbitration agreement is a contract. *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 577; 552 NW2d 181 (1996). "Where contractual language is clear, its construction is a question of law and is therefore reviewed de novo." *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). This Court reviews factual findings attendant to the interpretation of ambiguous contractual language for clear error. *Keller v Paulos Land Co*, 5 Mich App 246, 256; 146 NW2d 93 (1966).

The arbitration agreement provides in pertinent part as follows:

> 4. Any motion to vacate the arbitration award pursuant to MCR 3.602(J) shall commence upon approval as to form of the proposed judgment by counsel or upon

issuance of a supplemental award which determines the final form of the judgment, whichever is later.[1]

* * *

8. If a motion is made following entry of the judgment seeking to set aside the judgment or amending it pursuant to MCR 2.612, the motion shall be submitted to the arbitrator for an additional award, and an amended judgment or order will be entered by this court in accordance with the additional award.

Defendant approved the judgment as to form on September 2, 1997, and the judgment was entered on September 3, 1997. On September 10, 1997, defendant filed motions to vacate or reconsider the award and to set aside the judgment. The trial court determined that it could not properly decide the motion to set aside the judgment because the parties had agreed that the arbitrator would decide such motions. We agree.

As the trial court noted, the agreement is ambiguous in that ¶ 4 permits a party to file a motion to vacate the award after judgment is entered on the award, while ¶ 8 requires that any motion to set aside the award be decided by the arbitrator. Although the arbitrator denied defendant's motion *to reconsider the award*, he decided no motion *to set aside the judgment* because defendant presented no such motion to him. Although we see little logic in structuring this agreement as the parties have done, we cannot conclude that the trial court erred in holding that the agreement precluded the court from deciding defendant's motions. Judgment had already been entered on the award when the motion to vacate was filed, and the agreement specifically requires that the arbitrator first decide motions to set aside or amend the judgment. Specific contract provisions override general ones. *Haefele, v Meijer, Inc*, 165 Mich App 485, 498; 418 NW2d 900 (1987), citing 2 Restatement Contracts, 2d, § 203(c), p 93, remanded on other grounds 431 Mich 853 (1988). Further, "The cardinal rule in the interpretation of contracts is *to ascertain the intention of the parties*. To this rule all others are subordinate." *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 209, 220 NW2d 664 (1974), adding emphasis and quoting *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). We agree with the trial court that "it's clear … that the parties in fact did consider that there may be post judgment issues that would arise and that those in fact would have to be submitted to the arbitrator."

Defendant also argues that the arbitrator's award should be vacated on the ground that the arbitrator exceeded his powers by disregarding the law concerning separate property and marital fault. MCR 3.602(J)(1)(c). We disagree. Arbitrators exceed their powers when they act upon "errors of law so substantial that, but for such errors, the awards must have been substantially different." *DAIIE v Gavin*, 416 Mich 407, 445; 331 NW2d 418 (1982). "[A]n award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). We must carefully evaluate allegations that an arbitrator has exceeded his or her powers to ensure that the claim is not a ruse to induce review of the merits of the arbitrator's decision. See *id.*

First, defendant asserts that the arbitrator improperly excluded plaintiff's inheritance from the marital estate. We disagree. When dividing a marital estate, the goal is to make an equitable division of the marital property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). "Assets earned by a spouse during the marriage are properly considered part of the marital estate." *Id.* at 110. Whether to treat the inheritance of one spouse as subject to division is a discretionary matter dependent upon the circumstances of a particular case. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992). A party's inheritance may be treated as part of the marital estate if the marital property is otherwise insufficient to cover the needs of the other party. *Id.*; *Lee v Lee*, 191 Mich App 73, 78-79; 477 NW2d 429 (1991), citing MCL 552.23; MSA 25.103. One party's inheritance may likewise be properly subject to division where the other party contributed to the acquisition, improvement, or accumulation of the inheritance. *Lee, supra*, citing MCL 552.401; MSA 25.136. See also *Byington, supra* at 112 n 3 ("the separate property of one spouse may be awarded incident to a divorce to the other spouse under appropriately compelling circumstances").

In this case, the arbitrator determined that the original corpus of the inheritance, $75,000, was not part of the marital estate, but that the increase in value generated by that corpus over a period of two decades was part of the marital estate because defendant actively assisted in the accumulation of the increase. Defendant asserts that in excluding the original $75,000, the arbitrator disregarded the law concerning separate property. We disagree. The arbitrator correctly summarized the applicable law and properly differentiated between the original inheritance and its subsequent increase in value. We find no material and substantial error of law informing the arbitrator's decision in this regard.

Defendant further argues that the award was inequitable because the arbitrator disregarded the applicable law concerning marital fault, alleging that the arbitrator afforded that factor disproportionate weight. We disagree. The following factors should be considered when apportioning the estate: "the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health, and needs, fault or past misconduct, and any other equitable circumstance." *Byington, supra* at 115, citing *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). "The significance of each of these factors will vary from case to case, and each factor need not be given equal weight where the circumstances dictate otherwise." *Byington, supra*. No one factor, including fault, should be given disproportionate weight. *Sparks, supra* at 158-159.

According to defendant's calculations, plaintiff received $412,470, or approximately 66 percent, of the marital property, leaving defendant $210,200, or approximately 34 percent. However, defendant's calculations included both plaintiff's inheritance as discussed above, plus stock from Alloy Products Corporation, neither of which the arbitrator determined was part of the marital estate.[2] By our calculation, after subtracting the Alloy stock and inheritance corpus from the award, plaintiff received approximately 62 percent of the estate as opposed to defendant's 38 percent. Additionally, the arbitrator awarded plaintiff one-half of defendant's pension benefits.[3]

The arbitrator found that plaintiff's reasons for seeking divorce—in particular that defendant had engaged in an inappropriate extramarital relationship—demonstrated fault on defendant's part. The arbitrator specifically decided that $10,000 should be subtracted from defendant's share of the marital

assets because he had diverted that amount to his female friend. The arbitrator concluded that defendant's fault, combined with other factors, including the length of the marriage and the need to do equity under the circumstances, warranted awarding plaintiff a greater portion of the marital assets. The arbitrator's discussion of the applicable law cites all of the factors that should be considered, including the disparity between the parties' incomes. We detect no disregard for the law, including as concerns the factor of fault, in the arbitrator's reasoning or decision. Accordingly we must reject defendant's argument that an error of law led the arbitrator to the wrong decision.

Defendant also contests the adequacy of the arbitrator's explanations regarding the award. However, this argument fails to consider that the case was decided by an arbitrator and not a trial court. "'Michigan law mandates no requirements relative to form or necessity of factual findings or legal reasoning in support of an award.'" *DAIIE v Ayvazian*, 62 Mich App 94, 102; 233 NW2d 200 (1975), quoting from a party's argument. We find the arbitrator's findings to be sufficiently specific to indicate how he arrived at the award. *Id.*

Finally, plaintiff asserts that she should be awarded sanctions, in the form of actual and reasonable attorney fees, pursuant to MCR 2.114, arguing that defendant's appeal was not well grounded in fact or law but was instead merely an attempt to induce this Court to review the merits of the arbitrator's decision. We note that plaintiff's request for sanctions on appeal should have been made pursuant to MCR 7.216(C), which authorizes this Court to assess actual and punitive damages for vexatious appeals, instead of pursuant to MCR 2.114. Nonetheless, because we conclude neither that defendant's appeal was taken without a reasonable basis for belief that there was a meritorious issue, nor that defendant's brief was grossly lacking in form or content, we decline to award sanctions in this instance. See MCR 7.216(C)(1).

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell

[1] Normally an application to vacate an award must be made within twenty-one days after a copy of the award is delivered to the applicant. MCR 3.602(J)(2).

[2] Plaintiff received 176 shares of Allow Products Corporation common stock worth $17,690, and defendant received 121 shares of Allow Products Corporation common stock worth $12,160.

[3] Defendant's pension totaled $1,080 net per month.