

STATE OF MICHIGAN
COURT OF APPEALS

KAREN WILSON,

Plaintiff-Appellant,

v

DONALD EUGENE WILSON,

Defendant-Appellee.

UNPUBLISHED

June 1, 2001

No. 219876

Oakland Circuit Court

Family Division

LC No. 97-600832 DM

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right a consent judgment of divorce entered in accordance with an arbitrator's award. We affirm.

The parties were married in 1980, when plaintiff was twenty years old and defendant was fifty-three. They had one child, a daughter, born in 1984. At the time of the marriage, defendant was employed as a store manager, but was injured at work in 1984 and has not worked since. He supported the family through a military pension, disability payments, and Social Security benefits. During the marriage, plaintiff received a bachelor of arts degree in 1983 and a medical degree in 1995. Her education was financed through student loans, and most of the loans were held for payment when plaintiff completed her residency in 2000. In March 1991, defendant inherited \$53,715 from his brother's estate, which was used as part of a down payment on the marital home.

Plaintiff filed for divorce in 1997. The parties stipulated to submit the entire action, including all issues regarding property division, to binding arbitration, agreed on an arbitrator, and agreed that the arbitrator would have the authority to fashion any remedy available to the parties under Michigan law at her sole discretion. In her findings of fact, the arbitrator determined that defendant should be credited with \$53,700 of the equity of the marital home as his separate property. The arbitrator also determined that plaintiff's medical degree was a marital asset and ordered plaintiff to make monthly \$1,000 payments to defendant for ten years as compensation for his contribution to her medical degree. Plaintiff's motion in the circuit court to modify or vacate the arbitration award was denied, and defendant's motion for entry of a judgment of divorce based on the arbitration award was granted.

Plaintiff argues on appeal that the arbitration award should be vacated because the arbitrator exceeded her powers or conducted the arbitration hearing so as to substantially prejudice her rights. “[H]aving invoked binding arbitration, the parties are required to proceed according to the applicable statute and court rule.” *Konal v Forlini (On Remand)*, 235 Mich App 69, 73; 596 NW2d 630 (1999), quoting *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995), citing MCL 600.5201; MSA 27A.5021; MCR 3.602. As such, MCR 3.602(J)(1) dictates that an arbitration award may be vacated only under limited circumstances:

(a) where 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; or

(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.

An allegation that an arbitrator has exceeded her powers “must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators’ decision.” *Gordon Sel-Way v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). “Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrators’ power in some way.” *Id*.

Plaintiff argues that the arbitrator exceeded her powers by adopting the report of a defense expert¹ purporting to value plaintiff’s medical degree at \$796,000. Plaintiff contends that the report ignored controlling case law by relying on a future earnings approach rather than valuing unrewarded sacrifices, and that it was a discovery violation for defendant to not disclose the existence of the report until one business day before the arbitration hearing, not file a witness list, and not identify this expert in response to plaintiff’s interrogatories.

Plaintiff’s argument that the arbitrator improperly relied on the report as the basis for her decision is without merit. It is not apparent from either the arbitrator’s findings or the proposed consent judgment of divorce submitted by the arbitrator that she relied on the expert’s report. Moreover, in a letter to the parties’ attorneys that preceded the arbitrator’s issuance of her

¹ This report was generated within days of the arbitration hearing and provided to plaintiff’s counsel one business day before the hearing. The expert was not identified or disclosed prior to the submission of the report. All of this was in violation of the court’s previous discovery orders and represented a rather shabby tactical gambit of which we disapprove. While not affecting our determination that the arbitrator reached a fair and equitable result, we nevertheless are constrained to comment that such a strategy does a disservice to the appearance of fairness in the process, an important element in our system of justice. Litigation by ambush serves no one well.

findings, the arbitrator indicated that she found it difficult to determine an appropriate amount to reimburse defendant for his contribution to plaintiff's medical degree, but was persuaded by defense counsel's argument that plaintiff should make monthly payments of \$1,000 to defendant for ten years. Rather than relying on the report, the arbitrator apparently considered the issue of compensation to defendant for plaintiff's medical degree and accepted the defendant's position. Plaintiff's argument that she should not have to pay defendant the specified monthly payments is essentially an argument that the arbitrator erred in determining that defendant should be compensated and in fashioning a remedy. This argument is not subject to this Court's review. See *Frain v Frain*, 213 Mich App 509, 511-512; 540 NW2d 741 (1995).

Moreover, the arbitrator did not err in determining that defendant was entitled to be reimbursed for his contributions towards plaintiff's medical degree. When apportioning a marital estate, a trial court's goal is to reach an equitable division in light of all the circumstances. *Welling v Welling*, 233 Mich App 708, 710; 592 NW2d 822 (1999). The parties agree that the issue whether defendant should be compensated for the degree is controlled by this Court's decision in *Postema v Postema*, 189 Mich App 89; 471 NW2d 912 (1991). In *Postema*, the plaintiff supported the defendant while he attended law school and also assumed the primary responsibility of maintaining their household. On appeal, this Court stated that "*fairness* dictates that a spouse who did not earn an advanced degree be compensated whenever the advanced degree is the end product of a *concerted family effort* involving mutual sacrifice and effort by both spouses." *Id.* at 94 (emphasis in original).

This Court in *Postema* noted that the nonstudent spouse's contribution involved not only the "tangible efforts and financial contributions associated with working and supporting the mate while the mate pursues the advanced degree" but also "other intangible, nonpecuniary efforts and contributions, such as where a spouse increases the share of the daily tasks, child-rearing responsibilities, or other details of household and family management undertaken in order to provide the mate with the necessary time and energy to study and attend class." *Id.* at 95-96. Further, both parties usually "share in the emotional and psychological burdens of the educational experience," which might be manifested as "increased tension within the household." During the educational process, the nonstudent spouse may also see a change in life style, such as "less time to pursue personal interests, or even a decision to either give up or temporarily postpone one's own education or career pursuits as part of the larger, long-range plan designed to benefit the family as a whole." *Id.* at 96.

The actual value of the degree itself is not a relevant consideration. *Id.* at 103. "[T]he focus of an award involving an advanced degree is not to reimburse the nonstudent spouse for 'loss of expectation' over what the degree might potentially have produced, but to reimburse that spouse for unrewarded sacrifices, efforts, and contributions toward attainment of the degree on the ground that it would be equitable to do so *in view of the fact* that that spouse will not be sharing in the fruits of the degree." *Id.* at 104 (emphasis in original).

In the present case, defendant largely supported plaintiff while she attended school, although she did contribute portions of her student loans to the family finances. Most importantly, he took care of the home and was the primary caregiver of the parties' daughter during these years. He apparently did not save for his own senior years, expending his disability

and pension income on his family. We find that it was equitable to apportion some value to defendant's contribution to plaintiff's degree. Because the parties agreed to submit all matters pertaining to property division to arbitration, it was therefore within the decision of the arbitrator to determine that defendant should receive a portion of the value of plaintiff's medical degree and to place a value on the degree. Moreover, the arbitrator did not obviously rely on the report of which plaintiff now complains, but accepted the recommendation of defense counsel as to how to value the degree and structure the payments to defendant. Because there is no error of law apparent on the face of the award and nothing that would lead a court to alter the award, *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998), the circuit court did not err in affirming the arbitrator's determinations.

Next, plaintiff argues that this Court should vacate the arbitrator's decision because the arbitrator awarded plaintiff eighty percent of the parties' debt but only twenty-three percent of their assets. The arbitrator, plaintiff contends, improperly determined the extent of the marital estate by failing to include defendant's inheritance. A court's first consideration when dividing property in a divorce action is the determination of marital and separate assets. *Byington v Byington*, 224 Mich App 103, 114 n 4; 568 NW2d 141 (1997). The marital estate is divided between the parties, but each party generally takes that party's own separate property with no invasion by the other party. *Id.* The decision to include inheritance in the valuation of marital assets is discretionary and is dependent upon the particular circumstances of a given case. *Demman v Demman*, 195 Mich App 109, 112; 489 NW2d 161 (1992).

Although the general rule is that an inheritance received by a spouse is that spouse's separate property and is not subject to distribution on divorce, there are two statutory exceptions to this rule. Under MCL 552.23(1); MSA 25.103, the court may award to either party in a divorce any part of the real or personal estate of the other party "if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage as are committed to the care and custody of either party." Under MCL 552.401; MSA 25.136, the court may include in the marital estate one spouse's personal or real property "as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property."

Plaintiff argues that "Michigan courts have consistently and overwhelmingly stated that where one spouse received a gift or inheritance during the marriage and has made such a gift joint property, the courts will consider the property as part of the marital estate." However, the cases cited by plaintiff do not support her argument. Rather, they demonstrate that this is a discretionary matter.²

In dividing the parties' property, the arbitrator considered the guidelines set forth in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992). The arbitrator determined that,

² See *Charlton v Charlton*, 397 Mich 84; 243 NW2d 261 (1976); *Polate v Polate*, 331 Mich 652; 50 NW2d 190 (1951); *Grotelueschen v Grotelueschen*, 113 Mich App 395; 318 NW2d 227 (1982); *Ross v Ross*, 24 Mich App 19; 179 NW2d 703 (1970).

“[b]ased on the facts and circumstances of this case including the length of the marriage, the age of the parties, and their earning abilities, this matter requires an uneven distribution of the marital estate, awarding approximately one-half of the assets, but substantially more of the debt to Karen, as well as requiring her to compensate Gene for the advance[d] degree obtained during the marriage.”

We conclude that the arbitrator’s division of the parties’ marital property was equitable, and the circuit court did not err in entering a judgment in accordance with the arbitrator’s award.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey