STATE OF MICHIGAN

COURT OF APPEALS

DELIA J. LAING,

Plaintiff-Appellant,

v

SCOTT D. LAING,

Defendant-Appellee.

UNPUBLISHED
June 29, 2001

No. 228834
Washtenaw Circuit Court
LC No. 98-012858-DM

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff Delia Laing appeals by right a divorce judgment entered on July 22, 2000, after arbitration, by the Washtenaw Circuit Court. We affirm the judgment but remand this matter to the trial court for the sole and limited purpose of ordering disclosure of the arbitrator's fee statement to the parties.

The parties were married on June 4, 1988. A daughter was born to this union on June 8, 1989. Defendant moved out of the marital home in November, 1998, and plaintiff thereafter commenced the instant divorce proceedings. Plaintiff had physical custody of the child pending entry of a divorce judgment.

On December 21, 1999, the trial court entered a consent order for binding arbitration. Child custody was one of the issues submitted to the arbitrator. According to the parties, a number of arbitration hearings were held. On June 22, 1999, at a proceeding scheduled as a settlement conference, the trial court entered a judgment of divorce, the text of which had been prepared by the arbitrator in lieu of a formal written opinion. The judge indicated on the record that the parties had agreed the arbitrator would prepare the judgment. He also indicated that each party would be provided with a copy of the judgment at the end of the hearing. The trial court reviewed the statement of fees presented by the arbitrator, totaling $18,674.60, and found it to be reasonable, noting that the fees would be incorporated into the judgment of divorce but that the parties would not be given copies of the fee statements because they would remain confidential. The judgment incorporated the written report and recommendations of a psychologist who interviewed the parties and their child. Pursuant to the judgment, defendant was awarded sole legal and physical custody of the child, effective immediately, and plaintiff was allowed supervised visitation.

Plaintiff's ensuing motions to vacate the arbitration award and stay enforcement of the divorce judgment pending appeal were denied by the trial court. On appeal, plaintiff contends the trial court erred in denying her motion to vacate the arbitration award pursuant to MCR 3.602(J)(1). We disagree.

The parties to a divorce action may consent to submit the issue of child custody to binding arbitration. *Dick v Dick*, 210 Mich App 576, 582-583, 588; 534 NW2d 185 (1995). A trial court's denial of a motion to vacate an arbitration award is reviewed de novo. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 177-178; 550 NW2d 608 (1996). Judicial review of arbitration awards is limited. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). As explained by this Court in *Dick, supra* at 588-589,

> According to the court rule, an arbitration award may not be set aside unless (1) the arbitrator or another is guilty of corruption, fraud, or used other undue means; (2) the arbitrator evidenced partiality, corruption, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded the arbitrator's power; or (4) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear material evidence, or conducted the hearing to prejudice substantially a party's rights. MCR 3.602(J)[1]; *Gordon Sel-way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). Otherwise, the agreement is to be given broad application. Only limited review by the courts is permitted.

See also *Rembert v Ryan's Family Steak House, Inc*, 235 Mich App 118, 164; 596 NW2d 208 (1999); *Konal, supra* at 73-74; *Dohanyos, supra* at 175-177.

Our Supreme Court, in *Gordon Sel-way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991), has emphasized the limited scope of review of an arbitration award, stating

> an allegation that the arbitrators have exceeded their 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. 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.

On appeal, plaintiff complains of the procedure by which the judgment of divorce was entered. Plaintiff's challenge to the judgment is predicated in large part on her assumption that no written arbitral award was ever issued in this case. Plaintiff contends that the arbitrator failed to issue a written arbitration award as required by the arbitration agreement and court rules, MCR 3.602(I) and (L) and MCR 2.602(B), when, in lieu of issuing a written award, the arbitrator instead prepared a written proposed judgment of divorce and submitted it directly to the trial court. Plaintiff maintains the trial court erred as a matter of law when it allegedly dispensed with the procedures prescribed by court rule and mandated by the arbitration agreement and entered the divorce judgment, prepared by the arbitrator, at the settlement conference. Plaintiff complains that the parties had no prior notice of the contents of the judgment, first learned of the details when the court read some of the provisions into the record at the settlement conference,

and did not receive copies of the judgment until the close of the settlement conference after the judgment was entered.

Plaintiff correctly notes that the arbitration agreement at issue and legal authority require the arbitrator to issue an arbitral award in writing. *Rembert, supra* at 165. The award should also contain findings of fact and conclusions of law. *Id*. This Court has recognized that these requirements are necessary to aid in meaningful review of the arbitration award. *Id.* Contrary to plaintiff's contention, however, we conclude that the judgment of divorce, as drafted by the arbitrator, satisfies this requirement. The judgment of divorce, although titled differently, was in writing and incorporated the arbitrator's factual findings and conclusions of law, thereby satisfying the purpose of the writing requirement, which was simply intended to allow for sufficient judicial review. *Rembert, supra* at 166.

Plaintiff nonetheless asserts that the arbitrator was required by the arbitration agreement to submit a written arbitration award and was not given authority to draft a judgment of divorce. The arbitration agreement provides in pertinent part:

> 9. Arbitration Award: The Arbitrator is authorized to make interim rulings on prehearing motions, and upon completion of the final hearing, the Arbitrator will issue an arbitration award, in writing, and deliver a copy of the award by mail to each attorney. The award shall be binding upon both parties, subject only to the applicable rules and law in the State of Michigan for arbitrations. The Arbitrator reserves jurisdiction for a period of 14 days following the issuance of the Award to receive a motion to correct any errors or omissions in the Award. The Arbitrator shall resolve any disputes as to form or content of the Order.
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> 11. Plaintiff's attorney shall be responsible for preparing a Judgment of Divorce containing the Arbitrator's findings for submission to the Court for entry.

Although the arbitration agreement by its express terms does require that the arbitrator issue a written arbitration award, and there is nothing in writing that memorializes an agreement between the parties to allow the arbitrator to prepare the judgment of divorce in lieu of this requirement, a thorough review of the record leads us to conclude that such an agreement was orally reached by the parties. The December 20, 1999, order entered by the trial court stated as follows:

> The parties shall submit to binding arbitration on all issues, including, but not limited to, custody, parenting time, child support, spousal support, property distribution, attorney fees, and *wording in the judgment*. . . . The arbitration fee shall be divided equally, unless the arbitrator determines otherwise. [Emphasis added.]

This order indicates that the arbitrator would be drafting the language contained in the judgment of divorce.

Moreover, despite plaintiff's trial counsel's affidavit to the contrary filed in the trial court in conjunction with the motion to vacate, the evidence indicates there was an understanding between the parties that the arbitrator would draft the judgment of divorce even before the court hearing at which the judgment of divorce was entered. In letters from defendant to the arbitrator, defendant provided the arbitrator with "a list of issues to be considered when preparing the final judgment of divorce. . . ." A letter dated April 26, 2000, from the arbitrator to trial counsel for both parties states, "[defendant] included issues he wants addressed in the final Judgment of Divorce." A second letter from the arbitrator, dated April 27, 2000, states, "Fees will be addressed in the Judgment of Divorce which will reflect my decision. It is anticipated that a Judgment will be entered before the end of May." Defendant's trial counsel represented to the trial court that plaintiff and defendant extensively discussed the fact that the arbitrator would draft the judgment of divorce. The trial court stated at the June 22, 2000, hearing that "it is the Court's understanding that the parties agree that [the arbitrator] would prepare the Judgment of Divorce." Plaintiff never objected to the court's statement or protested the existence of such an agreement. In fact, the judgment of divorce expressly states that "the parties through their counsel having consented to the Arbitrator presenting her opinion in the form of a Judgment rather than a written opinion . . . ," and, at the hearing on the motion to set aside the judgment, the trial court explained that the procedure followed in this case was based on the court's conclusion that the parties had reached an agreement:

> Well, it creates a little bit of a problem because, in order to verify what the agreement of the parties were, at the very outset of the hearing that day, I indicated on the record that it was my understanding that the parties had agreed that, in lieu of an arbitration order being presented, that, in fact, there was going to be a judgment, and there was no objection posed by either Mr. Hauer or Mr. Cmejrek. We then proceeded with the entry of the judgment.
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> So, notwithstanding the argument being made today, the Court is satisfied that the parties had, notwithstanding the written agreement, had at least agreed verbally that – and that the Court needn't speculate as to, perhaps, the reason. One might be to reduce the additional expense, any number of other practical reasons why the parties may have agreed that the arbitrator would simply prepare the judgment rather than an arbitration award.

We conclude, as did the trial court, that an oral agreement existed between the parties permitting the arbitrator to draft the judgment of divorce in lieu of issuing a written arbitration award. Error warranting reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964). A party may not create an "appellate parachute" by complaining of alleged errors in the trial court to which she abetted and contributed. *Hibbard v Hibbard*, 27 Mich App 112, 116; 183 NW2d 358 (1970). Plaintiff's argument in this regard is therefore without merit.

Plaintiff next argues that the arbitrator's decision was contrary to established law in Michigan because the arbitrator did not consider the best interests of the child pursuant to MCL 722.23 in rendering a decision regarding custody of the parties' daughter. However, the evidence belies plaintiff's contention. The report of the psychologist, which was expressly incorporated

and merged into the judgment of divorce, exhaustively and extensively analyzed the best interest of the child factors. The arbitrator, in the judgment of divorce, further found in pertinent part that "Supervised visitation is warranted given, amongst other things, the findings of [the psychologist], the heightened level of anger and hostility of Plaintiff against the Defendant and others, the need to establish both parental facilitation and counseling for the minor child." To the extent that plaintiff is attempting to challenge the substantive decision of the arbitrator, the challenge is unsuccessful. As previously noted, judicial review of an arbitration award is limited, *Konal, supra at* 74, and plaintiff cannot use the relevant court rule, MCR 3.602(J)(1), as a "ruse" to review the ultimate decision of the arbitrator or the factual findings made by the arbitrator. *Id*. at 75; *Frain, v Frain*, 213 Mich App 509, 512; 540 NW2d 741 (1995).

Next, plaintiff argues that the arbitrator's alleged failure to issue a written opinion deprived her of the fourteen-day appeal period provided for in the arbitration agreement. However, the appeal period was provided to correct any "errors" or "omissions" in the arbitration award. Dispensing with the fourteen-day appeal period, by issuing a judgment of divorce instead of a written arbitration agreement, did not harm plaintiff. To the contrary, even if plaintiff had the appeal period, she would have only been permitted to appeal procedural errors and not the substantive decision, which is essentially the same rights plaintiff exercised by filing the motion to vacate.

Plaintiff next contends that the arbitrator and the trial court engaged in ex parte communications. However, this contention is based purely on speculation and conjecture and, in any event, the communications about which plaintiff complains are permissible. See Code of Judicial Conduct, Canon 3(A)(4)(b) and (c).

Plaintiff's remaining arguments advanced in support of vacating the judgment of divorce are likewise meritless. Plaintiff, during an arbitration, is only guaranteed a fair proceeding, which must include representation by counsel, a neutral arbitrator, reasonable discovery, and an opportunity to present witnesses. *Rembert, supra* at 161-162. Plaintiff does not contend that she was denied any of these things. Instead, plaintiff's primary complaint is the fact that she was prevented from hearing the testimony of defendant and his witnesses and conducting a cross-examination of those witnesses. However, plaintiff is not required to be afforded that opportunity, *id.*, and plaintiff agreed, in the arbitration agreement, to the procedures as determined by the arbitrator. Similarly, the other procedural deficiencies alleged by plaintiff are also unfounded. In sum, we conclude that the trial court did not err in denying plaintiff's motion to vacate the divorce judgment pursuant to MCR 3.602(J)(1).

We do, however, find merit in plaintiff's contention that the trial court erred when, after concluding that the arbitrator's total fee of $18,674.60 was reasonable, it ordered the parties to pay the fee but ruled that the arbitrator's fee statement was confidential and could not be reviewed by the parties. The court specifically stated that "because of some of the information that is contained within the billing statements themselves indicated information that the Arbitrator received which the Court deems may be confidential, the Court will not release that specific information to the parties at this time."

MCR 3.602(M) provides the trial court with the authority to review the arbitrator's fee and determine its reasonableness:

> The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action.

However, neither the court rule nor case law confer on the trial court the ability to seal the arbitrator's fee statements. Moreover, the parties are entitled to review the fee statements in the event the parties wish to challenge the reasonableness of the arbitrator's fees. This is particularly true, here, where the arbitration agreement contained a specific fee provision agreed on by the parties and the arbitrator. We therefore remand this case for the sole and limited purpose of ordering the trial court to disclose the arbitrator's fee statement to the parties. The judgment of divorce is affirmed in all other respects.

Affirmed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Janet T. Neff