STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. HARTT,

Plaintiff/Counter-Defendant-Appellant,

V

CARRIE D. HARTT,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
January 17, 2008

No. 276227
Wayne Circuit Court
Family Division
LC No. 05-501001-DM

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce entered following an arbitration. Plaintiff argues that the arbitration award must be vacated; the trial court must conduct a de novo review of the record of arbitration proceedings regarding custody; and the arbitration award's property division must be vacated. We affirm.

Plaintiff first argues that the judgment of divorce should be vacated because it is based on an invalid arbitration award. Plaintiff maintains that the arbitration award is invalid because the parties failed to comply with the statutory requirements of the Domestic Relations Arbitration Act (DRAA). We disagree. We review de novo a trial court's decision on a motion to enforce, vacate, or modify an arbitration award. *Bayati v Bayati,* 264 Mich App 595, 597-598; 691 NW2d 812 (2004).

The domestic relations arbitration act permits parties to agree to binding arbitration of domestic disputes. MCL 600.5072; *Harvey v Harvey*, 470 Mich 186, 189; 680 NW2d 835 (2004). "The DRAA requires a written arbitration agreement setting out the subject of the arbitration and the arbitrator's powers." *Miller v Miller*, 474 Mich 27, 34; 707 NW2d 341 (2005). However, no written agreement beyond the order for binding arbitration is required if the parties: (1) stipulate to entry of the order and the order meets the criteria of MCL 600.5071 and MCL 600.5072(1)(e), and (2) satisfy MCL 600.5072(1)(a) to (d) on the record. *Miller, supra at* 35. MCL 600.5072 provides, in part:

> (1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:
>
> (a) Arbitration is voluntary.
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> (b) Arbitration is binding and the right of appeal is limited.
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> (c) Arbitration is not recommended for cases involving domestic violence.
>
> (d) Arbitration may not be appropriate in all cases.
>
> (e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

On December 12, 2005, the parties agreed to arbitrate their claims. Although defendant was not present when the agreement was placed on the record, her attorney acted on her behalf and informed the court of defendant's wish to arbitrate. Appearing in pro per, plaintiff informed the trial court that he also wished to arbitrate this matter, and that he understood that all the issues would be arbitrated, the arbitration was voluntary and the decision was binding absent a showing of fraud or misrepresentation. The trial court confirmed that defendant was aware of the limited ability to appeal in arbitration and the costs associated with it. After both sides to this action agreed to arbitration, defense counsel informed the court that a stipulated order would be available within ten days and that the arbitration would begin in January 2006.

Although plaintiff argues that the arbitration award is invalid because there was no written agreement to arbitrate, plaintiff is mistaken. The parties entered into an agreement satisfying the requirements of MCL 600.5072 when they stipulated to entry of the order for binding arbitration that the court in due course was supposed to enter. *Miller, supra at* 34. Although the stipulated order was not entered within the anticipated time frame, on January 25, 2007, the court entered an order for arbitration nunc pro tunc deemed effective, December 12, 2005. "An entry nunc pro tunc is proper to supply an omission in the record of action really had, but omitted through inadvertence or mistake." *Shifferd v Gholston***,** 184 Mich App 240, 243; 457 NW2d 58 (1990). Because the stipulated order was supposed to be entered, but through mistake or inadvertence no order was entered, the order for arbitration nunc pro tunc was sufficient to correct this error.

The parties agreed on the record to arbitrate and the following were made known on the record: (1) the arbitration was voluntary, (2) the decision was binding absent a showing of fraud or misrepresentation, (3) the limited role of appeal in arbitration and (4) the costs associated with arbitration. Although the remaining factors listed in MCL 600.5072 were not specifically complied with, this does not invalidate the agreement to arbitrate. "As long as the parties agree to some document that meets the minimal requirements of MCL § 600.5071 and MCL § 600.5072(1)(e), the agreement is sufficient." *Miller, supra* at 34. The parties agreed to arbitrate on the record and a stipulated order was entered nunc pro tunc. Therefore, the arbitration award issued is valid and will not be vacated.

Plaintiff next argues that the trial court erred when it accepted the arbitrator's custody, child support and parenting time recommendations without making an independent determination of the best interest of the minor children. We disagree. We review de novo a trial court's decision on a motion to enforce, vacate, or modify an arbitration award. *Bayati, supra* at 597-598. We review questions of statutory interpretation de novo. *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

Custody disputes are to be resolved in the best interests of the children, using the factors set forth in MCL 722.23. *Thompson v Thompson*, 261 Mich App 353, 359; 683 NW2d 250 (2004). These factors include the love, affection and other emotional ties existing between the parties and the child involved. MCL 722.23(a).

Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 128; 596 NW2d 208 (1999). The purpose of arbitration is to avoid prolonged litigation, and its effect is to narrow a party's right to litigation. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1988); *Hendrickson v Moghissi*, 158 Mich App 290, 298; 404 NW2d 728 (1987).

With respect to judicial review of an arbitration award of custody, the Revised Judicature Act (RJA) provides: "Subject to subsection (2), *the circuit court shall not vacate or modify an [arbitration] award concerning child support, custody, or parenting time unless the court finds that the award is adverse to the best interests of the child* who is the subject of the award or under the provisions of section 5081." MCL 600.5080(1) (emphasis added). However, subsection (2) provides: "*A review or modification of a child support amount, child custody, or parenting time shall be conducted* and is subject to the standards and procedures provided in other statutes, in other applicable law, and by court rule that are applicable to child support amounts, child custody, or parenting time." § 5080(2) (emphasis added).

"Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue." *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; 738 NW2d 770 (2007) (internal quotation marks and citations omitted). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, Mich App 131, 134; 730 NW2d 757 (2006). "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Id*. at 136.

Under the plain language of § 5080(1) and (2), the circuit court shall not vacate an arbitration award concerning child support, custody or parenting time unless it determines that the award is adverse to the child's best interests, but the circuit court "shall" review such an award. "Shall" is mandatory. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 68; 737 NW2d 332 (2007). In conducting the required review, "… as long as the circuit court is able to 'determine independently what custodial placement is in the best interests of the children[,]' *Harvey v Harvey*, 470 Mich 186, 187 (2004), an evidentiary hearing is not required in all cases." *MacIntyre v MacIntyre (MacIntyre II)*, 472 Mich 882; 693 NW2d 822 (2005).

We conclude from the record presented that the trial court did not err in its review of the arbitration award. After a thorough review of the arbitrator's findings, the trial court

independently determined that the arbitrator's custody award was in the best interest of the children. We reject plaintiff's assertion that the trial court was required to specifically consider the transcribed testimony of the nine witnesses who testified during arbitration (including the parties) in order to satisfy the required independent review. First, the written arbitration award was lengthy and detailed. The trial court could properly conduct a sufficiently independent review from the award as presented. Second, although plaintiff filed his motion requesting the independent review, plaintiff did not file the arbitration testimony transcripts with his motion. By failing to provide these transcripts, plaintiff either attempted to harbor an appellate parachute[1] or inappropriately delay the proceedings. Defendant argues, and we agree, that under these circumstances, the trial court's best and most appropriate option in determining whether the custody, child support and parenting time awards were in the children's best interest was to review the written award itself.

Lastly, plaintiff argues that the arbitrator exceeded his authority when he: (1) failed to separate marital and pre-marital property; and (2) miscalculated the value of the property located at 1116 Iroquois Street in Detroit, Michigan. Plaintiff also argues that the arbitrator showed bias and partiality against him. We disagree. We review de novo a trial court's decision on a motion to enforce, vacate, or modify an arbitration award. *Bayati*, *supra* at 597-598.

An arbitration award may "be vacated in limited circumstances, such as where an arbitrator evidences partiality, refuses to hear material evidence, or exceeds powers." MCR 3.602(J)(1); *Collins v Blue Cross & Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998). Arbitrators exceed their authority when they act in contravention of controlling principles of law. *Krist v Krist*, 246 Mich App 59, 62; 631 NW2d 53 (2001). "A reviewing court may vacate an arbitration award where it finds an error of law that is apparent on its face and so substantial that, but for the error, the award would have been substantially different." *Collins*, *supra* at 567.

Plaintiff argues that the arbitrator failed to separate marital and pre-marital property. "The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). When dividing property in a divorce action, a court's first consideration is the determination of marital and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Generally, "the marital estate is divided between the parties, and each party takes away from the marriage that party's own separate estate with no invasion by the other party. However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met." *Reeves*, *supra* at 494. The first exception permits invasion when "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." *Reeves*, *supra* at 494. The second exception permits invasion when "one significantly assists in the acquisition or growth of a spouse's separate asset." *Reeves*, *supra* at 495.

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[1] A party may not invite error at the trial court in order to secure an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW 2d 158 (2002).

Here, plaintiff argues that the arbitrator acted in contravention of controlling principles of law when he failed to separate marital and pre-marital property. We disagree. When summarizing his factual findings regarding the Iroquois property, the arbitrator found that, although the parties did not marry until December 2001, they moved in together in January 1997. The parties lived together at the Iroquois property. Plaintiff purchased this property in 1984 and it was later used as the marital home. However, from March to June 1997, the parties lived at defendant's West Bloomfield home because the Iroquois property was being renovated and repaired. When the repairs were completed, the parties moved back into the Iroquois home. At some point, defendant sold her West Bloomfield home and used $100,000 of the proceeds to pay for the improvements and repairs to the Iroquois property.

Because the arbitrator found that defendant contributed to the improvement of the Iroquois property, through physical and monetary contributions, the property was included in the marital estate. The arbitrator found that defendant contributed to the property because she initiated a deferred income program for the property, contributed her pension, and added items such as appliances, antiques, furniture and works of art to the home. The arbitrator concluded that defendant contributed to the martial home with pre-marital assets and that she contributed to the growth of the Iroquois property because she maintained the home with plaintiff before they married and during the marriage. The arbitrator included the Iroquois property in the marital estate under the permitted exception to the general rule, which allows invasion when "one significantly assists in the acquisition or growth of a spouse's separate asset." *Reeves, supra* at 495. Because we are unable to find any error of law that is apparent on the face of the arbitration award regarding this issue, we cannot conclude that the arbitrator erred. *Collins*, *supra* at 567.

Plaintiff also argues that the arbitrator miscalculated the value of the Iroquois property and issued an inequitable property award. According to plaintiff, the Iroquois home was valued at $375,000 in 1997. However, because of the $106,000 mortgage on the property, plaintiff maintained the property had a value of $269,000 at that time. Plaintiff argues that he should have been awarded $269,000 for the property and that the arbitrator's miscalculations deprived him of that amount. We disagree.

Based on the evidence presented, the arbitrator valued the Iroquois property at $695,000. Although the arbitrator valued the home at $695,000, only $320,000 of that amount was included in the marital estate because the arbitrator credited plaintiff $375,000 for his pre-marital contribution to the home. When the rest of the parties' assets were calculated, the estate was valued at $634,650, which included the $320,000 for the home and remaining assets valued at $314,650. Because the arbitrator credited defendant her pre-marital contribution of $100,000 to the home, the arbitrator, at the end of the calculations, deducted the $100,000 from the total estate. For that reason, the estate's total value was $534,650, instead of $634,650. The parties were then granted $267,325 in assets, which was an equal division of the estate. However, because plaintiff was granted the marital home, which had an estate value of $320,000, to make an equitable division of the assets, plaintiff was ordered to pay defendant $52,675.

Although plaintiff was awarded less than what he expected to receive for the Iroquois property, he has failed to show the arbitrator miscalculated the value of the home and issued an inequitable award. The arbitrator permissibly included that Iroquois property in the marital estate because defendant contributed to the growth of the property. Both parties were granted the amount that each contributed to the property before they were married. When the total property

award was calculated the parties were each granted $267,325 in assets. Because plaintiff received the Iroquois property valued at $320,000, after the deductions, and defendant was granted the remaining assets, which was less than $320,000, the arbitrator ordered plaintiff to pay defendant the $52,675 difference. We find no error in the award.

Plaintiff further argues that the arbitrator showed bias and partiality against him because the arbitrator: (1) inflicted financial harm on him; (2) granted defendant custody even though he raised the children and cared for the children on a daily basis; (3) accused him of being "suspicious" and implying that he may have "psychological problems;" and (4) commented on the daughter's preference to live with defendant.

An arbitration award may be vacated if an arbitrator evidences partiality. *Collins, supra* at 567. However, "the partiality or bias which will overturn an arbitration award must be certain and direct and not remote, uncertain or speculative." *Kauffman v Haas*, 113 Mich App 816, 819; 318 NW2d 572 (1982).

Plaintiff argues that the arbitrator exhibited bias against him when he gave defendant $100,000 credit toward the Iroquois property, which inflicted financial harm on him. Although plaintiff maintains that the arbitrator's actions evidenced bias and partiality, plaintiff has failed to prove so. Four arbitration awards were issued in this case. In the prior arbitration awards, defendant was not credited for her $100,000 pre-martial contribution to the Iroquois property. However, the arbitrator did so in the fourth arbitration award. The arbitrator explained that he gave defendant the $100,000 credit because it was fair and equitable to do so. The arbitrator explained that defendant would not be able to benefit from the increasing value of the property, despite her previous contributions to the property. Because defendant used $100,000 of her own funds for the repair and renovation of the Iroquois property, which contributed to the increasing value of the property, the arbitrator concluded that it was only fair that she be credited for her contribution, just as plaintiff was credited for his.

Plaintiff has failed to show that arbitrator's actions were improper. "The partiality or bias which will overturn an arbitration award must be certain and direct and not remote, uncertain or speculative." *Haas, supra* at 819. The arbitrator concluded that plaintiff would benefit greatly from the increasing value of the home and defendant would not be able to do so. The arbitrator credited defendant for her contribution as a means of making the property award fair and equitable. We cannot find that the arbitrator's actions were biased or partial.

Plaintiff also argues that the arbitrator was biased and partial because defendant was granted custody of the children even though he raised the children and cared for the children on a daily basis. The arbitrator explained that he granted defendant custody because it was in the best interest of the children. The arbitrator determined that defendant was more able than plaintiff to provide the children with food, clothing and medical care. Because defendant had consistent income and more stability than plaintiff, the arbitrator determined that defendant was more equipped to provide the children with a stable family unit. The arbitrator found both parties were equal regarding the love, affection, and other emotional ties best interest factor, and that neither party was favored regarding the length of time the children have lived in a stable and satisfactory environment.

We do not find that the arbitrator's custody award evidenced bias or partiality. Rulings against a party, without more, are generally insufficient, in themselves, for a finding of bias. See generally *Cain v Dep't of Corrections*, 451 Mich 470, 496; 548 NW2d 210 (1996). It appears that plaintiff's only support for this claim is that there must be bias because the arbitrator ruled against him on this issue. Because such is insufficient to prove bias, plaintiff has failed to prove his claim.

Plaintiff further argues that the arbitrator was biased because the arbitrator accused him of being "suspicious" and implied that he may have "psychological problems." This claim is also unfounded. The arbitrator found that the parties were equal when it came to their mental and physical health. However, the arbitrator commented, "while there is suspicion on the part of the arbitrator [plaintiff] has psychological problems requiring treatment, no medical evidence was presented which would adversely affect [plaintiff] as to pertains to this factor." The arbitrator then commented that, although plaintiff argues otherwise, defendant's treatment for her emotional problems was a positive factor.

Although plaintiff maintains that the arbitrator's actions and words exhibited bias, we disagree. The arbitrator's comments were not improper and did not negatively affect plaintiff because the arbitrator found the parties were neutral regarding this factor. Plaintiff's claim of bias is mere speculation. Because "partiality or bias which will overturn an arbitration award must be certain and direct and not remote, uncertain or speculative," plaintiff has failed to prove his claim. *Haas, supra* at 819.

Lastly, plaintiff argues that the arbitrator improperly commented on the daughter's preference to live with defendant. We disagree. If the trial court deems the child to be of sufficient age to express a preference, it must consider the reasonable preference of the child. MCL 722.23(j); *Treutle v Treutle*, 197 Mich App 690, 694-695; 495 NW2d 836 (1992). "The child's preference does not automatically outweigh the other factors, but is only one element evaluated to determine the best interests of the child." *Treutle, supra* at 694.

It was within the arbitrator's discretion to inform the court that the daughter was of sufficient age to express her preference and that she did so. MCL 722.23(i). A child's preference is one of the best interest factors that should be considered when determining custody. We cannot conclude that the arbitrator exhibited bias because he commented on the preference in accordance with MCL 722.23(i). For the reasons stated, plaintiff has failed to show bias or partiality.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering