STATE OF MICHIGAN

COURT OF APPEALS

CHRISTA NICOLE KIRBY,

Plaintiff-Appellant,

v

BRIAN JOSEPH VANCE,

Defendant-Appellee.

UNPUBLISHED
February 5, 2008

No. 278731
Wayne Circuit Court
Family Division
LC No. 06-625940-DC

Before: Kelly, P.J., and Meter and Gleicher, JJ.

GLEICHER, J. (*dissenting*).

For the several reasons discussed below, I respectfully dissent.

The parties agreed to arbitrate their custody, support and parenting time dispute pursuant to the domestic relations arbitration act (DRAA), MCL 600.5070 *et seq*. Section 5077(2) of that act provides as follows:

> A record shall be made of that portion of a hearing that concerns child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition.

Other than the arbitrator's notes, no record exists of the arbitration conducted in this case. The majority acknowledges that the arbitrator failed to tape her interviews of plaintiff's witnesses, and that the arbitrator also failed to tape any portion of the evidence provided by defendant. Because no portion of the arbitration proceeding was tape-recorded, the "record" in this case consists solely of the arbitrator's handwritten notes and the written opinion she filed three weeks later.

In most respects, the DRAA "sets no procedural requirements for arbitration. Rather, it specifically eschews them." *Miller v Miller*, 474 Mich 27, 31; 707 NW2d 341 (2005). The statutory mandate of a record in custody arbitration hearings, however, is a notable exception. Because the statutory language imposing the hearing requirement is unambiguous, "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Further, the Legislature's use of the word "shall" signifies "a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471

Mich 745, 752; 691 NW2d 424 (2005). *Miller*'s approbation of an informal approach to domestic relations arbitration does not permit us to ignore § 5077(2).

In my view, the central purpose of the record requirement created by § 5077(2) derives from MCL 722.24(1) of the Child Custody Act, which provides that in all custody disputes, the court "shall declare the child's inherent rights and establish the rights and duties as to the child's custody, support, and parenting time in accordance with this act." In *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004), the Michigan Supreme Court construed the Child Custody Act to require that "even when parties initially elect to submit a custody dispute to an arbitrator or to the friend of the court, they cannot waive the authority that the Child Custody Act confers on the circuit court." *Id*. at 193-194. The circuit court must determine the best interests of a child before entering an order resolving a custody dispute. *Id*. at 192. In *Harvey*, the Supreme Court emphasized that the judicial obligation to determine a child's best interests may not be waived by the parties, despite the general "deference [afforded] to parties' negotiated agreements." *Id*. at 193.

Section 5077(2), commanding the creation of a "record" in a custody arbitration hearing, thus serves a specific statutory purpose. A record allows the circuit court to fulfill its obligation under MCL 722.24(1) to discern the best interests of the child. The DRAA's record requirement, in conjunction with the Child Custody Act's mandate that authority for child custody decisions resides ultimately in the circuit court, should be interpreted in pari materia, because these provisions share a common intent. "'The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject.'" *Jennings v Southwood*, 446 Mich 125, 137; 521 NW2d 230 (1994), quoting *Wayne Co v Auditor Gen*, 250 Mich 227, 233; 229 NW 911 (1930). Statutes in pari materia are to be read and construed together as one law, even if they were enacted at different times and without specific reference to each other. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). "[T]hey must be construed to preserve the intent of each and, if possible, interpreted in such a way that neither denies the effectiveness of the other." *Crawford Co v Secretary of State*, 160 Mich App 88, 95; 408 NW2d 112 (1987). In enacting both MCL 600.5077(2) and MCL 722.24(1), the Legislature recognized that a circuit court cannot adequately review an arbitrator's decision regarding custody, child support or parenting time without a record.

The Legislature not only specifically mandated the creation of a record, it also defined the type of record required, referencing the Michigan Court Rules pertaining to deposition testimony. MCL 500.5077(2). The applicable court rule, MCR 2.306(C)(2), requires that the person before whom a deposition is taken, or someone acting under that person's direction, shall "record the testimony of the witness." The recording may be accomplished "stenographically," or the testimony may be "recorded by other means in accordance with this subrule." MCR 2.306(C)(2)(a). The "other means" described by the court rule allow the parties to "designate the manner of recording and preserving the deposition." MCR 2.306(C)(3)(a). The parties "may include other provisions to assure that the recorded testimony will be accurate and trustworthy." *Id*. If a deposition is not taken stenographically, "it must be transcribed" before a party may use it in court, unless the court waives the transcription requirement. *Id*. This court rule thus requires the creation of a record that is accurate, reliable, and susceptible to transcription. It does not contemplate that a deposition may be "recorded" by the taking of notes.

The majority holds that plaintiff waived her claim that the arbitration should have been recorded. In my view, the parties could not waive § 5077(2)'s requirement that a record of this arbitration be created, because an attempted waiver of this statutory mandate would destroy the circuit court's ability to perform its mandatory best interests review. The majority correctly observes that a party may waive its own rights. The very essence of the Michigan Supreme Court's decision in *Harvey*, however, is that a party may not waive the obligation of the court to conduct an independent best interests review of the record in the child custody context. *Id*. at 187. If, as the *Harvey* Court ruled, the parties cannot waive the circuit court's obligation to review arbitration decisions affecting custody, I find it difficult to reach the conclusion that the parties may waive the central component of that review—a careful review of the relevant testimony. I believe that the arbitrator's failure to comply with § 5077(2) substantially prejudiced the rights of both parties to the meaningful review required by *Harvey*, and that vacation of the award is required pursuant to MCL 600.5081(2)(d) and MCR 3.602(J)(1)(d).

Additionally, I disagree with the majority's conclusion that the Supreme Court's order in *MacIntyre v MacIntyre*, 472 Mich 882; 693 NW2d 822 (2005), controls the question whether a record was required here. In *MacIntyre*, the Supreme Court entered an order reversing this Court's published decision[1] holding that the DRAA required a de novo evidentiary hearing, rather than a de novo review of the record, before a trial court entered a custody order. The Supreme Court's order stated,

> [t]he parties' agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is necessary to exercise its independent duty under the Child Custody Act, MCL 722.25. But 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.

The Supreme Court remanded the case to our Court for consideration of the remaining issues on appeal.

The Supreme Court's order in *MacIntyre* does not describe the nature of the record that was available for independent review in that case, and neither do the two opinions published by this Court.[2] "An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 483; 633 NW2d 440 (2001). In my view, our Supreme Court's order in *MacIntyre* does not meet these criteria, because it does not contain a "concise statement of the applicable facts." Furthermore, the Supreme Court

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[1] *MacIntyre v MacIntyre*, 264 Mich App 690; 692 NW2d 411 (2005) (*MacIntyre I*).

[2] In *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449; 705 NW2d 144 (2005) (*MacIntyre II*), this Court mentioned that the parties conducted an arbitration pursuant to the DRAA. Because that arbitration involved child custody issues, the parties presumably complied with MCL 600.5077(2), by creating a record consistent with that statute.

carefully elected to include the words "in all cases" in its order. This qualification reflects the Supreme Court's acknowledgement that an evidentiary hearing may be required in select cases, and in my view this is one of them.

In *MacIntyre II*, this Court explained that although a child custody fact finder must articulate factual findings and conclusions concerning each of the best interest factors, those findings and conclusions "need not include consideration of every piece of evidence entered and argument raised by the parties. *However, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings.*" *MacIntyre II*, *supra* at 452 (emphasis supplied). This Court's decision in *MacIntyre II* therefore assumed the availability of "evidence" within a "record."

The 20-page, handwritten "record" in this case violates the statutory mandate of § 5077(2), and cannot be reconciled with *MacIntrye II*. The arbitrator's notes capture some of the evidence presented during the arbitration proceeding. Unquestionably, the notes do not capture all of the evidence, nor could they have done so. Contemporaneously taken, handwritten notes of an evidentiary process are inherently incomplete. Were it otherwise, lawyers would have no need of certified court reporters, and would routinely stipulate that depositions be "recorded" by professional note-takers. The notes in this case were particularly susceptible to incompleteness, because as she created the notes summarizing the testimony of plaintiff's witnesses, the arbitrator believed that her tape recorder was recording the proceeding, and that subsequent transcription could correct, clarify or supplement the notes. At best, the arbitrator's notes reflect her *impressions* of the evidence. They do not adequately substitute for a "recording" as the court rules define that term.

The majority asserts that because the trial court "noted that its review of the notes enabled it to make separate findings regarding each of the best interest factors," it fulfilled its statutory mandate to independently determine the proper custodial placement. In my view, this conclusion misses the point. It was the obligation of the trial court to make findings of fact based on evidence gleaned from a record created in conformity with § 5077(2). No such record exists in this case.

Furthermore, *this* Court also has an obligation to independently review the trial court's findings of fact, to determine whether they are against "the great weight of [the] evidence." MCL 722.28. We must affirm a trial court's findings on each best interest factor unless "the evidence clearly preponderates in the opposite direction." *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (internal quotation omitted). Our role is to review a trial court's findings, acting as "the functional equivalent of a trial judge reviewing the findings of a jury." *Id*. at 878. In this case, I find myself unable to meaningfully fulfill my obligation. The handwritten notes are hurriedly written, include shorthand forms susceptible to differing interpretations, and cannot possibly represent a complete recapitulation of the hours of testimony presented to the arbitrator. Absent any certainty that the notes correctly and completely reflect the evidence presented on both sides, I cannot meaningfully weigh the evidence.

The Legislature intended that a court reviewing a child custody decision exercise its statutory responsibility based on accurate and trustworthy information. Neither this Court nor the circuit court can perform its obligation here absent an adequate evidentiary record.

Consequently, I would remand for another arbitration, properly conducted under MCL 500.5077(2).

/s/ Elizabeth L. Gleicher