

STATE OF MICHIGAN
COURT OF APPEALS

DOREEN C. CONSIDINE,

Plaintiff-Appellant,

v

THOMAS D. CONSIDINE,

Defendant-Appellee.

UNPUBLISHED

December 15, 2009

No. 283298

Oakland Circuit Court

LC No. 2005-715192-DM

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce, which was entered by a circuit court in accordance with a domestic relations arbitration award. The circuit court also denied plaintiff's motion to vacate or modify the arbitration award. We affirm.

I. Background

After plaintiff filed this divorce action, the parties entered into an arbitration agreement whereby they agreed to submit "all issues in controversy" to binding arbitration under the domestic relations arbitration act ("DRAA"), MCL 600.5070 *et seq.* After the arbitrator issued his initial award, both parties filed motions seeking to correct perceived errors or deficiencies in the award. The arbitrator thereafter issued an amended award resolving the matters in dispute. Defendant subsequently filed a motion in circuit court to enforce the amended arbitration award, and plaintiff filed a motion to vacate or modify the award. The circuit court granted defendant's motion and denied plaintiff's motion.

On appeal, plaintiff argues that the arbitrator exceeded his authority and committed errors of law in issuing the arbitration award and, therefore, the circuit court erred in denying her motion to vacate or modify the award. We disagree.

II. Standard of Review

A circuit court's decision to enforce, vacate, or modify a statutory arbitration award is reviewed de novo. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). Concerning review of a domestic relations arbitration award, MCL 600.5081 provides, in pertinent part:

(1) If a party applies to the circuit court for vacation or modification of an arbitrator's award issued under this chapter, the court shall review the award as provided in this section or section 5080 [review of child support awards].

(2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:

* * *

(c) The arbitrator exceeded his or her powers.

* * *

(3) The fact that the relief granted in an arbitration award could not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.

(4) An application to vacate an award on grounds stated in subsection (2)(a) shall be made within 21 days after the grounds are known or should have been known.

(5) If the court vacates an award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement or, if there is no such provision, by the court. If the award is vacated on the grounds stated in subsection (2)(a) or (c), the court may order a rehearing before the arbitrator who made the award.

(6) Other standards and procedures relating to review of arbitration awards described in subsection (1) are governed by court rule.

In this case, plaintiff sought review only under subsection (2)(c).

"[A] party seeking to prove that a domestic relations arbitrator exceeded his or her authority must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law." *Washington, supra* at 672. The arbitrator's findings of fact are not reviewable. *Id.*, citing *Detroit Automobile Inter-Ins Exch v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982).

Where a party claims that an arbitrator acted contrary to controlling law, a "court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Gavin, supra* at 428-429. "It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable." *Id.* at 429. The Court in *Gavin* explained:

In many cases the arbitrator's alleged error will be equally attributable to alleged "unwarranted" factfinding as to asserted "error of law." In such cases the award should be upheld since the alleged error of law cannot be shown with the

requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. [*Id.* at 429.]

In discussing whether an error of law is serious enough to warrant vacating an arbitration award, the *Gavin* Court stated:

It must be plain to even the most casual student of this subject that some errors of law in an arbitration award may be so egregious, may so materially affect the outcome of the arbitration, may so plainly demonstrate a disregard of principles fundamental to a fair resolution of the dispute, or may so unequivocally generate a legally unsustainable result, that they cannot be said to be within the parties' agreement to arbitrate or the arbitrator's authority.

At the same time, it is equally plain that there are cases in which error committed by the arbitrators, either in the procedure governing the conduct of the dispute resolution or even in the application or non-application of a legal principle, is so minimal and inconsequential to the outcome of the arbitration as to be immaterial. Justice and common sense demand that we draw a line between the two and that it be drawn sufficiently close to the center of the spectrum that it cannot in fairness be said that the line is a fiction and that errors of substantive law, no matter how egregious, are never reviewable because they are the price paid for the procedural advantages of the dispute resolution. [*Id.* at 430.]

In sum, "arbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *Id.* at 434. Thus, "where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision will be set aside." *Id.* at 443 (citation omitted).

III. Plaintiff's Claims of Procedural Error

Plaintiff argues that the arbitrator exceeded his authority by (1) considering defendant's motion for reconsideration of the original award because such a motion is not recognized in an arbitration proceeding; (2) considering defendant's motion for reconsideration because it was not timely filed; and (3) issuing an amended award after he lost jurisdiction for failing to issue a decision within 14 days after defendant filed his response to plaintiff's motion to correct errors and omissions in the original award.

As indicated preciously, "a party seeking to prove that a domestic relations arbitrator exceeded his or her authority must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law." *Washington, supra* at 672. However, if an error "either in the procedure governing the conduct of the dispute resolution or even in the application or non-application of a legal principle, is so minimal and inconsequential to the outcome of the arbitration as to be immaterial," it is not grounds for vacating an arbitration award. *Gavin, supra* at 430.

In her timely motion to correct errors and omissions in the original award, plaintiff raised issues concerning the division of a life insurance policy on defendant's father, child support, and spousal support. In his motion for reconsideration, defendant also addressed the policy, and raised additional issues concerning the division of the debts and liabilities of the parties' jointly owned company, Con-Dor, L.L.C., and the division of the parties' personal property. Thus, only these last two additional issues are potentially affected by the arbitrator's alleged procedural error in considering defendant's motion for reconsideration. The remaining three issues—the life insurance policy, child support, and spousal support—were already before the arbitrator as part of plaintiff's motion.

A. The Title of Defendant's Motion

We disagree with plaintiff's argument that the arbitrator lacked authority to consider defendant's motion because it was labeled a motion for reconsideration. Plaintiff correctly notes that the DRAA does not expressly provide for a party to move for reconsideration of an arbitration award. However, the act provides that a party may file a motion to correct errors and omissions in an arbitration award. MCL 600.5078(3) provides:

An arbitrator under this chapter retains jurisdiction to correct errors or omissions in an award until the court confirms the award. Within 14 days after the award is issued, a party to the arbitration may file a motion to correct errors or omissions. The other party to the arbitration may respond to such a motion within 14 days after the motion is filed. The arbitrator shall issue a decision on the motion within 14 days after receipt of a response to the motion or, if a response is not filed, within 14 days after expiration of the response period.

Although defendant's motion was labeled a motion for reconsideration, in substance it was just like plaintiff's motion, in that both parties identified alleged substantive errors or omissions in the original arbitration award, urged the arbitrator to correct them, and requested that an amended award be issued. The title of defendant's motion was simply a matter of semantics, not a violation of a material term of the arbitration agreement or the DRAA. Cf. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989) (a court is not bound by a party's choice of labels because this would exalt form over substance). Thus, the arbitrator did not lack the authority to consider defendant's motion for this reason.

B. The Timeliness of Defendant's Motion for Reconsideration

Plaintiff also argues that the arbitrator lacked the authority to consider defendant's motion because it was not timely filed.

MCL 600.5078(3) provides that a party may move to correct errors and omissions “[w]ithin 14 days after the award is issued.” The parties' arbitration agreement similarly states that “[t]he 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 original award was mailed to the parties on July 19, 2007, and defendant filed his motion 18 days later, on August 6, 2007. Plaintiff argues that the award was “issued” on the day that it was mailed and, therefore, defendant's motion was untimely.

We note that the issues of the life insurance policy, child support, and spousal support were already before the arbitrator pursuant to plaintiff's motion. Thus, the only issues arguably affected by the untimeliness of defendant's motion are the division of Con-Dor's debts and liabilities, and the division of the parties' personal property.

The arbitrator determined that the statutory 14-day period should begin on Monday, July 23, 2007, rather than on the date of mailing, Thursday, July 19, 2007, to "allow[] the weekend" for the parties to receive the award. The arbitrator added that this decision was nonetheless "moot" because MCR 3.602(J)(2) appeared to allow 21 days to file a motion.

Plaintiff correctly notes that MCR 3.602(A) states that it applies to statutory arbitration under the MAA. However, this Court has held that by providing that "[o]ther standards and procedures relating to review of arbitration awards . . . are governed by court rule," MCL 600.5081(6) makes MCR 3.602 applicable to domestic relations arbitration cases. See *Valentine v Valentine*, 277 Mich App 37, 39 n 1; 742 NW2d 627 (2007); see also MCL 600.5070(1) (domestic relations arbitration proceedings are "also governed by court rule").

In any event, MCR 3.602(J)(2), which in 2007 provided 21 days to file an application to vacate an arbitration award, refers to proceedings before the *circuit court*, not proceedings before the arbitrator. Thus, the arbitrator erred to the extent that he relied on MCR 3.602(J)(2) as authority for concluding that defendant's motion was timely filed.

With regard to the arbitrator's decision to select July 23, 2007, as the "issue" date of the award, we note that procedural questions that grow out of the parties' dispute and bear on the final disposition of the claim, such as the timeliness of a claim, are generally for the arbitrator to determine. See *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226, 232-233; 590 NW2d 580 (1998). Further, the parties' arbitration agreement in this case provides, under the heading "procedure," that the format of the arbitration shall be determined by the arbitrator, subject to approval of the parties.

The DRAA does not define "issued." This is somewhat similar to the situation in *Miller v Miller*, 474 Mich 27, 31-33; 707 NW2d 341 (2005), in which our Supreme Court held that because the DRAA does not define what constitutes a "hearing" and sets no procedural requirements, the arbitrator acted within his authority in "hearing" the parties separately, in separate rooms, as the parties had originally agreed. The Court noted that arbitration is informal by design, and that the parties are free to shape the parameters and procedures used. *Id.* at 32-33, 35.

Thus, while the DRAA and the parties' agreement require that a motion be filed within 14 days after an award is issued, that provision does not appear to be particularly "material," given that the arbitrator can correct errors and omissions, with or without a motion of the parties, at any time before the award is confirmed. We note that the arbitrator exceeded his authority when he deemed the award to have been "issued" on Monday without first securing the parties' agreement. The arbitration agreement clearly sets forth that the arbitrator's authority to determine the format of the arbitration is subject to the parties' approval. Absent that approval, the arbitrator had no authority to reclassify the issue date of the order. However, relief from the arbitrator's error is not warranted. As we explain below, the arbitrator was statutorily granted the authority to amend the award at any time prior to the court confirming the award.

MCL 600.5078(3) provides that the arbitrator “retains jurisdiction to correct errors or omissions in an award *until the court confirms the award.*” [Emphasis added.] This provision is clear and unambiguous, and must be enforced as written. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 399; 662 NW2d 695 (2003). As previously indicated, by the time defendant filed his motion for reconsideration, plaintiff had already raised the issues concerning the division of the life insurance policy, child support, and spousal support. In his motion, defendant presented additional arguments concerning the policy, and raised additional issues concerning Con-Dor, and the division of personal property. As discussed later, all of the issues addressed in defendant’s motion for reconsideration pertained to errors or omissions in the original award and, therefore, under MCL 600.5078(3), the arbitrator had authority to reach them, regardless of the timeliness of defendant’s motion. Accordingly, we reject plaintiff’s argument that the arbitrator exceeded his authority by considering defendant’s motion. The circuit court did not err in denying plaintiff’s motion to vacate or modify the award on this basis.

C. The Timeliness of the Arbitrator’s Amended Award

Plaintiff next argues that the arbitrator erred by failing to issue a decision on her motion within 14 days after defendant filed his response to her motion.

As plaintiff observes, MCL 600.5078(3) requires that an arbitrator issue a decision on a motion to correct errors and omissions within 14 days after a response is received (or the response period elapses). In this case, the arbitrator issued an amended award on September 14, 2007, 29 days after defendant filed his response on August 16, 2007, to plaintiff’s motion. Thus, the arbitrator’s decision was 15 days late. However, the arbitrator explained that he was unable to issue a decision earlier because his wife was ill. Therefore, he provided both parties with additional time to submit responses. More significantly, as discussed above, MCL 600.5078(3) provides that the arbitrator “retains jurisdiction to correct errors or omissions in an award *until the court confirms the award,*” which had not yet occurred in this case. Therefore, we conclude that the arbitrator did not lose jurisdiction to issue an amended award that corrected errors or omissions in the original award.

IV. Plaintiff’s Claims that the Arbitrator Committed Errors of Law

Plaintiff argues that the arbitrator committed substantive errors of law by awarding the life insurance policy to defendant as his separate property, and in deciding issues of Con-Dor’s liabilities, child support, spousal support, and the parties’ personal property.

As indicated previously, an arbitration award may be vacated when it is evident from the face of the award that the arbitrator committed an error of law, and that, but for that error, the award would have been substantially different. *Gavin, supra* at 443-444. However, our Supreme Court has cautioned that “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.” *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). Thus, courts are precluded from “upsetting an award for reasons going to the merits of the claim.” *Id.* at 500.

A. The Life Insurance Policy

In his amended decision, the arbitrator found that the original policy was purchased by defendant's father in 1995, that the policy was later surrendered in 2002, and that the cash surrender value was used to purchase a new policy as a gift for defendant. Plaintiff argues that the arbitrator's disposition of the policy was erroneous because defendant paid the premiums on the policy, the cash surrender value of the original policy was never transferred to defendant's father, that the evidence did not support the arbitrator's determination that the policy was a gift to defendant, and that defendant even conceded that the cash surrender value of the policy was a marital asset.

Apart from her disagreement with the arbitrator's decision, plaintiff has not identified an error of law apparent on the face of the amended award with respect to the life insurance policy. The arbitrator's determination that defendant would be entitled to the policy as his separate property, not subject to distribution, if it was acquired as a gift from his father is consistent with established law. Cf. *Dart v Dart*, 460 Mich 573, 585; 597 NW2d 82 (1999) (property acquired by inheritance is generally considered separate property). Plaintiff simply disagrees with the arbitrator's factual determination that the policy was a gift from defendant's father. She has submitted various evidentiary materials with her brief in an effort to draw this Court into a de novo review of the factual merits of the trial court's determination, but such review is not permitted.

Conversely, the original award contained an error of law in that it awarded both the cash surrender value of the policy, which by definition terminates the policy, *and* the policy's death benefit, which could not be paid out if the policy was surrendered for its cash value. While the amended award determined that the policy was defendant's separate asset (thus substantially changing the outcome), plaintiff has not shown that this determination was affected by an error of law apparent on the face of the award. Thus, the circuit court did not err in denying plaintiff's motion to vacate or modify the arbitrator's award with respect to this issue.

B. Child Support

Plaintiff argues that the arbitrator erred in failing to order defendant to pay child support arrears, in failing to address the fact that no temporary child support was ordered, and in concluding, without addressing the child support formula, that the property advances received by plaintiff were more than sufficient to provide interim support for the child. Once again, plaintiff's arguments go to the merits of the award. Plaintiff does not identify an error of law concerning child support arrears apparent on the face of the award. Moreover, child support cannot be ordered or modified retroactively. See MCL 552.603. In this case, it is undisputed that no interim child support order was ever entered. Therefore, the arbitrator would have committed an error of law by ordering defendant to pay child support for periods before the award was issued. Thus, the circuit court did not err in refusing to vacate or modify the award with respect to this issue.

C. Con-Dor's Debts and Liabilities

Plaintiff argues that the arbitrator erred in allocating to her half of Con-Dor's debts and liabilities, including future attorney fees. She argues that there was no evidence or argument presented at the arbitration hearing on this issue, and that defendant's balance sheet allocated no

liabilities to the marital estate. She maintains that the arbitrator erred in considering defendant's belated motion concerning Con-Dor.

Once again, plaintiff fails to identify an error of law apparent on the face of the award. Rather, her arguments relate to the evidence presented at the arbitration hearing, and to the timeliness of defendant's motion, in an effort to induce this Court to review the merits of the arbitrator's award regarding Con-Dor.

Plaintiff correctly argues that unless otherwise provided by law or a company's operating agreement, members of a limited liability company such as Con-Dor are generally not personally liable for the company's debts. See MCL 450.4501(3). However, the company's present and future debts and liabilities must be paid upon dissolution, before its assets are distributed to its members. See MCL 450.4808. Thus, the arbitrator's original award arguably contained an error of law to the extent that it distributed Con-Dor's assets to the parties without providing for payment of Con-Dor's debts and liabilities, if necessary. The circuit court did not err in denying plaintiff's motion to vacate or modify the arbitration award with respect to this issue.

D. The Parties' Personal Property

Plaintiff argues that the arbitrator erred in ordering the parties' personal property to be divided because defendant never raised this issue at the arbitration hearing, did not introduce any evidence on the subject, and allegedly stipulated that all of the parties' personal property would go to plaintiff.

Once again, plaintiff fails to identify an error of law apparent on the face of the award. Her arguments relate to the evidence and alleged stipulations presented at the arbitration hearing, and to the correctness of the arbitrator's findings and conclusions, in an effort to induce this Court to reach the merits of the arbitrator's decision. The circuit court did not err in denying plaintiff's motion to vacate or correct the award with respect to this issue.

E. Spousal Support

Plaintiff lastly argues that the arbitrator erred in refusing to reserve the issue of spousal support, thereby precluding her from petitioning for spousal support in the future, once defendant becomes employed or otherwise resumes earning an income. Plaintiff argues that Michigan law provides that a party need not have to invade or dissipate her share of the marital estate in order to support herself.

The arbitrator stated that he was aware of the case law cited by the parties, but nonetheless decided not to reserve the issue of spousal support for future consideration. On appeal, plaintiff attacks the correctness of this decision in light of the evidence presented at the arbitration hearing, but has not identified an error of law apparent on the face of the award. The trial court did not err in denying plaintiff's motion to vacate or modify the award with respect to this issue.

Affirmed.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens