STATE OF MICHIGAN

COURT OF APPEALS

DIANE M. BIES-RICE,

Plaintiff-Appellee,

v

ALVIN FOSTER RICE, JR.,

Defendant-Appellant,

and

DAVID FINDLING,

Appellee.

UNPUBLISHED
September 4, 2012

Nos. 295631; 295634
Wayne Circuit Court
LC No. 08-100728-DO

DIANE M. BIES-RICE,

Plaintiff-Appellee,

v

ALVIN FOSTER RICE, JR.,

Defendant-Appellant.

No. 300271
Wayne Circuit Court
LC No. 08-100728-DO

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

These consolidated appeals arose from a divorce action between plaintiff Diane Bies-Rice and defendant Alvin Foster Rice, Jr. After plaintiff filed a complaint for divorce in January 2008, the parties stipulated to binding arbitration to resolve all contested issues. On November 4, 2009, the arbitrator issued his report and award dividing the marital assets. On December 1, 2009, the trial court entered a judgment of divorce that incorporated the arbitrator's award. On that same date, the court entered a separate order approving the fees and costs of a court-appointed receiver and directing defendant to pay those expenses. Defendant, proceeding in propria persona, now appeals as of right from the divorce judgment in Docket No. 295631, and

appeals as of right from the order approving the receiver's fees in Docket No. 295634.[1] After defendant filed his claims of appeal in Docket Nos. 295631 and 295634, additional arbitration proceedings were held to resolve disputes concerning the disposition of household personal property. On May 19, 2010, the arbitrator issued a second report and award distributing the personal items, and on August 25, 2010, the trial court issued an order adopting the arbitrator's second award. Defendant has filed a claim of appeal from that order in Docket No. 300271. We affirm the judgment of divorce in Docket No. 295631, affirm the order approving the receiver's fees and costs in Docket No. 295634, and dismiss defendant's appeal in Docket No. 300271.

I. RELEVANT BACKGROUND FACTS

This contentious divorce litigation began in 2008. After plaintiff filed her complaint for divorce, both parties continued to reside in the marital home. On September 3, 2008, the trial court appointed a receiver in response to evidence that defendant was removing assets from the home in violation of a mutual restraining order. The court's order appointing the receiver stated that each party would pay one half of the receiver's costs, but that defendant alone would be liable for the receiver's costs if it was determined that he violated the mutual restraining order. In January 2009, the parties stipulated to submitting "[a]ll contested issues" to binding arbitration. In May 2009, plaintiff obtained a personal protection order (PPO) against defendant. The arbitrator issued his report and award on November 4, 2009. The arbitrator found that neither party was at fault for the breakdown of the marriage, but that defendant had appropriated substantial marital assets in the last years of the marriage, including plaintiff's jewelry, collectibles, and funds for the purchase of a restaurant for defendant's girlfriend. Each party was awarded assets valued at approximately $400,000. Defendant's share included property that he was determined to have appropriated. The arbitrator also specified a procedure for distributing "items of household furniture, furnishings, and appliances." In addition, the arbitrator ordered defendant to pay the receiver's costs and fees of $32,248.49.

II. DOCKET NO. 295631

Initially, we reject defendant's argument that the November 4, 2009, arbitration award is invalid because plaintiff obtained a PPO against him and the trial court never obtained the waiver required by MCL 600.5072(2). Issues involving the interpretation of a statute are reviewed de novo as questions of law. *Truel v City of Dearborn*, 291 Mich App 125, 131; 804 NW2d 744 (2010). When interpreting a statute, a court "should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses." *Id*. Clear and unambiguous statutory language must be applied as written. *Id*.

MCL 600.5072(2) provides:

[1] Although defendant was represented by counsel when he filed his claims of appeal, this Court granted counsel's motion to withdraw and defendant has not obtained new counsel.

> If either party is subject to a personal protection order involving domestic violence or if, in the pending domestic relations matter, there are allegations of domestic violence or child abuse, *the court shall not refer the case to arbitration unless each party to the domestic relations matter waives this exclusion.* A party cannot waive this exclusion from arbitration unless the party is represented by an attorney throughout the action, including the arbitration process, and the party is informed on the record concerning all of the following:
>
> (a) The arbitration process.
>
> (b) The suspension of the formal rules of evidence.
>
> (c) The binding nature of arbitration. [Emphasis added.]

This case was referred to arbitration pursuant to the parties' stipulation on January 15, 2009. Plaintiff did not obtain her PPO against defendant until May 2009. It is undisputed that neither party was subject to a PPO when the case was referred to arbitration. Although MCL 600.5072(2) restricts a court's authority to refer a case to arbitration when either party is subject to a PPO at the time of referral, the statute does not provide any restrictions against continuing arbitration if a PPO is issued later. This Court may not read into a statute anything that is not within the manifest intention of the Legislature as derived from the statute itself. *Michigan Ed Ass'n v Secretary of State*, 489 Mich 194, 217-218; 8012 NW2d 35 (2011). Accordingly, because neither party was subject to a PPO when the case was referred to arbitration, there was no violation of the statute.

Next, defendant argues that the arbitrator's November 4, 2009, report and award dividing the marital estate should be vacated because the arbitrator exceeded his authority by issuing a grossly disparate property distribution without any basis for the incongruity. We conclude that defendant's failure to timely file a motion to vacate the arbitration award precludes this claim for relief.

Domestic relations arbitration is governed by MCL 600.5070 – MCL 600.5082, and by MCR 3.602. See MCL 600.5070(1) (providing that arbitration proceedings in domestic relations actions are "governed by court rule except to the extent those provisions are modified by the arbitration agreement or this chapter"). MCR 3.602 provides, in pertinent part:

> **(I) Award: Confirmation by Court.** An Arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.
>
> **(J) Vacating Award.**
>
> (1) A request for an order to vacate an arbitration award under this rule *must be made by motion*. If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2) On motion of a party, the court shall vacate an award if:

(a) 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.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(3) A motion to vacate an award must be filed within 91 days after the date of the award. However, if the motion is predicated on corruption, fraud, or other undue means, it must be filed within 21 days after the grounds are known or should have been known. *A motion to vacate an award in a domestic relations case must be filed within 21 days after the date of the award.* [Emphases added.]

Current subsection (J)(3) was added to MCR 3.602 in October 2007, effective January 1, 2008. See 480 Mich cxlvi (2007). Before the October 2007 amendment, MCR 3.602(J)(2) provided that "[a]n application to vacate an award must be made within 21 days after delivery of a copy of the award to the applicant[.]" See 475 Mich lvii. The former rule did not specifically refer to domestic relations cases, but applied to "statutory arbitration under MCL 600.5001–600.5035." See *Valentine v Valentine*, 277 Mich App 37, 39 n 1; 742 NW2d 627 (2007), and MCR 3.602(A). In *Valentine*, this Court held that because of MCL 600.5081(6)—which provides that "[o]ther standards and procedures relating to review of arbitration awards described in subsection (1) are governed by court rule"—the rule in former MCR 3.602(J)(2) applied to a domestic-relations arbitration. *Valentine*, 277 Mich App at 39 n 1. The current version of the rule largely codifies this view.

On appeal, defendant does not dispute that, to be timely, a motion to vacate the arbitration award was required to be filed within 21 days after the date of the November 4, 2009, award. In addition, it is undisputed that defendant did not file a motion to vacate the arbitration award within 21 days after the date of the award. Defendant attempts to excuse his failure to timely file a motion to vacate the arbitration award by blaming his attorney for erroneously informing him that the period for filing a motion to vacate did not expire until December 6, 2009. However, clear language in a court rule must be applied as written. See *In re Leete Estate*, 290 Mich App 647, 656; 803 NW2d 889 (2010). MCR 3.602(J)(3) states that a motion to vacate an arbitration award "must be filed within 21 days after the date of the award." The use of the term "must" indicates something that is mandatory. See *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 742 NW2d 627 (2009) (because the use of the term "must" in former MCR 3.602(J)(2) denotes mandatory action, the trial court properly denied the defendant's untimely motion to vacate an arbitration award). Defendant's failure to timely file a motion to vacate the arbitration award precludes relief on appeal.

Accordingly, we affirm the judgment of divorce in Docket No. 295631.

III. DOCKET NO 295634

Defendant argues that the trial court erred by requiring him, rather than plaintiff, to pay the receiver's costs and fees. He also challenges the reasonableness of the costs and fees awarded.

Citing MCR 2.622(D), defendant argues that plaintiff should have been required to pay the receiver's fees and expenses because it was plaintiff who sought the appointment of the receiver. We first note that this argument deals with an issue resolved by way of an arbitration award.[2] The trial court did not err in approving the arbitrator's decision, in light of defendant's failure to timely file a motion to vacate, as discussed above, and in light of the deferential standard of review applicable to such awards. See *Washington v Washington*, 283 Mich App 667, 675; 770 NW2d 908 (2009). Nevertheless, even if we approach this issue as involving a direct circuit-court action, we find no basis for reversal.[3]

MCR 2.622(D) provides:

> **Expenses in Certain Cases.** When there are no funds in the hands of the receiver at the termination of the receivership, the court, on application of the receiver, may set the receiver's compensation and the fees of the receiver's attorney for the services rendered, and *may* direct the party who moved for the appointment of the receiver to pay these sums in addition to the necessary expenditures of the receiver. If more than one creditor sought the appointment of a receiver, the court may allocate the costs among them. [MCR 2.622(D) (emphasis added).]

This rule provides that a court "*may* direct the party who moved for the appointment of the receiver" to pay the receiver's compensation (emphasis added). Generally, the word "'"may" will not be treated as a word of command unless there is something in the context or subject matter of the act to indicate that it was used in such a sense.'" *Old Kent Bank v Kal Kustom, Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003), quoting *Mill Creek Coalition v South Branch of Mill Creek Intercounty Drain Dist*, 210 Mich App 559, 565; 534 NW2d 168 (1995). Accordingly, contrary to defendant's argument, the trial court was not required to impose the fees on plaintiff.

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[2] It was the arbitrator who held defendant responsible for paying the receiver's fees.

[3] Defendant did not argue below that he was not legally liable for any of the receiver's costs or fees, leaving that issue unpreserved. Unpreserved claims of error are reviewed for plain error affecting the party's substantial rights. See *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 381; 808 NW2d 511 (2011).

Further, MCL 552.13(1) provides:

> In every action brought, either for a divorce or for a separation, the court may require either party to pay alimony for the suitable maintenance of the adverse party, to pay such sums as shall be deemed proper and necessary to conserve any real or personal property owned by the parties or either of them, and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency. It may award costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of the receiver.

This statute authorized the trial court to require either party to pay the receiver's fees. The court's order appointing the receiver provided that each party would pay one half of the receiver's fees, unless defendant was found to have violated the court's order enjoining the removal of assets, in which case he would be required to pay the entirety of the receiver's fees. As noted by the arbitrator, defendant did violate the court's order. Accordingly, the trial court did not err in requiring defendant to pay the receiver's compensation.

Defendant also challenges the amount of the receiver's fees. This Court "review[s] for an abuse of discretion the circuit court's decision to approve or disapprove the individual expenses incurred by the receiver." *Ypsilanti Twp v Kircher*, 281 Mich App 251, 275; 761 NW2d 761 (2008).

"Receivers have a right to compensation for their services and expenses." *Band v Livonia Assoc*, 176 Mich App 95, 111; 439 NW2d 285 (1989). The "receiver's specific rate of compensation must be reasonable and must not be excessive." *Ypsilanti Twp*, 281 Mich App at 280-281. "The trial court should normally hold an evidentiary hearing when the opposing party challenges the reasonableness of a fee request." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). However, a trial court does not err by awarding fees without holding an evidentiary hearing if "the parties created a sufficient record to review the issue, and the court fully explained the reasons for its decision." *Id.*[4]

The trial court was satisfied with the receiver's explanation that the fees incurred were necessary and reasonable in view of defendant's attempts to remove and conceal property. Defendant's record of surreptitiously removing property and concealing assets at a restaurant property justified the receiver's filing of a lien on the property. In addition, there is no merit to defendant's complaint that the receiver *unjustifiably* caused the incurrence of higher storage fees for a vehicle than defendant had been charged before the receiver's involvement. In fact, defendant does not contend that the storage fees were unreasonably high, only that he lost the benefit of having no storage fees assessed. It was not unreasonable for storage fees to be assessed once a receivership was activated. Defendant also complains that the receiver sold a truck for well below its market value, but the truck was sold at auction to the highest bidder.

[4] Moreover, defendant does not argue, in the context of this issue, that the trial court should have conducted a full evidentiary hearing.

Defendant additionally complains about certain allegedly high transaction fees but does not provide specifics regarding why the fees should be considered unreasonably high. In light of the record available and the necessary work performed by the receiver, and, significantly, in light of the fact that defendant's own conduct prompted the creation of the receivership in the first instance,[5] we find no abuse of discretion with regard to the trial court's order pertaining to the amount of receiver's fees.

Accordingly, we affirm the trial court's order approving the receiver's costs and fees of $32,248.49 in Docket No. 295634.

IV. DOCKET NO 300271

Plaintiff argues, and we agree, that this Court lacks jurisdiction to consider defendant's appeal in Docket No. 300271. Issues involving this Court's jurisdiction are reviewed de novo as questions of law. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

MCR 7.203(A)(1) provides that this Court has "jurisdiction of an appeal of right" from "[a] final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6)," subject to certain exceptions not applicable here. MCR 7.202(6)(a)(i) defines "final judgment" or "final order," in the context of the present case, as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order . . . ." Although the November 4, 2009, arbitration award did not specifically adjudicate the disposition of each household item, it provided the procedure for the disposition of that property. Thus, we conclude that the December 1, 2009, judgment of divorce, which incorporated the arbitration award, qualified as the final order as defined in MCR 7.202(6)(a)(i). The August 25, 2010, order adopting the second arbitration award constituted a postjudgment order enforcing the arrangements set forth in the December 1, 2009, judgment of divorce. Accordingly, the August 25, 2010, order was not appealable as of right. Therefore, we dismiss defendant's appeal in Docket No. 300271 for lack of jurisdiction.

The orders in Docket Nos. 295631 and 295634 are affirmed, and the appeal in Docket No. 300271 is dismissed for lack of jurisdiction.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder

[5] The trial court stated at a hearing that it was appointing a receiver because of allegations, later substantiated, that defendant had been hiding assets.