STATE OF MICHIGAN

COURT OF APPEALS

JUDIE BETH KIM, f/k/a JUDIE BETH LACOSTE

Plaintiff-Appellant-
Cross-Appellee,

v

ROBERT BRUCE LACOSTE,

Defendant-Appellee-
Cross-Appellant.

UNPUBLISHED
March 27, 1998

No. 202713
Washtenaw Circuit Court
LC No. 91-043918

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiff filed a petition to change the domicile of the parties' minor child from Michigan to Minnesota where her new spouse had accepted a job. Defendant contested the petition and alternatively, requested that he be granted custody. Pursuant to an agreement between the parties and a previous court order, the case was submitted to binding arbitration. The arbitrator ruled against plaintiff on her petition. Plaintiff then moved to vacate the arbitration award in the trial court. After an evidentiary hearing, the trial court refused to vacate the arbitration award, and plaintiff appeals as of right. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I

Plaintiff first argues that the arbitration award should be vacated because the arbitrator exceeded her authority by implementing a procedure, which was an improper "hybrid" form of arbitration and by disregarding the procedure set out in the arbitration agreement and prior consent order. She also claims that it was improper for the arbitrator to exclude the parties' attorneys from part of the proceeding and that the arbitration award was procured by fraud. We disagree that the arbitration award should have been vacated on any of these grounds.

A court's power to vacate a binding arbitration award is very limited. *Gordon Sel-Way , Inc v Spence Brothers, Inc,* 438 Mich 488; 475 NW2d 704 (1991). MCR 3.602(J)(1) provides:

(1) On application 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;

(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.

Review of an award alleged to have been the result of an arbitrator exceeding her power is limited to cases where the arbitrator acted beyond the material terms of the contract or arbitration agreement. *Id.* at 495-496 (1991); *Dohanyos v Detrex Corp (After Remand),* 217 Mich App 171, 175-176; 550 NW2d 608 (1996).

We find no merit to plaintiff's argument that an improper form of "hybrid" arbitration was used contrary to the mandates of MCL 600.5001 *et seq.*; MSA 27A.5001 *et seq.*, and MCR 3.602. In *Dick v Dick*, 210 Mich App 576; 534 NW2d 185 (1995), upon which plaintiff relies, the arbitration agreement did not comport with the requirements of the arbitration statute. The agreement included provisions that allowed the parties to appeal substantive issues to the Court of Appeals. This Court held that the "hybrid" type of arbitration that the parties had attempted to create was not enforceable because parties are not permitted to agree to expand the scope of judicial review in a binding arbitration. *Id.* at 588-589. The issue at hand is not remotely similar to that presented in *Dick*. The parties in this case did not have an arbitration agreement, which contained terms that are fundamentally diametric to the binding nature of a binding arbitration. They also did not attempt to expand the scope of judicial review in contravention of the statute.

The arbitration agreement at issue contained provisions that the arbitrator would decide the format, with the objective of expediting the proceedings, and would attempt to reach a settlement of the issues during the proceedings. There is no authority to support that this arbitration agreement, which contemplated that the arbitrator would work with the parties to mediate the dispute, is an unenforceable, "hybrid" arbitration. Based on our review of the record, the parties here agreed that mediation or settlement negotiations would be attempted as part of the arbitration process prior to the issuance of a binding arbitration award. Plaintiff did not object to the mediation attempts by the arbitrator, which would have, if successful, expedited this matter. The arbitrator did not act beyond the material terms of the arbitration agreement in attempting to mediate the case.

Moreover, the fact that the parties were directed by the arbitrator to appear without their attorneys at the first meeting does not lead to a conclusion that the arbitration award should be vacated. It was unwise and contrary to Michigan law for the arbitrator to order the parties to appear for the first meeting without counsel. MCR 3.602(G) provides that a party has a right to be represented by an

attorney at an arbitration hearing. However, an arbitration award is not vacated simply where there is an error of law. *NuVision v Dunscombe,* 163 Mich App 674, 684; 415 NW2d 234 (1987). Rather for a court to vacate an award, there "must be error so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Id.*, citing *DAIIE v Gavin,* 416 Mich 407, 443; 331 NW2d 418 (1982). Based on our review of the record, the absence of counsel at the initial meeting was not an error of law that was material or substantial enough to justify vacating the award. We also note that there was testimony at the evidentiary hearing that plaintiff knew the arbitrator wanted to first meet with the parties alone in order to try to reach a settlement. She never objected to this procedure.

We also find that the arbitrator did not exceed her authority by failing to follow one of the procedures set forth in the arbitration agreement. The provision provided that in "the absence of a mediated agreement, the parties shall each present the mediator with a proposed resolution and the mediator shall then choose the proposal which is in the child's best interest ...." In this case, the arbitrator did not chose either party's proposal, finding that neither was in the child's best interest. The arbitrator devised her own proposed solution. By the terms of the arbitration agreement, the arbitrator was vested with authority to decide all of the issues raised by the parties with regard to custody, change of domicile, parenting time, child support, and transportation, *as well as any other issues raised by the parties*. The provision at issue was flawed where it required the arbitrator to pick the proposal that was in the child's best interest but failed to outline what procedure to follow if neither proposal was in the child's best interest. The provision could not be enforced in the situation presented where neither proposal was in the child's best interest. The appropriate remedy, where a provision of an arbitration agreement is not enforceable, appears to be to strike the provision and enforce the remainder of the agreement. *Bruckner v McKinlay Transport,* 454 Mich 8; 557 NW2d 536 (1997); *Dick, supra* at 589. Accordingly, we reform the arbitration agreement to take out the provision requiring the arbitrator to pick one provision or the other. We find that the arbitrator did not exceed her authority by deciding the issues presented by the parties.

Critical to our determination of this issue is the fact that the parties agreed and approved of the arbitrator's decision to reach her own solution instead of adopting wholesale one proposed resolution or the other[1]. This occurred after counsel for defendant raised an issue about the provision being flawed[2]. General contract principles apply to arbitration agreements. *Grazia v Sanchez,* 199 Mich App 582, 586; 502 NW2d 751 (1993). Thus, "[a] true meeting of the minds is required for a valid arbitration agreement, just as in any contract." *McKain v Moore,* 172 Mich App 243; 431 NW2d 470 (1988). Parties can agree to modify a contract if there is a meeting of the minds on the modification. See *DPOA v Detroit,* 452 Mich 339, 348; 551 NW2d 349 (1996). The parties agreement to modify a contract can be deduced from their course of conduct, *id.*, or by consent. See *Kondzer v Wayne Sheriff,* 219 Mich App 632, 635; 558 NW2d 215 (1996). In this case, the record indicates that the parties consented to allow the arbitrator to fashion her own resolution to the issues. There was a meeting of the minds with respect to the new term and thus, there was an agreement to modify the arbitration contract.

Finally, we find that there was insufficient evidence to support that the arbitration award was procured by fraud. First, our review of the record does not reveal that there were any fraudulent or

intentional misrepresentations made by defendant. Second, the award was based on the arbitrator's assessment of the matter under the test set forth in *D'Onofrio v D'Onofrio*, 144 NJ Super 200; 365 A2d 27 (1976), which was adopted by our Court for settling matters regarding the removal of minors from Michigan. *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985). Our review of the record reveals no evidence to suggest that the arbitrator relied on misrepresentations in rendering her award. Therefore, we hold that the arbitration award was not procured by fraud.

II

Next, plaintiff argues that the arbitrator improperly delegated her fact finding function and her responsibility to hear evidence to a psychologist, Dr. Clark. We disagree.

Based on the record, it is clear that the arbitrator in this case did not delegate any of her functions to Dr. Clark. Instead, the arbitrator requested that Dr. Clark evaluate the potential change of custody situation and make an assessment. Michigan law allows for a court to utilize resources in the behavioral sciences and other professions and consider the recommendations for resolving custody disputes. MCL 722.27(1)(d); MSA 25.312(7)(1)(d). There is no reason that an arbitrator may not similarly utilize an expert professional to assist in resolving a dispute. Moreover, the parties agreed that Dr. Clark should conduct an evaluation in this case. Further, nothing in the record indicates that Dr. Clark made binding findings of fact or conclusions of law, reviewed motions, required the production of evidence, issued subpoenas, conducted any proceedings, examined witnesses, or recommended a proposed judgment. The arbitrator alone made the decision in this case. We find that the arbitrator did not exceed her authority in any way by calling upon Dr. Clark for an evaluation and then considering Dr. Clark's conclusions[3].

III

Plaintiff next argues that the trial court abused its discretion by awarding attorney fees to defendant for defending against the proceedings to vacate the arbitration.

In *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674 (1997), this Court stated:

> A court may award a party in a divorce action "any sums necessary to enable the . . . party to carry on or defend the action, during its pendancy." MCL 552.13(1); MSA 25.93(1). An award of legal fees in a divorce action is authorized when it is necessary to enable the party to carry on or defend the suit. MCR 3.206(C)(2); *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). They may also be awarded when the party requesting payment has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation.

This Court applied the stated rule to a post-divorce dispute in *Hawkins*.

MRE 2.114(D) and (E) provide:

(D) The signature of an attorney or a party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, *including reasonable attorney fees*. The court may not assess punitive damages. [emphasis added.]

A court may also assess sanctions under MCL 600.2591; MSA 27A.2591 based on the filing of a frivolous action.

In this post-divorce proceeding, defendant requested costs, attorney fees and sanctions for having to defend against plaintiff's motion to vacate the arbitration award. The trial court ruled:

> The Court finds Defendant to be the prevailing party in this dispute. The Court had taken the matter of costs and fees under advisement, and had stated on the record that it would award costs and fees to the prevailing party. Accordingly, the Court orders costs to be paid by the Plaintiff Defendant's counsel and the arbitrator's counsel. MCR 2.625(A)(1). With respect to attorney fees, the Court did state that it would consider an award of fees after it had heard the matter. The Court is of the Opinion that because there was no merit to Plaintiff's arguments, counsel for Defendant and the arbitrator shall be paid by Plaintiff at the rate of $100.00 per hour . . .

On appeal, plaintiff's question presented does not address the issue of the trial court's awarding costs to defendant. Therefore, we will not address the issue of the taxable costs that were awarded pursuant to MCR 2.625(A)(1). *Orion Twp v State Tax Comm,* 195 Mich App 13, 18; 489 NW2d 120 (1992).

With regard to the award of attorney fees, there was no showing that defendant needed an award of fees to enable him to defend against the post-divorce motion. Moreover, there was no finding by the trial court that plaintiff's attempt to vacate the arbitration amounted to unreasonable conduct in the course of litigation, *Hawkins, supra,* nor did it make a finding that her claims were frivolous or that her motion was filed in violation of MCR 2.114(D). The trial court simply found that plaintiff's

arguments lacked merit and then awarded fees to be paid by plaintiff. On appeal, defendant argues that the trial court found plaintiff's request to vacate the arbitration award to be frivolous. Our review of the record does not lead to a similar conclusion. It is entirely unclear as to why and under what provisions fees were granted and whether there was a finding of frivolity. Therefore, we reverse the grant of fees and remand for the trial court to make findings as to whether fees are warranted against plaintiff or her counsel under *Hawkins, supra* or the applicable court rules and statute[4].

On cross appeal, defendant argues that the trial court's award of $100 per hour as an attorney fee was improper and inconsistent with the language of MCR 2.114(E). Defendant's argument hinges on whether the trial court granted fees pursuant to that provision. Because there is nothing in the record to suggest that fees were granted under MCR 2.114(E), we will not make a determination as to whether $100 was a proper amount under that court rule. Defendant should address his argument to the trial court on remand if the trial court grants fees pursuant to MCR 2.114(E).

Finally, we do not find plaintiff's appeal to be vexatious pursuant to MCR 7.216(C)(1)(a).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

[1] Testimony at the evidentiary hearing supported that counsel for both parties were consulted when the flaw in the provision at issue became apparent. Everyone agreed that the arbitrator should not be bound to accept one proposal or the other. In fact, in her own proposal, plaintiff specifically stated that the arbitrator should not be constrained to choose one proposal over the other.

[2] Recall that the arbitrator had authority to decide all issues raised by the parties.

[3] Plaintiff's reliance on *Carson Fisher Potts & Hyman v Hyman*, 220 Mich App 116, 121; 559 NW2d 54 (1996) is misplaced. In that case, the court issued an order giving the expert witness authority to engage in judicial functions. This Court held that a trial court may not delegate its judicial functions to an expert.

[4] On cross appeal, defendant argues that the circuit court erred by not requiring that the award of attorney fees be paid, in part, by plaintiff's counsel. Because it is unclear as to why fees were being awarded, this Court cannot address the merits of defendant's argument on this issue and cannot determine whether it was error for the trial court to fail to award fees against plaintiff's counsel.