STATE OF MICHIGAN

COURT OF APPEALS

MARY ELIZABETH ZELASKO, Plaintiff-Appellee,	UNPUBLISHED December 8, 2015
v	No. 324514 Oakland Circuit Court Family Division
RICHARD ANTHONY ZELASKO, Defendant-Appellant.	LC No. 2011-788549-DM

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted[1] an order appointing a substitute arbitrator to arbitrate the parties' divorce after the agreed-upon arbitrator died. The same order denied defendant's request that all of the interim arbitration orders be vacated. Because nothing in the domestic relations arbitration act (DRAA), MCL 600.5070 *et seq*., permits a trial court to appoint a substitute arbitrator absent agreement of the parties, we reverse that portion of the order appointing a substitute arbitrator. However, we agree with the trial court that there is no reason to disturb the previous interim orders, which were either not contested or were affirmed by the trial court, and affirm that portion of the order.

I. BASIC FACTS AND PROCEDURAL HISTORY

The parties were married on October 23, 2004. The parties had three minor children. Plaintiff worked as a sales associate earning between $100,000 and $120,000 annually. Defendant owned his own businesses and earned approximately $36,000 annually. Plaintiff filed a complaint for divorce in September 2011 and defendant filed a counter-complaint for divorce in October 2011. The parties entered into an arbitration agreement under the DRAA and agreed to appoint John F. Mills as arbitrator "to decide all contested issues . . ." During the course of the proceeding, the arbitrator issued several interim awards. The first and second interim awards pertained to issues involving holiday parenting time and summer day camp expenses.

[1] *Zelasko v Zelasko*, unpublished order of the Court of Appeals, entered May 28, 2015 (Docket No. 324514).

On July 5, 2013, defendant won the $80 million Mega Millions jackpot. After taxes and deductions, defendant's winnings amounted to $38,873,628. In an interim award dated November 22, 2013, the arbitrator decided the issue of property division. The arbitrator determined that defendant's lottery winnings were part of the marital estate. The arbitrator opined that that was probably not the first lottery ticket that defendant purchased during the marriage and that, "[a]s losses throughout the marriage were incurred jointly, so should winnings be shared jointly." The arbitrator also noted, "[d]espite winning the lottery, [defendant] has not contributed any money to Plaintiff for the support of his three children." The arbitrator awarded plaintiff $15 million of the lottery winnings. The arbitrator also divided the remainder of the marital estate. The lottery winnings were by far the biggest asset. The arbitrator determined that neither party needed spousal support and deferred the issues of child support and parenting time.

Plaintiff filed a motion to confirm the arbitrator's award, and defendant filed a motion to vacate the award. The trial court denied defendant's motion, granted plaintiff's motion, and entered an order confirming the award. The court rejected defendant's argument that the arbitrator was biased against him, which the court noted defendant raised for the first time after the arbitrator's fifth interim award.

On February 12, 2014, the arbitrator awarded plaintiff interim child support in the amount of $7,167 per month based on the Michigan Child Support Formula. Plaintiff filed a motion to confirm the arbitrator's seventh award and defendant filed a motion to vacate the award. The trial court granted plaintiff's motion and denied defendant's motion. The court again rejected defendant's claim of bias and noted that plaintiff had not yet had access to any of the lottery proceeds and had not received any child support.

On June 11, 2014, the arbitrator held a supplemental evidentiary hearing regarding parenting time, custody, and child support. At the end of the hearing, arbitrator Mills indicated that he would issue an award by July. He indicated that his award would incorporate all of the interim awards, but that he would not restate all of the interim awards. On July 26, 2014, the arbitrator died without having issued the final award.

Following briefing regarding how to proceed, the trial court held a hearing on September 23, 2014. Defense counsel argued that the DRAA contains no provision specifically addressing the death of an arbitrator, but that an analogous provision regarding the disqualification of an arbitrator allows the court to appoint another arbitrator agreed to by the parties, or the court must void the arbitration agreement and proceed as if arbitration never occurred. Counsel argued that if either party was unwilling to consent to a substitute arbitrator, the case must proceed as if arbitration was not ordered and all interim orders are void. Plaintiff's counsel, on the other hand, argued that defendant had already had his opportunity to have the court review the seven interim arbitration awards, and the court confirmed the awards that defendant challenged. Counsel asserted that what defendant really wanted was a "re-do" because he wanted a different result regarding the distribution of the lottery winnings. Counsel contended that the arbitrator's death should not affect rulings that he had already made.

The trial court ruled as follows:

In this case, the Court's opinion and order dated March 13th, 2014 . . . explains that Mr. Mills finished hearing testimony on all issues for arbitration and that for whatever reason he rendered several interim orders, two of which defendant attempted to vacate and the court upheld.

Moreover, the parties stipulate that the only remaining issues left to arbitrate involve parenting time, child support and possibly custody.

Concerning aspect [sic] of this matter is that Mr. Mills finished hearing testimony on all of the issues subject to arbitration. Nevertheless, . . . starting the entire arbitration process anew would be a complete waste of judicial resources at this time, especially considering the fact that the Court already reviewed some of Mr. Mills' interim awards and upheld them.

Based on the case law mentioned above, I'm ruling in favor of plaintiff. There is no reason to vacate Mr. Mills' interim property settlement orders and it is clear that a new arbitrator must be appointed for the remaining issues of parenting time, child support and possibly custody. The new arbitrator can hold a new hearing on such remaining issues and/or utilize the transcript from the prior hearings conducted by Mr. Mills.

Under MCL 600.5075 the court may appoint another arbitrator agreed to by the parties. That's my ruling, so please draft an order that state[s] for the purposes – or for reasons on the Record. I am denying your motion. Have you – and I'll give you an opportunity to discuss agreeing upon a new arbitrator, I will appoint –

MR. WEINER [plaintiff's counsel]: I think we've tentatively agreed on Mr. Good – (inaudible).

MR. ROBBINS [defense counsel]: Well, I need to discuss it with my client.

THE COURT: Why don't you do that?

On October 22, 2014, the trial court entered an order appointing a substitute arbitrator. The order stated in part as follows:

There is no reason to vacate Mr. Mills' interim property settlement orders and it is clear that a new arbitrator must be appointed for the remaining issues of parenting time, child support and possibly custody. The new arbitrator can hold a new hearing on such remaining issues and/or utilize the transcript from the prior hearings conducted by Mr. Mills. Under MCL 600.5075 the Court may appoint another arbitrator agreed to by the parties. . . .

IT IS FURTHER ORDERED that if the parties cannot agree upon a substitute arbitrator to replace John F. Mills for purposes of these limited issues, the Court shall appoint a substitute arbitrator.

Defendant expressly declined to select a new arbitrator. Thus, the trial court entered an order, over defendant's objection, appointing Gil Gugni as the new arbitrator.

Defendant filed an application for leave to appeal. While the application was pending, Gugni issued an award addressing child custody and child support. However, this Court granted a stay of proceedings[2] and the award has not been confirmed. Although the new arbitrator was authorized to take testimony on the issues of custody and child support, the parties agreed to let the existing record serve as the basis for the award.

II. ANALYSIS

On appeal, defendant argues that the trial court erred when it appointed a substitute arbitrator where defendant objected to the appointment. We agree. Defendant further argues that, pursuant to MCL 600.5075(2), the whole process must begin again in front of the trial court and all of the arbitrator's prior actions are void. On that point, we disagree.

The issue whether the trial court had the authority to appoint a substitute arbitrator is a question of law that this Court reviews de novo. See *Kessler v Kessler*, 295 Mich App 54, 57; 811 NW2d 39 (2011). This Court also reviews de novo issues of statutory interpretation. *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 275; 856 NW2d 206 (2014). Additionally, this Court reviews de novo issues of contract interpretation. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014).

The DRAA governs domestic-relations arbitration. *Cipriano v Cipriano*, 289 Mich App 361, 367; 808 NW2d 230 (2010). MCL 600.5071 provides:

> Parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time, or to a postjudgment proceeding related to such an action, may stipulate to binding arbitration by a signed agreement that specifically provides for an award with respect to 1 or more of the following issues:
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> (a) Real and personal property.
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> (b) Child custody.
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> (c) Child support, subject to the restrictions and requirements in other law and court rule as provided in this act.
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> (d) Parenting time.
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> (e) Spousal support.

[2] *Zelasko v Zelasko*, unpublished order of the Court of Appeals, entered June 26, 2015 (Docket No. 324514).

(f) Costs, expenses, and attorney fees.

(g) Enforceability of prenuptial and postnuptial agreements.

(h) Allocation of the parties' responsibility for debt as between the parties.

(i) Other contested domestic relations matters.

The DRAA "contemplates that the parties will discuss with the arbitrator the scope of the issues and how information necessary for their resolution will be produced" and "contemplates that the parties will decide what is best for their case." *Miller v Miller*, 474 Mich 27, 32; 707 NW2d 341 (2005). Critically, "arbitration is a matter of contract." *Id.* "It is the agreement that dictates the authority of the arbitrators and the disputes to be resolved through arbitration." *Rowry v Univ of Mich*, 441 Mich 1, 10; 490 NW2d 305 (1992). Accordingly, the DRAA requires that the parties "first sign an agreement for binding arbitration delineating the powers and duties of the arbitrator." *Miller*, 474 Mich at 32, citing MCL 600.5072(1)(e).

Here, the parties agreed to have Mills decide the issues of property division, child support, spousal support, parenting time, costs, expenses, and attorney fees. Only Mills was authorized to decide the contested issues.[3] See *Rowry*, 441 Mich at 10. The parties' arbitration agreement did not provide for the appointment of a substitute arbitrator in the event Mills died. Thus, the trial court altered the parties' agreement when it appointed a substitute arbitrator after Mills died and thereby infringed "on the parties' recognized freedom to contract for binding arbitration." *Miller*, 474 Mich at 32-33.

Finding that the trial court was without authority to appoint a substitute arbitrator, we now must determine the proper course of action going forward. There is no provision in the DRAA that deals with the death of an arbitrator. Defendant compares the current situation to MCL 600.5075 of the DRAA, which deals with disqualification. Pursuant to MCL 600.5075:

> (1) An arbitrator, attorney, or party in an arbitration proceeding under this chapter shall disclose any circumstance that may affect an arbitrator's impartiality, including, but not limited to, bias, a financial or personal interest in the outcome of the arbitration, or a past or present business or professional relationship with a party or attorney. Upon disclosure of such a circumstance, a party may request disqualification of the arbitrator and shall make that request as soon as practicable after the disclosure. If the arbitrator does not withdraw within 14 days after a request for disqualification, the party may file a motion for disqualification with the circuit court.
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> (2) The circuit court shall hear a motion under subsection (1) within 21 days after the motion is filed. If the court finds that the arbitrator is disqualified, the court

[3] However, as discussed below, the trial court retained ultimate authority over the issue regarding the children.

> may appoint another arbitrator agreed to by the parties or may void the arbitration agreement and proceed as if arbitration had not been ordered.

Defendant maintains that "death is the ultimate disqualification." (p 13.) We find such a comparison flawed. In a situation where an arbitrator has been found to be biased or partial, the validity of the entire proceeding becomes an issue and it makes sense to have a "do over." But here, there has never been a finding that Mills was biased or that the proceedings were unfair. The parties' arbitration contract portion regarding the children – and only that portion - was legally impossible to complete, not because Mills was biased, but because Mills became unavailable.

Given our conclusion that MCL 600.5075 has no application, we are not bound by the statute's requirement that, in the absence of an agreement for a new arbitrator, the matter "proceed as if arbitration had not been ordered." Instead, Mills' interim orders that have already been completed and confirmed are distinct and divisible. The fact that he was rendered unable to decide *all* the issues does not impugn the issues already decided. Defendant concedes as much on appeal when he writes: "As each key interim award was issued by Mills, [defendant] filed timely requests to correct errors and omissions and [plaintiff] filed motions with the trial court to confirm the awards. Ultimately, orders were entered confirming Mills' interim awards over Rich's objections." At the last hearing before him, Mills indicated that he intended that the final arbitration award would incorporate the interim awards without restating them and that the only issues remaining were parenting time and support modification. Thus, while not *all* of the issues were decided, those that were decided should stand. The matters at issue in the seven interim awards have been decided, and the only remaining issues pertain to child custody, support, and parenting time. Thus, the arbitrator rendered decisions on issues involved in this dispute before his death.

Significantly, the remaining issues regarding custody are within the particular purview of the trial court. As our Supreme Court set forth in *Harvey v Harvey*, 470 Mich 186; 680 NW2d 835 (2004), the trial court was the ultimate determiner of the children's best interests, regardless of the parties' agreement under the DRAA:

> [T]he deference due parties' negotiated agreements does not diminish the court's obligation to examine the best interest factors and make the child's best interests paramount. Nothing in the Child Custody Act gives parents or any other party the power to exclude the legislatively mandated "best interests" factors from the court's deliberations once a custody dispute reaches the court.
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> Furthermore, neither the Friend of the Court Act nor the domestic relations arbitration act relieves the circuit court of its duty to review a custody arrangement once the issue of a child's custody reaches the bench. The Friend of the Court Act states that the circuit court "shall" hold a hearing de novo to review a friend of the court recommendation if either party objects to that recommendation in writing within twenty-one days.
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> Likewise, [the DRAA] authorizes a circuit court to modify or vacate an arbitration award that is not in the best interests of the child. It requires the circuit

> court to review the arbitration award in accordance with the requirements of other relevant statutes, including the Child Custody Act. *The court retains authority over custody until the child reaches the age of majority.*
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> *Thus, 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.* As the Court of Appeals has previously explained, parties cannot by agreement usurp the court's authority to determine suitable provisions for the child's best interests. Permitting the parties, by stipulation, to limit the trial court's authority to review custody determinations would nullify the protections of the Child Custody Act and relieve the circuit court of its statutorily imposed responsibilities. [*Id.* at 193-194 (internal citations omitted, emphasis added).]

Where the interim orders have either been unchallenged or confirmed and where the trial court retained a de novo review of child custody issues, we conclude that the interim orders should stand and that the case should be remanded before the trial court to decide the remaining issues.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly