STATE OF MICHIGAN

COURT OF APPEALS

AIMEE LEIGH WATERMAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2016
v	No. 332537 Kent Circuit Court
DANNY LEE WATERMAN, Defendant-Appellant.	LC No. 15-011713-DM

Before: WILDER, P.J., and MURPHY and O'BRIEN, JJ.

PER CURIAM.

Defendant, Danny Lee Waterman, appeals by right the judgment of divorce that the trial court entered after defendant and plaintiff, Aimee Leigh Waterman, submitted their dispute to binding arbitration. On appeal, defendant argues that the trial court and arbitrator both erred in several respects and that the errors warrant revisiting the decisions concerning child custody, child support, and the award of property. Because we conclude that defendant has not established any errors warranting relief, we affirm.

I. BASIC FACTS

Plaintiff testified that she was 40 years of age at the time of the hearing. She met defendant, who was approximately two years older, when she managed a gym that his business partners operated. Defendant worked for General Motors as an engineer, but he also operated a business on the side involving gyms and martial arts. They married in May 2007 and had a daughter in January 2010.

The present divorce began in December 2014. The record shows that both parties were unable to work together to resolve their differences. Instead, the parties repeatedly involved their lawyers, the court, and occasionally other governmental employees, in every dispute, however minor it might be.

In July 2015, they stipulated to an order submitting their divorce to binding arbitration. The arbitrator held hearings over three days in August and November 2015. At the hearings, the parties testified about the nature of their relationship during the marriage, defendant's business, their assets, and events occurring after the start of the divorce proceedings. It was undisputed

that plaintiff did not bring significant financial assets to the marriage and that she did not work during the marriage.

The arbitrator entered an opinion and award concerning custody in September 2015. The arbitrator went through the best-interest factors stated in MCL 722.23, and determined that none of the factors favored either party. The arbitrator specifically rejected defendant's contention that his wife had a substance abuse problem, had inappropriate relationships with men that detrimentally affected their daughter, or had mental health issues. He explained that there was no credible evidence that she engaged in problematic behaviors that directly involved the child and no credible evidence that "either party's mental or physical health is at issue or will affect the best interests of [the child]."

The arbitrator also found that neither party was willing to facilitate and encourage a close and continuing relationship between their daughter and the other parent:

> Instead of focusing their attention on their minor daughter[,] . . . each of the parties are more interested in exerting power plays over the opposing party. This is evidenced by the referrals to [Child Protective Services]; the unilateral referral of [the child] to the YWCA counselling; the failure to make timely and appropriate child support payments and payoffs concerning the credit card; the failure of the parties to be able to work together in a civil manner with respect to the drop-off and pick-up of [the child]; the perennial involvement of law enforcement by both parties; and the various other actions of both parties concerning their failure to follow the present temporary order. . . .

The arbitrator felt that he had to protect the parties' daughter by awarding physical custody and arranging parenting time to minimize the contact between the parties. The arbitrator determined that it was in the child's best interests to award plaintiff primary physical custody and to give defendant substantial parenting time. The arbitrator also ordered defendant to pay $900 per month in child support and $600 per month in spousal support until further order. He refused defendant's request to order that plaintiff take drug and alcohol tests.

In December 2015, the arbitrator entered a final opinion and award. The arbitrator found that defendant paid off the marital home with his own money before the parties were married or shortly thereafter and that it was—with the exception of the $10,000 increase in value—his separate property. The arbitrator also found that defendant's Delphi Retirement Savings Program, the money in the Chase banking account, which had more than $33,000 in it, and the 1969 Camaro were all defendant's separate property.

The arbitrator found that the PNC bank account was marital property but that both parties had depleted it. After addressing both parties' withdrawals, the arbitrator found that defendant owed plaintiff $6,500 for her share of the account. The arbitrator also divided equally defendant's Magna 401(k) Account, which he found had about $80,000, along with several small savings accounts. He ordered defendant to sell the motor home and divide the proceeds or loss equally. The arbitrator found that defendant violated the arbitrator's orders when he used an insurance payment to pay off the Nissan. Accordingly, he awarded the Nissan to plaintiff without contribution to defendant.

After dividing the limited marital estate, the arbitrator noted that—because he had substantial separate property—defendant was leaving the marriage with more than a half-million dollars in assets. By contrast, plaintiff was leaving with an award that was less than $100,000, one-half of which was tied up in a retirement account. The arbitrator found that defendant demanded that plaintiff stop working and that they had both become accustomed to a lifestyle where they took trips whenever they wanted and where there was never an issue as to money. "So as to not force [plaintiff] into a lifestyle of a single mother who skimps by week to week on a high school degree and minimum wage," the arbitrator determined that it was appropriate to order defendant to pay $75,000 to plaintiff from his separate property.

The arbitrator considered at length whether it would be appropriate to order periodic spousal support. Under the totality of the circumstances, the arbitrator determined that defendant should pay $700 per month in modifiable spousal support to plaintiff for 30 months. The arbitrator also found that defendant repeatedly violated his orders during the arbitration process and that those violations caused plaintiff unnecessarily to incur attorney fees totaling $5,000. Although plaintiff asked the arbitrator to order defendant to pay the full $50,000 that she owed in attorney fees on the basis of need, the arbitrator found that many of plaintiff's fees were incurred because she was quick to bring every dispute—even baseless ones—to her lawyer. For that reason, he only ordered defendant to pay $15,000 of plaintiff's attorney fees on the basis of need.

Finally, the arbitrator awarded plaintiff certain personal property that she requested with the remainder going to defendant, ordered defendant to pay the remaining credit card debts, and awarded defendant his business, One Body Sport and Nutrition.

After plaintiff moved for clarification, the arbitrator amended the arbitration award. The arbitrator stated that the award required defendant to pay $11,500 in cash ($5,000 for the home's equity and $6,500 to equalize the marital bank account) to plaintiff in addition to the payment of $75,000 from his separate estate. He further ordered that "this cash payment" was due on or before February 13, 2016. The arbitrator also amended the award to provide that, if defendant did not timely pay the cash awards, plaintiff could file a lien against the marital home and charge 3% interest per year.

In March 2016, after a convoluted procedural process that involved dismissing the original case, reinstating the original temporary orders and awards, and ordering the arbitrator to revisit the award of child support, the trial court entered a judgment of divorce that for the most part followed the arbitrator's awards. The trial court also entered uniform child and spousal support orders.

Defendant now appeals in this Court.

II. CUSTODY HEARING

A. STANDARDS OF REVIEW

Defendant first argues that the trial court erred when it adopted the arbitrator's child custody determination; specifically, he argues that the trial court had to conduct its own best-

interest hearing or, at the very least, had an obligation to review de novo whether the arbitrator's child custody determination was in the child's best interests.

This Court must affirm "all orders and judgments" involving a child custody dispute unless the trial court "made findings of fact against the great weight of [the] evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. This Court reviews a trial court's discretionary rulings, such as to whom to award custody, for an abuse of discretion. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). A trial court abuses its discretion within the meaning of MCL 722.28, when the result is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Shulick v Richards*, 273 Mich App 320, 324; 729 NW2d 533 (2006) (quotation marks and citation omitted). Finally, this Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. ANALYSIS

The parties stipulated to binding arbitration of all the issues arising from their divorce—including child custody and parenting time. See MCL 600.5071. The arbitrator took testimony from the parties, and defendant had the opportunity to present evidence concerning the behaviors that he felt affected his wife's ability to parent. The record shows that the arbitrator considered the testimony and evidence and rejected as incredible defendant's evidence that plaintiff was an unfit parent or otherwise engaged in problematic behaviors that adversely affected the child's best interests. Indeed, he determined that it was in the child's best interests to award defendant and plaintiff joint legal custody, but to give plaintiff primary physical custody.

In order to promote informal dispute resolution, the Legislature limited a circuit court's authority to vacate or amend an arbitrator's award after binding arbitration. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991) (recognizing that courts have a limited power to modify, correct, or vacate an arbitration award and stating that the limits serve to preserve the efficiency and reliability of arbitration). The court may normally only vacate an arbitrator's award if the "award was procured by corruption, fraud, or undue means"; if there was "evident partiality," "corruption," or "misconduct prejudicing a party's rights"; if the "arbitrator exceeded his or her powers"; or if 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." MCL 600.5081(2). Nevertheless, when a trial court adjudicates a custody dispute as part of a divorce action, it has an obligation to "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" the Child Custody Act. MCL 722.24(1). And the parties to the custody dispute cannot "waive the authority that the Child Custody Act confers on the circuit court" by stipulating to arbitration. *Harvey v Harvey*, 470 Mich 186, 193-194; 680 NW2d 835 (2004). Accordingly, the trial court in this case had an obligation to determine whether the arbitrator's custody award was in the best interests of the parties' child. *Id.* at 192; see also *Bayati v Bayati*, 264 Mich App 595, 597; 691 NW2d 812 (2004) (stating that the trial court has an independent duty to determine what custodial placement

is in the children's best interests "no matter what type of alternate dispute resolution is used by the parties").

Although a trial court has an obligation to act in the child's best interests and retains the authority to vacate an arbitrator's award that does not comport with the child's best interests, see MCL 600.5080(1), the trial court does not have an obligation to conduct its own evidentiary hearing. "Our holding should not be interpreted, where the parties have agreed to a custody arrangement, to require the court to conduct a hearing or otherwise engage in intensive fact-finding." *Harvey*, 470 Mich at 192; see also *MacIntyre v MacIntyre*, 472 Mich 882; 693 NW2d 822 (2005) (stating that the trial court was not required to hold an evidentiary hearing on the child's best interests, as long as it was able to independently determine what custodial placement was in the child's best interests). Moreover, a trial court may not vacate or modify an arbitrator's custody determination unless it "finds that the award is adverse to the best interests of the child who is the subject of the award . . . ." MCL 600.5080(1). A trial court meets its obligation to review an arbitrator's custody award if it is able to "satisfy itself concerning the best interests of the children" on the record before it. *Harvey*, 470 Mich at 193; see also *Rivette v Rose-Molina*, 278 Mich App 327, 333; 750 NW2d 603 (2008) (stating that a trial court must either satisfy itself that the referee properly considered the best interests of the child or make its own findings regarding the best interests of the child).

The arbitrator made relevant findings for each of the best-interest factors in his opinion and award. The arbitrator also addressed and rejected defendant's contention that plaintiff had a problem with alcohol or drugs:

> [Defendant] has requested this Arbitrator to order that [plaintiff] submit to random alcohol and drug testing. Although the Arbitrator is concerned with certain situations and actions of [plaintiff] during her parenting time, there has been no credible evidence presented thus far to warrant random alcohol and drug testing. This is further underscored by the fact that [defendant] now claims that during the marriage [plaintiff] had a substance abuse and alcohol problem, yet agreed at the beginning of this case . . . to stipulate to [her] having primary physical custody of their daughter . . . . This agreement is completely inconsistent with a father who would believe that the mother of his daughter had a serious substance and alcohol problem.

Similarly, when reviewing the moral fitness of the parties under MCL 722.23(f), the arbitrator recognized that defendant had "made various accusations and arguments relative to infidelity and substance abuse," but he found that there was no "credible evidence that this type of behavior ever occurred directly involving [the child]." That is, the arbitrator found that plaintiff's choice in boyfriends and her use of alcohol did not adversely affect the child's best interests. For that reason, the arbitrator gave no preference to either parent on that factor.

The trial court presided over the parties' divorce—a divorce that was particularly contentious and fraught with accusations of impropriety on both sides—for months, and it was plainly aware of defendant's allegations concerning plaintiff's parental fitness. Defendant also reiterated his accusations and summarized his evidence in his brief in support of his motion to vacate the custody award. Defendant's evidence that plaintiff was abusing alcohol and drugs

was, however, not particularly persuasive. He primarily relied on his own testimony that his wife had abused alcohol during the marriage, which evidence the arbitrator discussed and rejected. He also relied, among other things, on evidence that plaintiff made cash withdrawals, phone calls and posts to her Facebook page late at night, got a tattoo, had bags of beer cans in the garage, and had a boyfriend who had past convictions for alcohol and drug related offenses. Given the record before it, the trial court could conclude that the arbitrator properly resolved this evidentiary dispute and could satisfy itself that the arbitrator's custody award was in the child's best interests. It did not have to conduct a separate hearing or independently assess the weight and credibility of the testimony and evidence. *Harvey*, 470 Mich at 192-193.

The record also shows that the trial court expressed satisfaction that the arbitrator's custody award was in the child's best interests. The court acknowledged that the arbitrator "applied and analyzed the best interest factors" stated in MCL 722.23, and then determined that the "award was entirely consistent with Michigan law." Because Michigan law requires custodial placements to be made on the basis of the best interests of the child, MCL 722.25(1), the trial court's statement that the arbitrator's award was "entirely consistent" with Michigan law constituted an acknowledgment that the award was in the child's best interests.

The trial court did not palpably abuse its discretion or otherwise err by confirming the arbitrator's custody award. *Harvey*, 470 Mich at 193; MCL 722.28.

III. MENTAL HEALTH RECORDS

A. STANDARDS OF REVIEW

Defendant next argues that both the trial court and arbitrator erred when determining that the custody arrangement was in the child's best interests. Because plaintiff failed to turn over her medical and mental health records, defendant maintains that the trial court and arbitrator should have precluded her "from asserting her physical and mental fitness in the Custody dispute."

This Court reviews a trial court's decision on a motion to compel discovery for an abuse of discretion. *Eyde v Eyde*, 172 Mich App 49, 54; 431 NW2d 459 (1988). This Court also reviews for an abuse of discretion a trial court's decision whether to impose a sanction for a discovery violation. *Local Area Watch v Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004). This Court reviews de novo as a question of law whether a party's failure to produce medical or mental health records automatically precludes a party from asserting his or her fitness as a parent or otherwise gives rise to an adverse presumption. See *Sinicropi v Mazurek*, 273 Mich App 149, 155; 729 NW2d 256 (2006).

B. ANALYSIS

Michigan generally follows a policy of open and broad discovery that entitles a party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense . . . ." MCR 2.302(B)(1); see also *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 260; 833 NW2d 331 (2013) (stating that "Michigan follows a policy of open and broad discovery").

However, a party is not entitled to obtain "medical information" about a party's "mental or physical condition" unless that party's mental or physical condition "is in controversy." MCR 2.314(A)(1); see also *LeGendre v Monroe Co*, 234 Mich App 708, 722-724; 600 NW2d 78 (1999). Typically, a party's mental condition is in controversy when that party has alleged that he or she suffered a specific psychiatric injury or condition, or otherwise suffered severe mental injury. *LeGendre*, 234 Mich App at 736.

In child custody cases, the trial court must consider the "mental and physical health of the parties involved" when determining a child's best interests. MCL 722.23(g). For that reason, a party's mental and physical health are relevant to the trial court's custody determination. This Court has also recognized that, at least in the context of a termination proceeding, a trial court may require the release of confidential records where the records are "necessary and material" to determining the best interests of a child. *In re Baby X*, 97 Mich App 111, 120; 293 NW2d 736 (1980) (quotation marks and citation omitted); see also *In re Brock*, 442 Mich 101, 119-120; 499 NW2d 752 (1993) (stating that the physician-patient privilege does not apply to a child protective proceeding that was initiated by a report made under the child protection law). Nevertheless, the Legislature did not intend to suspend the medical privilege in custody disputes by requiring trial courts to consider the mental and physical health of the parties. *Navarre v Navarre*, 191 Mich App 395, 398-400; 479 NW2d 357 (1991). If a party prevents the discovery of medical information relating to his or her mental or physical health by asserting his or her privilege, that party "may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition," unless the trial court orders otherwise. MCR 2.314(B)(2).

In this case, defendant served plaintiff with a request for the production of documents. He asked for her complete health records, including her "records relating to mental healthcare, communicable diseases, HIV or AIDS, and treatment for alcohol or drug abuse for [the] past 24 months." He did not allege or present any evidence tending to suggest that plaintiff suffered from a serious mental health condition. As such, he did not establish that her mental health was "in controversy" within the meaning of MCR 2.314(A)(1), or that her mental health records were otherwise necessary and material to a proper determination of custody. See *In re Baby X*, 97 Mich App at 120. Instead, it appears from the context of the discovery request that defendant merely speculated that his wife's medical records might reveal relevant information. Michigan's commitment to broad discovery does not encompass fishing expeditions premised on conjecture and speculation. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011).

Because defendant did not establish that he had the right to discover plaintiff's mental health records, he cannot show that her failure to comply with his request warranted sanction under MCR 2.314(B)(2). Further, he has cited no other authority establishing that plaintiff's failure to voluntarily turn over her mental health records warranted an adverse presumption or precluded her from presenting evidence and arguing that she could properly parent her child. And, in any event, it appears that the parties and arbitrator had an adequate opportunity to examine plaintiff's mental health for purposes of determining the child's best interests.

At the arbitration hearing, plaintiff admitted that she had been seeing a counselor to help her recover from the "emotional, mental, manipulating abuse that [she has] been going through

for the last ten years." She also testified that she had been prescribed Clonazepam for anxiety and Wellbutrin for depression. Further, there was no indication that plaintiff refused to answer questions about her mental health and, when her therapist testified concerning the child's therapy, plaintiff indicated that she would be willing to allow the therapist to testify about her own therapy, if the arbitrator wished it. Despite the opportunity, the arbitrator expressed no interest in questioning the witness about her work with plaintiff. There was also no evidence that plaintiff was seeing a therapist for a substance abuse problem, and the parties had an adequate opportunity to present evidence and address whether plaintiff in fact abused alcohol or drugs. On this record, it cannot be said that the trial court and arbitrator abused their discretion by failing to sanction plaintiff for not turning over her mental health records or erred by considering her testimony and evidence concerning her fitness to parent the child. *Local Area Watch*, 262 Mich App at 147.

To the extent that defendant contends that the trial court or arbitrator should have compelled plaintiff to turn over her mental health records, he did not preserve that issue by asking the trial court or arbitrator to do so. This Court may overlook a party's failure to properly preserve a claim of error under some circumstances. See *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). "But this Court will exercise its discretion to review such claims sparingly and only when exceptional circumstances warrant review." *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 346; 852 NW2d 180 (2014), vacated in part on other grounds 497 Mich 927 (2014).

Here, it is not clear that plaintiff's mental health was in controversy in the divorce and, accordingly, it is not clear that her mental health records were subject to discovery under MCR 2.314(A)(1). Even if her mental health records were subject to discovery, the trial court was not obligated to preclude her from presenting evidence on her mental health under MCR 2.314(B)(2). By failing to raise this issue below, defendant prevented the trial court or arbitrator from considering the issue, developing the facts, and offering a rationale for any decision. The record is, therefore, insufficiently developed to permit appellate review and we decline to review this issue further. *Smith*, 269 Mich App at 427.

IV. CHILD SUPPORT FORMULA

A. STANDARDS OF REVIEW

Defendant also argues that the arbitrator misapplied the Michigan Child Support Formula (MCSF). This Court reviews de novo the proper interpretation and application of the MCSF. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). This Court also reviews de novo as a question of law whether the arbitrator exceeded his authority by acting beyond the material terms of the arbitration contract or acted in contravention of controlling law. *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005).

B. ANALYSIS

The trial court held a hearing on defendant's motion to vacate the arbitrator's award in February 2016. At the hearing, the trial court confirmed the arbitrator's awards with the exception of the award of child support. The court determined that the award of child support

was on its face erroneous because it appeared that the arbitrator deviated from the child support formula without applying the law applicable to deviations. For that reason, the trial court vacated the award and ordered the arbitrator to recalculate the amount.

The arbitrator thereafter held a hearing, and the parties agreed that defendant's income should be determined from his tax returns, but the parties differed over whether his income was actually higher than stated on his tax return. Specifically, they presented opposing arguments concerning whether the deductions claimed on defendant's tax return were applicable when calculating child support.

In February 2016, the arbitrator issued a revised child support award. He found that defendant had an income of $91,486. The arbitrator explained that he determined defendant's income by taking his base salary of $60,000 and adding $20,000 in business profits and adding back $11,486 in depreciation that was not allowed under the MCSF. The arbitrator also imputed income to plaintiff on the basis of her ability to work.

After plaintiff's trial lawyer asked the arbitrator to reconsider the award, the arbitrator elected to revise the child support award in March 2016. He found that defendant's income was $125,000 rather than $91,486, and he determined that plaintiff should not have any income imputed to her. On appeal, defendant argues that this amended award did not comply with the MCSF because the arbitrator's finding that he had $125,000 in income was entirely speculative and he gave no reason for the decision to no longer impute income to plaintiff.

Under the MCSF, the arbitrator had the authority to impute income to plaintiff if it found that she was "voluntarily unemployed or underemployed, or has an unexercised ability to earn," 2013 MCSF 2.01(G), and that imputation was "appropriate in [the] particular case," 2013 MCSF 2.01(G)(4). When imputing income, the arbitrator had to consider a variety of factors that might affect the party's capacity to earn potential income and had to reduce the potential income by the additional costs associated with earning it. 2013 MCSF 2.01(G)(2) and (3). Taken together, the arbitrator had considerable discretion to determine whether and to what extent to impute income to plaintiff under the MCSF. He eventually determined that it would not be appropriate to do so, notwithstanding his earlier finding.

Judicial review of an arbitrator's award in a domestic relations proceeding is extremely limited. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). A trial court can only vacate or modify an arbitrator's award under certain rare circumstances, such as where the award was procured by fraud, the arbitrator was partial, the arbitrator engaged in misconduct, or where the arbitrator exceeded his or her powers. See MCL 600.5081(2). Here, defendant has only argued that the arbitrator exceeded his authority.

In order to establish that the arbitrator exceeded his authority, defendant must show—in relevant part—that the arbitrator acted contrary to controlling law. *Washington*, 283 Mich App at 672. In reviewing the claim, the trial court could not "review the arbitrator's findings of fact, and any error of law [had to] be discernible on the face of the award itself." *Id.* (citations omitted).

There was evidence that plaintiff had not worked for a long period of time and had a limited ability to earn income, which was—at least in part—caused by defendant's insistence that she cease working outside the home for the length of the marriage. There was also evidence that plaintiff would incur child care expenses if she were to return to work full-time. Given the evidence, it cannot be said that the arbitrator's decision amounted to error that was discernable on the face of the award itself. *Id.*

The same is true of the arbitrator's finding that defendant had an actual income of $125,000. The MCSF broadly defines income to mean "all income minus the deductions and adjustments permitted" in the manual. 2013 MCSF 2.01(A). For business owners, the manual warns that the deductions permitted under the tax code might not be relevant when considering the income that the parent actually has available to pay child support. 2013 MCSF 2.01(E)(4)(e). Indeed, the MCSF specifically excludes depreciation as an allowable expense when calculating income. See 2013 MCSF 2.01(E)(4)(e)(ii). Thus, the arbitrator had to carefully scrutinize defendant's tax return and determine whether his deductions should be included in his income; the arbitrator could not apply a deduction to reduce defendant's income for purposes of calculating child support unless it found that he actually incurred the expense and the expense was "consistent with the nature of the business" to which it applied. *Borowsky*, 273 Mich App at 676.

Although defendant argues on appeal that the arbitrator erred when he imputed income that was more than double what he reported on his tax return, the arbitrator did not state that he was imputing income to defendant. Instead, he found that defendant had an income of $125,000. Moreover, there was undisputed evidence that defendant's actual income was substantially more than the $60,000 salary listed on his tax form. Defendant's 2014 tax forms showed that he had flow-through income of $20,111 and a depreciation expense of $11,489 that was not permitted under the MCSF. As such, his income was at least $91,600 for purposes of the MCSF.

Defendant's tax forms also showed that he took substantial deductions that were difficult to reconcile with the nature of his business. He deducted $60,055 in rent payments, $5,303 in employee benefit programs, and $38,322 for other deductions. If the arbitrator found that these deductions were inconsistent with the nature of his consulting business, it would have to disallow them for purposes of calculating defendant's income. *Borowsky*, 273 Mich App at 676. Examining the testimony and documentary evidence, the arbitrator could have increased defendant's income by substantially more than he did. Because the arbitrator's award was not on its face inconsistent with Michigan law, the trial court did not err when it upheld it. *Washington*, 283 Mich App at 672.

V. PAYMENT FROM SEPARATE PROPERTY

A. STANDARDS OF REVIEW

Defendant next argues that the arbitrator erred when it ordered him to pay $75,000 out of his separate property. When examining a dispositional ruling in a divorce case, this Court reviews the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). However, this Court must affirm the trial court's dispositional ruling unless this Court "is left with the firm conviction that the division was inequitable." *Id.* at 152. This

Court also reviews de novo as a question of law whether the arbitrator exceeded his authority or acted in contravention of controlling law. *Miller*, 474 Mich at 30.

B. ANALYSIS

During a divorce, Michigan courts generally divide only the marital estate and may not invade one spouse's separate property. *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). However, the Legislature has authorized courts to invade a spouse's separate assets when the property awarded to one spouse is "insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party . . . ." MCL 552.23(1).[1] And the arbitrator found that it would be equitable under the circumstances to order defendant to pay $75,000 out of his separate property.

Although the arbitrator did not go into detail, he expressed several grounds in support of his decision. He noted that during the marriage the parties lived a certain lifestyle—one where they could take trips whenever they wished and where they were never without cash. He further found that the division of the marital estate was such that plaintiff would be reduced to the "lifestyle of a single mother who skimps by week to week . . . on minimum wage." Plaintiff's inability to fund the same lifestyle, the arbitrator found, was in part due to defendant's insistence that she stop working. The arbitrator also found that the majority of the marital estate was tied up in assets that were "not liquid." Stated another way, the arbitrator found that defendant had sufficient assets and income to maintain the lifestyle that he had become accustomed to during the marriage, but plaintiff's assets and income would reduce her to living the life of a minimum-wage worker. For these reasons, the arbitrator determined that it would be equitable to order defendant to transfer a portion of his separate estate to plaintiff in order to enable her to live a lifestyle closer to what she had become accustomed during the marriage.

The trial court could not vacate the arbitrator's award unless that decision was erroneous on its face. *Washington*, 283 Mich App at 672. Because MCL 552.23(1) specifically allows such an invasion of separate property and there was evidentiary support for the decision to order the payment, the trial court did not err when it refused to disturb the arbitrator's award.

Citing *Stoudemire v Stoudemire*, 248 Mich App 325, 342; 639 NW2d 274 (2001), defendant nevertheless argues that it is contrary to Michigan law to invade a spouse's separate property when an order of spousal support would be sufficient. The Court in *Stoudemire* held that the trial court did not err when it ordered the husband to pay spousal support to the wife in order to enable the wife to meet her expenses while she transitioned into the workforce. *Id.* at 341-342. It did not hold that a trial court must order spousal support in lieu of invading separate property. In addition, the Legislature did not limit the award of support in this way. Instead, trial courts—and arbitrators—may order support "in gross or otherwise as the court considers

[1] The arbitrator cited MCL 552.23(1) and MCL 552.401, but it is evident that MCL 552.401 does not apply to the facts of this case.

just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case." MCL 552.23(1).

Here, there was evidence that plaintiff had limited earning potential and that she would need significant support to enable her to maintain her lifestyle and provide her daughter with the same lifestyle that defendant could afford when the child stays with him. There was also evidence that plaintiff would need cash in order to establish a suitable new residence. Finally, as the arbitrator noted and the record plainly shows, defendant—for whatever reason—repeatedly failed to make the payments that he was required to make. A party's failure to timely make periodic payments may be grounds for ordering the invasion of that party's separate property. See *McClung v McClung*, 40 Mich 493, 498-499 (1879) (holding that the trial court did not err when it ordered a payment in gross because the evidence showed that the husband would do everything in his power to avoid regular payment).

The arbitrator could reasonably conclude that equity demanded that defendant pay both a lump sum from his separate property and periodic payments of spousal support in order to ensure that plaintiff had suitable support and maintenance. Consequently, the trial court did not err when it refused to vacate or modify the arbitrator's award.

VI. EXPANDING THE PROPERTY AWARD

A. STANDARD OF REVIEW

Defendant finally argues that the trial court improperly amended the arbitrator's award by allowing plaintiff to stay in the marital home until two weeks after he paid her the $75,000 required under the award. He maintains that the trial court's attempt to enforce the payment provisions of the award in this way materially altered the terms of the award. This Court reviews de novo whether the trial court had the authority to vacate or modify an arbitrator's award. *Washington*, 283 Mich App at 671.

B. ANALYSIS

The arbitrator found that the marital home was defendant's separate property and awarded it to him. The arbitrator, however, awarded plaintiff possession of the home until February 13, 2016. The arbitrator later amended the award to clarify that defendant also had to pay $11,500 to plaintiff to cover her share of the marital estate and that the sum was due on February 13, 2016. He further provided that, if defendant did not pay the $75,000 that he was required to pay by January 15, 2016, plaintiff would be entitled to 3% interest on the unpaid balance and could secure the balance with a lien against the marital home.

Defendant failed to pay either sum by the stated deadlines, and the trial court repeatedly revised the deadlines to give him more time to pay, even though it found that he had the ability to pay. In the judgment of divorce, the trial court recognized that plaintiff was to vacate the marital home by February 13, 2016, but provided that she was to move out by that date or by a "later time set by court order." The trial court entered an order implementing the judgment of divorce on April 13, 2016. It ordered defendant to pay plaintiff the $75,000 award from his separate

property by April 20, 2016, and stated that plaintiff would have 14 days from the date of his payment to vacate the marital home.

The trial court's judgment and order arguably amounted to an improper modification of the arbitrator's award. See *Washington*, 283 Mich App at 671-672. But even if it were error, defendant has not shown that the error warrants relief.

On appeal, defendant asks this Court to reverse the trial court's decision to allow plaintiff to remain in the home until 14 days after he makes the required payment. He further asks that this Court "permit the payment of remaining sums over time as necessary at 3% interest per annum." However, he also states on appeal that he "tendered" the $75,000 payment on April 14, 2016, and the record shows that plaintiff has vacated the marital home. Thus, even if we were inclined to grant his request, the issue is moot because the requested relief would have no practical legal effect. See *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Because this issue is moot, we decline to review it.

Defendant has not established that there were any errors warranting relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ William B. Murphy
/s/ Colleen A. O'Brien