STATE OF MICHIGAN

COURT OF APPEALS

DEBRA LEA MILLER,

Plaintiff-Appellant,

v

JOHN THOMAS MILLER,

Defendant-Appellee.

FOR PUBLICATION
November 30, 2004
9:00 a.m.

No. 242470
Wayne Circuit Court
LC No. 01-102843-DM

Before: Smolenski, P.J., and Saad and Kelly, JJ.

SAAD, J.

I. NATURE OF THE CASE

After unsuccessful efforts to settle this divorce case, the trial court entered a stipulated order for binding arbitration under Michigan's Domestic Relations Arbitration Act ("DRAA").[1] Pursuant to the express terms of the trial court's order, the parties understood that this litigation would be arbitrated pursuant to the DRAA. Yet, rather than conducting a hearing, as that term is used by our Legislature,[2] the arbitrator instead attempted to settle the matter by mediation and

[1] 2000 PA 419, effective March 28, 2001; MCL 600.5070, *et seq*.

[2] Black's Law Dictionary (4th ed. 1968), defines a hearing as a "[p]roceeding of relative formality [. . .] with definite issues of fact or law to be tried [. . .] much the same as a trial." In its popular sense, the term applies to any formal proceeding before a judge or other magistrate exercising a judicial function." *In re Marriage of Fine*, 116 Ill App 3d 875, 877; 452 NE2d 691 (1983) (internal citation omitted).

"An arbitration implies a difference, a dispute, and involves, ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference." *Omaha v Omaha Water co*, 218 US 180, 194; 30 S Ct 615; 54 L Ed 991 (1910).

The Random House Unabridged Dictionary (2nd Ed. 1998) defines "hearing" as "an instance or a session in which testimony and arguments are presented, esp. before an official, as a judge in a lawsuit."

In the context of parole violation hearings, this Court stated that "[t]he present statute does not spell out the right of the parties to produce witnesses and proofs, but it does provide for a hearing. It is the opinion of this Court that a hearing necessarily comprehends the right of the

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ultimately issued what the arbitrator characterized as an arbitral award despite plaintiff's unsatisfied request for an arbitral hearing. The trial court affirmed the "arbitral award" over plaintiff's objection that she never was afforded a hearing guaranteed under the DRAA.

Accordingly, the sole issue on appeal is whether a domestic relations litigant is bound by an "arbitral award" if the arbitrator does not conduct a hearing, but instead meets with the parties, *ex parte*, in an effort to settle the case. Put another way, the question is whether the trial court should have vacated the arbitral award because the arbitrator failed to follow the unambiguous provisions of the DRAA.

Under the clear, mandatory language of the DRAA, litigants who give up the numerous rights afforded by general litigation in circuit court and instead choose binding arbitration to adjudicate their domestic relations claims are afforded basic, protective rights, the most important of which is a full and fair hearing. Here, this essential statutory right was neither waived nor provided and therefore, we reverse the trial court's erroneous refusal to set aside the arbitral award.

II. FACTS AND PROCEEDINGS

Because our opinion deals only with the denial of plaintiff's statutory right to a hearing under the DRAA, we will forego the usual recitation of facts regarding this divorce. Rather, the relevant facts here deal exclusively with the nature of the proceedings and the arbitration.

Plaintiff filed for divorce in January 2001, and the court attempted an *in camera* settlement conference with the parties on October 10, 2001. The court held a further settlement conference on October 26, 2001, and scheduled another settlement conference for November 30, 2001, and informed the parties that if they could not reach a settlement by this date, the matter would be referred to arbitration. On December 4, 2001, the trial court entered a stipulated order for binding arbitration of all issues of the divorce.[3]

The "arbitration"[4] took place on February 20, 2002. The arbitrator separated the parties into two separate rooms and attempted to resolve certain contentious issues between the parties.

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accused to produce witnesses and proofs and to meet the witnesses who are produced against him. *We are of the opinion that any proceeding which does not provide for the production of witnesses and the introduction of evidence would not be a hearing at all.*" *Feazel v Dept of Corrections*, 31 Mich App 425, 431; 188 NW2d 59 (1971) (emphasis added).

[3] The trial court's order stated, in relevant part, "[b]y approval of this Order for entry by the parties and their respective attorneys, the Court, pursuant to the provisions of [the DRAA], the Court [sic] refers all issues in this civil action to binding arbitration."

[4] We use the term "arbitration" in quotes here because, as we make clear in this Opinion, we do not regard the arbitrator's efforts to settle this case to be the equivalent of arbitration. We find it difficult to find the right phraseology to describe what the arbitrator did here. Arbitration was ordered, but no arbitration took place in the traditional sense of the word because no hearing took place, no witnesses were sworn in, and no testimony was taken. Plaintiff sought additional "sessions" because she wanted the chance to present her case in the manner commonly defined as an arbitration. The arbitrator's efforts at settlement mimicked the procedure known as

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According to plaintiff's testimony, the arbitrator explained that if the "arbitration" was not finished on February 20, he would use the initial session as a fact-finding or mediation session and, if this proved unsuccessful, he would schedule future dates for an arbitral hearing. According to plaintiff, the arbitrator said that if the initial procedure proved ineffective, he would proceed with formal arbitration with the usual introduction of testimony and documents through witnesses. At some point in the proceedings, the arbitrator advised plaintiff and her attorney that defendant had to leave to return to Colorado and that the arbitrator would attempt to resolve the matter without any further hearing dates. In response, plaintiff says that she requested additional arbitration sessions so that she could present her case, her witnesses and cross-examine defendant. Despite this request, the arbitrator did not schedule an arbitral hearing. Instead, on April 1, 2002, the arbitrator issued a proposed award without scheduling any further sessions, without providing the parties the opportunity for direct or cross-examination or the introduction of exhibits. Upon receipt of the proposed award, plaintiff's counsel again requested additional hearing dates in order to present plaintiff's case. Among many other substantive complaints that plaintiff had regarding the proposed award, plaintiff vigorously complained that the arbitrator totally failed to comply with the DRAA by his failure to hold a hearing. On April 10, 2002, the arbitrator presented a final, binding arbitration award which the arbitrator said reflected many of the substantive objections outlined by plaintiff, except plaintiff was never afforded her statutory right to a hearing.

On April 19, 2002, plaintiff filed a motion to set aside the arbitral award and to appoint a new arbitrator. Plaintiff asserted, correctly, that the arbitrator failed to meet with the parties[5] in the manner and for the purpose specified by the DRAA, and failed to conduct a hearing as required by the Act.[6] Plaintiff also maintained, again correctly, that the matter proceeded to arbitration without the statutorily mandated Stipulation Agreement for Binding Arbitration. MCL 600.5071. On May 24, 2002, the trial court heard arguments and rejected plaintiff's objections and entered its Judgment of Divorce that incorporated the arbitration award, and on June 21, 2002, entered its order that denied plaintiff's motion to set aside the arbitral award. This appeal followed and we reverse the trial court's erroneous denial of plaintiff's motion to set aside the award for the reasons stated below.

III. ANALYSIS

For many years, Michigan's statutes and court rules provided rules for arbitration in general,[7] but not specifically for domestic relations matters. And, although our Court approved

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mediation, but he nonetheless characterized the "proceeding" in his "award" as a "hearing." It is little wonder that plaintiff, who simply asked to present her case, found it difficult to define, but nonetheless understandably objected to, what transpired on the day she expected to present her case to an arbitrator.

[5] MCL 600.5076.

[6] MCL 600.5074(1) ("An arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration . . . .") (emphasis added).

[7] See MCL 600.5001, *et seq.* (Michigan's arbitration statute); MCR 3.602 (court rule governing arbitration).

the use of arbitration in domestic relations matters, our case law did not provide guidelines for these arbitrations. See *Dick v Dick*, 210 Mich App 576; 534 NW2d 185 (1995).

Our Legislature noted the absence of procedures and safeguards for fair arbitral hearings in domestic relations matters, and in order to encourage domestic relations litigants to give up their litigation rights and choose binding arbitration, responded by enacting the DRAA.[8]

Requirements for Binding Arbitration Under the DRAA

The DRAA provides numerous "due process" or procedural protections to a domestic relations party who agrees to binding arbitration. The DRAA provides that the parties who agree to binding arbitration should do so "by a signed agreement that specifically provides for an award" regarding delineated issues. MCL 600.5071. Further, the DRAA specifically prohibits a court from ordering a domestic relations party to participate in arbitration "unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language" of the salient features of arbitration. MCL 600.5072.[9]

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[8] "[T]he RJA does not specifically address arbitration in domestic relations matters and so provides no guidelines or standards for such arbitration. Michigan court rule [3.216(A)(3)] allows a court to order arbitration, upon stipulation of the parties, but also doesn't provide standards or guidelines for such arbitration. . . .

Because of crowded court dockets and the fact that criminal cases must take precedence over other matters, the parties (and their families) in a domestic relations dispute may find themselves waiting a long time before they have a hearing to resolve the dispute and as a result often will resort to alternative dispute resolution methods. . . .

The bills would address all of these problems. Standards and guidelines would provide uniformity to the process and safeguards that are essential to fair hearings." House Legislative Analysis Section analysis of the DRAA, at 5.

[9] MCL 600.5072(1) provides:

> (1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:
> (a) Arbitration is voluntary.
> (b) Arbitration is binding and the right of appeal is limited.
> (c) Arbitration is not recommended for cases involving domestic violence.
> (d) Arbitration may not be appropriate in all cases.
> (e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.
> (f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

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Importantly, subsection (1)(e) of 5072 provides that, "The arbitrator's powers and duties are delineated in a *written arbitration agreement* that all parties must sign before arbitration commences." MCL 600.5072(1)(e) (emphasis added). Section 5073 provides for the qualifications and appointment of an arbitrator. MCL 600.5073.

Most importantly to our holding, in language that specifies that a domestic relations litigant who gives up her right to litigate her matter in court shall have a full and fair arbitral hearing, the DRAA unambiguously provides that:

> An arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement. [MCL 600.5074(1) (emphasis added).]

With respect to the defendant's contention and the trial court's erroneous holding that *ex parte* meetings with the parties satisfy this statutory mandate for "hearing," we hold that the DRAA is clear and unambiguous in requiring a hearing. *Id.* A party who gives up her right to litigate her case in court, including substantial discovery and appellate rights, in exchange for binding arbitration may not be deprived of her right to present her case before a neutral arbitrator. To underscore this clear mandate, Section 5076 of the DRAA requires the arbitrator to meet with the parties to discuss the scope of the issues, the date, time and place of the *hearing*, including witnesses and experts who may testify, and a schedule for exchange of expert reports or summary of expert testimony.[10] By this provision, our Legislature clearly expressed its intent

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> (g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.
> (h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.
> (i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration.

[10] MCL 600.5076(1) provides (emphasis added):

> (1) As soon as practicable after the appointment of the arbitrator, the parties and attorneys shall meet with the arbitrator to consider all of the following:
> (a) Scope of the issues submitted.
> (b) Date, time, and *place of the hearing*.
> (c) *Witnesses*, including experts, *who may testify*.
> (d) Schedule for exchange of expert reports or summary of expert testimony.
> (e) Subject to subsection (2), exhibits, documents, or other information each party considers applicable and material to the case and a schedule for production or exchange of the information. If a party knew or reasonably should have known about the existence of information the party is required to produce, that party waives objection to producing that information if the party does not object before the hearing.

that the arbitrator and the parties would meet and prepare thoroughly for a full and fair hearing. Indeed, MCL 600.5076 serves as the functional equivalent of a "pretrial conference" so the parties can plan to present their case at the arbitral hearing. For us to hold that the DRAA requires this preparatory meeting, but not the hearing itself, would do an injustice to the legislative scheme and the parties. Further, in reviewing the grounds for vacation of an arbitral award under the DRAA, we note, importantly, that the statute requires a court to vacate an award when:

> the arbitrator refused to postpone the *hearing* on a showing of sufficient cause [or] refused to hear evidence material to the controversy or otherwise *conducted the hearing* to prejudice substantially a party's right.[[11]]

In the face of this strong legislative direction to our judiciary to ensure fair hearings for domestic relations parties who choose arbitration, a trial court simply must overturn any award where the arbitrator has denied either party his or her statutory right to a hearing. It would be contrary to the letter and spirit of the DRAA to mandate that our courts vacate arbitral awards where arbitrators unfairly denied parties' requests for adjournment, unfairly refused to hear evidence, or unfairly conducted the hearing, but to nonetheless affirm awards where parties were denied their right to any hearing whatsoever. Indeed, to do so would be contrary to the plain language of the statute and contrary to the interests of parties in domestic relations litigation.

In order to keep faith with our Legislature's intent, courts and arbitrators must proceed in full compliance with the DRAA.[12] Efforts at settlement, mediation, or "shuttle diplomacy" simply will not satisfy the plain language of the statute.[13] Under the DRAA, nothing short of a

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[11] MCL 600.5081(2)(d) (emphasis added).

[12] Here, the court did not require the statutory Stipulation to Binding Arbitration Agreement. Instead, the court entered an order that simply quoted from the statute and ruled that this was sufficient. The DRAA requires that the parties sign an agreement as a protection to the parties and a trial court must adhere to this provision. Because our holding addresses the need for a hearing, we need not address whether the lack of this stipulation requires reversal or vacation of the arbitral award, and we decline to address that question here. However, we note that this Court has held, in another context, that a stipulated order that does not conform to the DRAA's requirements is void. *Harvey v Harvey*, 257 Mich App 278, 291; 668 NW2d 187 (2003).

[13] To hold otherwise here would be tantamount to conceding that a "hearing" can be defined by any trial court or arbitrator as something other than a hearing – a word that has clear meaning must be given its clear meaning instead of whatever meaning one chooses to give it:

> "I don't know what you mean by 'glory,'" Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't -- till I tell you. I meant 'there's a nice knock-down argument for you!'"
>
> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
>
> "When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

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full and fair hearing will suffice.[14] To satisfy this express language,[15] and the purpose of the DRAA, absent a knowing and voluntary waiver of the right to a hearing, our courts and arbitrators must ensure full compliance with the protections of the DRAA.[16]

IV. RESPONSE TO THE DISSENT

The fundamental difference between our interpretation of the DRAA and the dissent's is the dissent's willingness, but our refusal, to accept de facto mediation as satisfying the DRAA's requirement of a fair hearing. Here, the arbitrator in essence conducted what is commonly

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"The question is," said Alice, "whether you CAN make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master - - that's all." [Carroll, *Through the Looking Glass*, Ch. VI, "Humpty Dumpy."]

[14] Our courts have historically required a full and fair hearing as a precondition to binding arbitration. See *Renny v Port Huron Hosp*, 427 Mich 415, 437; 398 NW2d 327 (1986) (arbitration of employment contract claims); and *Rembert v Ryan's Family Steakhouse, Inc*, 235 Mich App 118, 161; 596 NW2d 208 (1999) (arbitration of statutory employment discrimination claims).

[15] "An arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement." MCL 600.5074(1) (emphasis added).

[16] If a domestic relations party is to be held to have waived any of her enumerated statutory rights and protections afforded to her by our Legislature, the waiver must be clear, knowing and voluntary. This Court has noted in other contexts, with respect to domestic relations, that parties may waive statutory rights, but any waiver should be clear and unambiguous. *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000). Here, there is no evidence of plaintiff's knowing and voluntary waiver of her rights to a full and fair hearing.

The dissent cannot seriously contend that plaintiff clearly and voluntarily waived her right to a hearing: Indeed, plaintiff and her counsel repeatedly asked for a hearing and have contended at every step of the proceeding that they desired a hearing in the sense that this term is commonly understood—the right to present evidence and to challenge the evidence presented by the other side.

At a hearing on June 28, 2002, plaintiff's counsel stated, "As to Mr. Tucker [the arbitrator] in our response, one of the things we continually urged Mr. Tucker to do was to hold arbitration hearings where we could put people under oath and present evidence. He was adamant, would not allow my client to testify, would not allow me to cross examine the defendant, would not allow me to call witnesses." June 28, 2002, Motion Hearing Transcript, p 20.

At an earlier hearing, plaintiff's counsel told the trial court that "Mr. Tucker spent very little time with us that day. He told my client and I we would be coming back to future sessions. In the afternoon he said Mr. Miller had to go back to Colorado that day, so we wouldn't be able to continue the next day. When I left that day, I was to contact him in two or three days in an attempt to schedule continued hearings. In summary, he didn't comply with either the order of the Court as arbitration or the statute." May 24, 2002, Motion Hearing Transcript, p 5.

understood as domestic relations mediation under MCR 3.216 by placing the parties into separate rooms and attempting to settle the case through this "shuttle diplomacy." Of course, in mediation, the parties are not bound by this process and thus our Supreme Court does not require a hearing under MCR 3.216. That is, if the mediator proposes a settlement, the parties may reject the mediator's proposed settlement agreement. This graphically underscores the difference between mediation, which occurred here, and binding arbitration, where the parties' lives may be altered substantially and forever because of the binding nature of an arbitral award, and the limited right of appeal from arbitral awards. Furthermore, recognizing that important rights are determined with finality in arbitrations, our courts have held[17] that a basic prerequisite to a binding arbitral award is a full and fair hearing.

The dissent misapprehends the Legislature's intent and ignores the plain language of the statute and further, misapprehends and misstates our very precise holding. We need not, and thus do not, as the Legislature did not, define with particularity the precise dimensions of a full and fair hearing. The Legislature may, of course, use terms of art such as "hearing," "witness" and "testify," with the knowledge that decades or indeed centuries of legal practice give meaning to these words which will be honored by the judiciary.[18] Indeed, our Legislature need not define every word used in a statute that addresses areas of professional practice or a learned profession. Nor do we, nor should we, seek here to define with precision and finality what each term, such as "hearing," means. Yet, neither are we limited from making a prudential judgment that what occurred here fails, woefully, to satisfy even the most minimal concept of a hearing. Indeed, when faced with these facts, it is incumbent upon us to rule that something which fails to even remotely resemble a hearing is clearly less than what the Legislature contemplated when it called for arbitral hearings as a predicate to binding arbitral awards. It is keeping faith with the legislative intent, not "paternalism,"[19] to hold as we do that the Legislature would not tolerate that a domestic relations litigant be bound by an arbitral award without the basic elementary right of having presented her case and having contested her opponent's case in a hearing. Secret meetings behind closed doors, followed by binding "arbitral awards," are patently unacceptable. Were we to hold, as defendant and the dissent urges, that what transpired here satisfies the legislative mandate for a full and fair hearing, we would repudiate the numerous provisions of the DRAA that the Legislature promulgated as "safeguards that are essentials to fair hearings."[20]

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[17] See *Renny*, *supra*; *Rembert*, *supra*.

[18] As a guideline to statutory interpretation, the Supreme Court has stated:

"Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning of its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *INS v St Cyr*, 533 US 289, 313; 121 S Ct 2271; 150 L Ed 2d 347 (2001), quoting *Morissette v United States*, 342 US 246, 263; 96 L Ed 288, 72 S Ct 240 (1952).

[19] *Miller v Miller*, ___ Mich App ___ , ___; ___ NW2d ___ (2004) (Opinion by Kelly, J., dissenting).

[20] "[T]he RJA does not specifically address arbitration in domestic relations matters and so

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And, were we to adopt the view of the dissent, litigants would be understandably reluctant to place their fate in the hands of a process that afforded little or no right to be heard in any meaningful sense. As we read the statute, what transpired here falls short of what our Legislature intended and what the plain language of the statute requires. It is not a process that we should or will endorse.

V. CONCLUSION

The DRAA's purpose of encouraging litigants to opt for binding arbitration and forgo litigation to reduce dockets and provide expeditious, inexpensive and fair alternatives to protracted litigation in domestic relations matters would be severely undermined, as would confidence in the statutory scheme, were we to permit an arbitrator, as here, to arbitrarily substitute *ex parte* meetings with the parties for the statutory guarantee of a full and fair hearing.

Accordingly, we hold that the DRAA requires, among other important protections afforded to a domestic relations party, a full and fair hearing before a neutral arbitrator. Therefore, we reverse the trial court's Judgment of Divorce that incorporated the arbitration award, we vacate the arbitral award, and we remand to the trial court for proceedings consistent with our opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski

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provides no guidelines or standards for such arbitration. Michigan court rule [3.216(A)(3)] allows a court to order arbitration, upon stipulation of the parties, but also doesn't provide standards or guidelines for such arbitration. . . .

Because of crowded court dockets and the fact that criminal cases must take precedence over other matters, the parties (and their families) in a domestic relations dispute may find themselves waiting a long time before they have a hearing to resolve the dispute and as a result often will resort to alternative dispute resolution methods. . . .

The bills would address all of these problems. Standards and guidelines would provide uniformity to the process and safeguards that are essential to fair hearings." House Legislative Analysis Section analysis, *supra* at 5.

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Before: Smolenski, P.J., and Saad and Kelly, JJ.

KELLY, J. *(Dissenting.)*

I respectfully dissent from the majority's decision to reverse the trial court's order denying plaintiff's motion to vacate the arbitration award. I believe that the public policy that the majority unwisely attempts to create threatens to disrupt the arbitration process by causing instability in this area of the law and threatening the finality of arbitration awards. The decision departs not only from the plain language of the domestic relations arbitration act (DRAA) but also from existing precedent. The protection that the Legislature and our courts have afforded is the protection of the parties' agreement to arbitrate without unwarranted intrusion by the courts. The very reason appellate review of arbitration is limited is to afford this protection. I would affirm.

I. Standard of Review

"We review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award." *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). Our review of a binding arbitration award is "strictly limited by statue and court rule." *Krist v Krist,* 246 Mich App 59, 66; 631 NW2d 53 (2001). Because the arbitration order was entered after the effective date of 2000 PA 319, this case is governed by the specific statutory scheme set forth in the DRAA. *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). The primary goal of statutory interpretation is to give effect to the intent of the Legislature by examining the plain language of the statute. *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999).

II. The Plain Language of the DRAA

I disagree with the majority's conclusion that the arbitrator failed to comply with the requirements of the DRAA, MCL 600.5070 *et seq*. The majority reads into the DRAA a

requirement that does not exist and precludes an arbitration procedure that the DRAA does not preclude.

The majority correctly points out that the DRAA sets forth several specific requirements for arbitration. For example, the DRAA requires a signed agreement by the parties, MCL 600.5071, that delineates the arbitrator's powers and duties, MCL 600.5072. The DRAA also requires that the arbitrator "hear and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement." MCL 600.5074(1). But the DRAA does not define hearing, nor does it set forth any specific requirements for a hearing. Notably, the majority states that "hearing" is a word "that has a clear meaning and must be given its clear meaning," but the majority opinion does not indicate what a hearing *is*, only what it *is not*. In a footnote, the majority refers to the dictionary definition of "hearing" and concludes that what took place in this case did not constitute was is "commonly understood" as a hearing. This provides little guidance for future judicial review and impermissibly imposes requirements beyond those imposed by the DRAA.

Pursuant to the majority opinion, parties may now appeal arbitration awards on the nebulous grounds that the procedure leading to the arbitration award was not a "hearing." But when these arbitration awards are appealed, there will likely be no record for this court to review. Except in limited circumstances not applicable here, the DRAA *prohibits* making a record of arbitration hearings:

> (1) Except as provided by this section, court rule, or the arbitration agreement, *a record shall not be made of an arbitration hearing under this chapter*. If a record is not required, an arbitrator may make a record to be used only by the arbitrator to aid in reaching the decision. The parties may provide in the arbitration agreement that a record be made of those portions of a hearing related to 1 or more issues subject to arbitration. [MCL 600.5077 (emphasis added).]

In the best-case scenario, the parties will generally agree about how the arbitration took place. In the worst-case scenario, the parties will disagree. How then will a court proceed to review the arbitration proceedings to determine if they constituted a "hearing" in accord with the majority's opinion, in which "hearing" is left undefined? Clearly if the Legislature had contemplated judicial review to determine whether arbitration hearings comported with some formulaic procedure, it would have *required* rather than *prohibited* recording arbitration hearings.

In addition to leaving hearing undefined and prohibiting making a record of arbitration hearings, the Legislature has strictly limited judicial review of arbitration awards. MCL 600.5081 provides:

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

Accordingly, the DRAA permits vacation or modification only if the arbitrator conducts a hearing in a prejudicial, corrupt, or fraudulent manner or if the arbitrator exceeds his or her powers, i.e., those powers which derive from the parties' agreement to arbitrate.

The DRAA specifies that the arbitrator's power is directly conferred by the parties' agreement:

(1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:

* * *

(e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

(f) During arbitration, the arbitrator has the power to decide each issue assigned to the arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues. [MCL 600.5072.]

Our courts have also recognized that "Arbitrators derive their authority to act from the parties' arbitration agreement." *Krist, supra* at 66, citing *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 495; 475 NW2d 704 (1991). Arbitration is generally recognized as a matter of contract. *Rowry v University of Michigan*, 441 Mich 1, 10; 490 NW2d 305 (1992). Arbitration agreements are generally interpreted in the same manner as ordinary contracts; they must be enforced according to their terms so as to effectuate the intentions of the parties. *Amtower v William C Roney & Co*, 232 Mich App 226, 233-234; 590 NW2d 580 (1998). Nothing in the plain language of the DRAA preludes parties from agreeing to a particular format of the arbitration. By precluding a divorcing couple from agreeing to an arbitration procedure, the majority errs in limiting the parties' ability to contract.

This directly contravenes the plain language of the DRAA, the effect of which is to afford a degree of self-determination, which lessens governmental intrusion into their private life, avoids adversarial posturing, and reduces personal antagonisms. Not only does the DRAA encourage the parties to enter a contract to arbitrate, it also facilitates further agreement between the parties with respect to the procedural form of the arbitration hearing. This allows the parties to take responsibility for creating the method of resolving their dispute -- a method that is uniquely suited to their relationship and resources. The DRAA sets forth the requirements of this step in the arbitration process in MCL 600.5076(1), which provides:

(1) As soon as practicable after the appointment of the arbitrator, the parties and attorneys shall meet with the arbitrator to consider all of the following:

(a) Scope of the issues submitted.

(b) Date, time, and place of the hearing.

(c) Witnesses, including experts, who may testify.

(d) Schedule for exchange of expert reports or summary of expert testimony.

(e) Subject to subsection (2), exhibits, documents, or other information each party considers applicable and material to the case and a schedule for production or exchange of the information. If a party knew or reasonably should have known about the existence of information the party is required to produce, that party waives objection to producing that information if the party does not object before the hearing.

(f) Disclosure required under section 5075.[1]

Thus, reading the statute as a whole, it is clear that the safeguards the Legislature imposed through the DRAA do not require the arbitrator to conduct arbitration in any specific manner (as no specifics are set forth), but do require the arbitrator to conduct the hearing *in accordance with the parties' agreement.* The majority's professed aversion for the procedure the parties agreed to does not provide a basis for vacating the award. "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne County Prosecutor,* 232 Mich App 482, 486; 591 NW2d 359 (1998). Further, although the majority refers to the process as mediation, the process was still binding and binding mediation is equivalent to arbitration and subject to the same judicial limitations on review. *Frain v Frain*, 213 Mich App 509, 513; 540 NW2d 741 (1995).

III. Precedent and Policy

The majority opinion also contravenes existing precedent and the underlying public policy regarding arbitration. Historically, Michigan courts have declined to establish requirements for arbitration proceedings. Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc,* 235 Mich App 118, 128; 596 NW2d 208 (1999). As such, the scope of judicial review of arbitration is very narrow and procedural matters should be left to the arbitrator. *Huntington Woods v Ajax Paving Industries, Inc,* 177 Mich App 351, 356; 441 NW2d 99 (1989). Our Supreme Court has acknowledged that judicial review of arbitration is restricted because courts are generally reluctant to speculate on what caused the arbitrator to rule as it did. "It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable . . . ." *DAIIE v Gavin,* 416 Mich 407, 428; 331 NW2d 418 (1982). The Court recognized that, with regard to arbitration,

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[1] MCL 600.5075 requires the arbitrator to disclose any circumstance that may affect his or her impartiality.

"there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required." It also recognized that arbitration procedures are "informal and sometimes unorthodox." *Id.* at 429. In a departure from this precedent, the majority has put restrictions on the arbitration process that neither our Legislature nor our courts saw fit to impose.

IV. Analysis

A closer look at the facts of this case reveals that the arbitrator did not, as the majority avers, unfairly deny plaintiff's requests, refuse to hear plaintiff's evidence, or unfairly conduct the hearing. Although there is no record of the arbitration proceedings, the majority opinion adopts without question and assumes as true plaintiff's assertions about what took place and what was said at arbitration. Because there is no record of the arbitration procedure, it is impossible for this Court to determine the veracity of plaintiff's assertions. But, on a basic level, the parties do not dispute that the arbitrator first met briefly with the parties and their attorneys to discuss the arbitration procedure. At this time, the parties *agreed* that, because of their acrimonious relationship, the arbitrator should meet with the parties and their respective attorneys separately. Neither party objected to this procedure, but rather, each party voluntarily entered a separate room. Then each party, in the presence of his or her attorney, voluntarily spoke with the arbitrator.

Nonetheless, sometime after the hearing concluded, plaintiff's attorney contacted the arbitrator and requested additional arbitration sessions for plaintiff to further present her case and challenge defendant's assertions. Plaintiff also sent the arbitrator two amended arbitration statements and additional documentation pertaining to defendant's income.

The arbitrator issued a proposed award without scheduling further sessions. In his findings of fact, he noted that plaintiff had requested further sessions. But he concluded that plaintiff raised nothing new that would justify further delay. The arbitrator summarized the evidence regarding the breakdown of the marriage and concluded that both parties were at fault.

After receipt of the proposed award, plaintiff again requested continued arbitration. The arbitrator gave plaintiff three days to submit an outline of the issues that she wanted to pursue. Plaintiff provided the arbitrator with a lengthy response to the award. She asked for the opportunity to present further evidence of defendant's inappropriate use of massage parlors and escort services, and to cross-examine defendant in this regard, to establish that defendant caused the breakdown of the marriage. Plaintiff also complained about nearly every aspect of the award itself.

The arbitrator rendered a final binding arbitration award in which he stated that he had considered plaintiff's concerns, but found that plaintiff failed to raise any new facts or issues. He also noted that he considered the cumulative evidence as well as any new facts raised by both parties. The final arbitration award was substantially similar to the first award, with some revisions in response to plaintiff's concerns. As far as plaintiff's complaints about the procedure, the arbitrator commented:

> The following summary, and the findings contained therein, are based on the credible testimony of the parties; the credible information contained in any

exhibit; the arguments of the lawyers, and the lengthy summaries filed by both counsel.

I have allowed both sides the opportunity to present anything further they felt was necessary to a full and complete understanding of their respective positions. Each side has submitted lengthy, additional summaries, all of which have been reviewed in detail, and against all the other evidence submitted. Plaintiff has insisted on additional "hearings". Plaintiff claims that the Award proffered to counsel for comment, was unfair, and that an ability to "confront" the Defendant and cross examine him would effect [sic] drastically his credibility.

The Arbitrator asked the plaintiff to submit a list of items that required such hearings. No list was received, but another summary was provided. The plaintiff's last summary (which was more an appeal of the proposed award) was answered by the Defendant. All of those submissions have also been carefully considered.

The defendant argues that all of the after hearing submissions of the Plaintiff are simply a rehash of old issues, and that no new issues are raised. I find that no new issues are raised. I further find that all of the topics addressed by the Plaintiff, post-hearing, were discussed on the day of the hearing I have considered the cumulative evidence, as well as any "new" facts raised by both sides.

Plaintiff's counsel takes issue with the format of the hearing, now suggesting that it should have had a more formal structure, and that the plaintiff's right of confrontation would have added another dimension to this Arbitrator's appraisal of the case. *The parties agreed to the informal nature of the hearing, and it was not until after the proposed award that any suggestion was made to testimony in a confrontational mode.* Further, had the hearing been more formal, almost none of the written evidence would have come into the record, because most of the exhibits were hearsay. Much of the commentary by the lawyers was only supported by hearsay documents. [Emphasis added.]

The majority further departs from existing precedent in that it finds error in the arbitrator's findings of fact. "Claims that the arbitrator made a factual error are beyond the scope of appellate review." *Konal v Forlini,* 235 Mich App 690, 75; 596 NW2d 630 (1999). In the emphasized portion of the arbitrator's award, the arbitrator found that the parties agreed to the informal nature of the hearing. In concluding that plaintiff did not agree to this procedure, but rather, was confused by it, the majority has improperly assigned error to the arbitrator's finding.

Even if this Court could properly review the arbitrator's findings of fact, the majority ignores several important factors. First, the arbitrator considered all of plaintiff's proffered evidence. Plaintiff cannot cite to a single piece of evidence that was not considered. With regard to cross-examination, the arbitrator did not "unfairly" deny plaintiff's request to cross-examine defendant, though he did deny her request. The denial was not unfair because, prior to plaintiff's request, the parties had agreed to meet with the arbitrator separately and voluntarily did so. Moreover, plaintiff wanted to cross-examine defendant about his infidelities which,

according to the arbitration award, defendant generally admitted. Finally, plaintiff did not complain that the arbitrator failed to comply with procedural requirements of DRAA until *after* the arbitration award was issued. It is paternalistic to conclude that plaintiff, a competent adult who entered into an agreement in the presence of her attorney, and voluntarily participated in the arbitration hearing while represented by her attorney, "found it difficult to define what transpired." The only thing plaintiff found difficult was accepting the arbitration award, despite having agreed to binding arbitration and having agreed to the arbitration procedure.

V. Conclusion

I would affirm the arbitration award because there is no proper basis for vacating it: although the arbitration procedure was "informal and unorthodox," there is no indication that the procedures exceeded the arbitrator's authority or lacked impartiality. The parties were "afforded basic, protective rights, the most important of which is a full and fair hearing."

/s/ Kirsten Frank Kelly