

STATE OF MICHIGAN
COURT OF APPEALS

DAVID HOLLOWAY,

Plaintiff-Appellant,

v

INGRID KELLEY,

Defendant-Appellee.

UNPUBLISHED

June 27, 2017

No. 331792

Oakland Circuit Court

LC No. 2014-825500-DO

Before: MARKEY, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order affirming an arbitration award in a divorce proceeding. Plaintiff claims that defendant should not have been awarded any amounts from certain retirement accounts. We affirm.

Plaintiff and defendant married on August 18, 2012, and on November 7, 2014, plaintiff filed for divorce. Plaintiff claimed in the complaint that the parties had no joint assets or liabilities and requested that each party be awarded “his and her own assets and liabilities.” On July 28, 2015, the trial court ordered the case into arbitration pursuant to a stipulation by the parties. The arbitration proceedings were not recorded. Therefore, the parties cite the November 13, 2015, arbitration award to support the factual background pertinent to this appeal. The parties also do not use specific dollar amounts in their appellate briefs because of a July 1, 2015, protective order, stipulated to by the parties, prohibiting the disclosure of information obtained during discovery. The order states that confidentiality shall remain in effect “even after the entry of the Judgment of Divorce.”

Plaintiff had a Fidelity Rollover individual retirement account (IRA) and a Fidelity Roth IRA, both of which he opened before the marriage. Shortly before filing for divorce, he also obtained a smaller retirement account (a Tenet 401K account) through his new employer. The arbitrator awarded plaintiff as his separate property the “premarital balances in his retirement . . . accounts” The arbitrator classified the Tenet 401K account as marital property. In addition, aside from certain specific deposits not at issue here, the arbitrator classified as marital property the appreciation of the values in the Fidelity Rollover IRA and the Fidelity Roth IRA and divided them between the parties.

Plaintiff filed, under seal because of the protective order, a motion to partially vacate the arbitration award, arguing that the arbitrator erred by including as marital property “all of [plaintiff’s] retirement benefits, including passive appreciation, other than his pre-marital base value” He stated that the parties had had “a short-term marriage” and “did not have a marital financial partnership.” He argued that the arbitrator erroneously awarded defendant retirement money acquired through “market forces and passive involvement.” He stated that the arbitrator exceeded his power by failing to apply Michigan law correctly. Plaintiff asked the trial court to award him, as his separate property, the entirety of his retirement accounts.¹

The motion hearing took place on January 27, 2016. Plaintiff’s attorney acknowledged at the hearing that review of arbitration awards is limited, but contended that a partial vacation of the award was appropriate because the arbitrator, by allegedly failing to follow Michigan law regarding short-term marriages and passive appreciation, exceeded his powers.

The trial court made its ruling from the bench, first emphasizing that it was not allowed to disturb the arbitrator’s factual findings or substitute its judgment for that of the arbitrator. The court stated that “in a short-term marriage you take what’s yours and you go, in general.” The court went on, however, to reiterate defendant’s position that “there’s some commingling of funds . . . [and] there’s an active management of the funds” The court mentioned the arbitrator’s ruling and stated, “that’s really not for me because . . . one or the other of you is going to the Court of Appeals, which really I think is your remedy in this case.” The court stated, “So, I’m gonna confirm the arbitration award because I think the appropriate remedy is an appeal, because I -- I don’t find on this record that the . . . arbitrator failed to follow Michigan law and exceeded his authority.” On January 28, 2016, the court entered an order denying plaintiff’s motion “for the reasons stated on the record[.]” The court later affirmed the arbitration award.

Judicial review of arbitration awards is limited. *Dick v Dick*, 210 Mich App 576, 589; 534 NW2d 185 (1995). A reviewing court may not substitute its judgment for that of the arbitrator. *City of Ann Arbor v American Federation of State, Co, & Municipal Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

MCR 3.602(J)(2) states:

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

(a) the award was procured by corruption, fraud, or other undue means;

¹ At the motion hearing, plaintiff’s attorney conceded that classifying the Tenet 401K account as marital property could be viewed as appropriate. This is significant because a reviewing court cannot substitute its judgment for that of the arbitrator. *City of Ann Arbor v American Federation of State, Co, & Municipal Employees (AFSCME) Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009).

(b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;

(c) the arbitrator exceeded his or her powers; or

(d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

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

See also MCL 600.5081(2).

Plaintiff acknowledges that factual findings by an arbitrator are not subject to review, see *City of Ann Arbor*, 284 Mich App at 144, but claims that the arbitrator in this case exceeded his authority by failing to follow Michigan law. As stated in *Dohanyos v Detrex Corp*, 217 Mich App 171, 176; 550 NW2d 608 (1996), "arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." "[A] reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Id.* at 175.

We fail to find an error of law as claimed by plaintiff. Plaintiff initially emphasizes that the parties' marriage was short, but he specifically acknowledges that "the increase in net worth of the parties may be divided even in short-term marriages[.]" Plaintiff claims that, even so, the parties' respective contributions to the marital estate must be considered if such a division is made. Plaintiff cites *Bone v Bone*, 148 Mich App 834; 385 NW2d 706 (1986). In that case, the Court stated:

The objective in arriving at a property settlement is to reach a fair and equitable division in light of all the circumstances. There are no set mathematical formulas governing a division of property. The division does not have to be equal, but it must not be inequitable. In making the division, the trial judge must examine several factors: the duration of the marriage, contributions of the parties to the joint estate, the parties' station in life and earning abilities, fault or past misconduct, and other equitable circumstances. [*Id.* at 838-839.]

The arbitration award does not demonstrate a violation of these principles. The arbitrator found that the parties had a joint account into which both made deposits and that this account was used for marital expenses. The arbitrator also found that defendant had significantly altered her life by moving from New York City to Detroit for the marriage. The arbitrator specifically cited the *Bone* Court's statement that a property settlement "is more correctly couched in terms of what

happened during the marriage, *i.e.*, an equitable division of any increase in net worth that may have occurred between the beginning and the end of the marriage.” *Id.* at 837-838. The arbitrator also found that the appreciation in the two biggest retirement funds² at issue was earned during the marriage through active involvement by plaintiff. Contrary to plaintiff’s implication, this factual finding is not subject to review by this Court. *City of Ann Arbor*, 284 Mich App at 144.³

Plaintiff claims that the award with regard to the retirement accounts was inequitable, but this is merely a rehashing of his earlier appellate arguments, and again, we cannot substitute our judgment for that of the arbitrator. *City of Ann Arbor*, 284 Mich App at 144.

In no way did the arbitrator exceed his authority. In contrast, the arbitrator followed the law and did as he was asked—he resolved the “division of each party’s interest in retirement plans” We find no basis for reversal.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro

² The smaller 401K account, as noted, was acquired during the marriage.

³ We note, at any rate, that the arbitrator specifically mentioned that plaintiff “directed the account manager regarding the purchase and sale of investments” in the Fidelity Rollover and Roth IRA accounts.