STATE OF MICHIGAN

COURT OF APPEALS

KATHARINE J. CULLENS,

Plaintiff-Appellee,

v

BRYAN D. CULLENS,

Defendant-Appellant.

UNPUBLISHED
December 18, 2012

No. 306519
Kent Circuit Court
LC No. 10-005331-DM

Before: HOEKSTRA, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals from the trial court's denial of his motion to vacate a domestic relations arbitration award and the trial court's entry of a judgment of divorce. Because we conclude that the arbitrator did not exceed his powers, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff filed a divorce action with the trial court on May 26, 2010. Plaintiff and defendant were married for 24 years and had one minor child (age 16) at the time of filing. The parties submitted to mediation, which was unsuccessful in resolving the issues between the two. The parties ultimately agreed to submit the case to domestic relations arbitration pursuant to the Domestic Relations Arbitration Act (DRAA), MCL 600.5070, *et seq*., before the same attorney who oversaw the mediation. The arbitrator rendered a written decision on June 06, 2011. Both parties filed post-decision motions to correct errors and omissions; the arbitrator issued a decision on those motions on July 15, 2011.

Plaintiff moved the trial court to enter a judgment of divorce incorporating the arbitrator's decision. Defendant responded with a motion to vacate and/or modify and correct the arbitration award. The trial court denied defendant's motion on August 26, 2011, and entered a judgment of divorce on September 16, 2011. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion to vacate or modify an arbitration award. *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). "This means that we review the legal issues presented without extending any deference to the trial

court." *Id.*, citing *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714 n 33; 624 NW2d 443 (2000).

However, appellate review of a domestic relations arbitration award is extremely limited. *Washington*, 283 Mich App at 671. The Michigan legislature has prescribed four narrow circumstances under which a circuit court may vacate an arbitration award:

> (2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:
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> (a) The award was procured by corruption, fraud, or other undue means.
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> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
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> (c) The arbitrator exceeded his or her powers.
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> (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. [MCL 600.5081(2).]

At issue in the current case is subsection (c). In order to prove that a domestic relations arbitrator exceeded his powers, a party must show that "the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law." *Washington*, 283 Mich App at 672.

This Court may not review the arbitrator's findings of fact. *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). Additionally, we will not engage in a review of an "arbitrator's 'mental path leading to [the] award.'" *Krist v Krist*, 246 Mich App 59, 67; 631 NW2d 53 (2001), quoting *Gavin*, 416 Mich at 429. Therefore, "any error of law must be discernible on the face of the award itself." *Washington*, 283 Mich App at 672, citing *Gavin*, 416 Mich at 429. Finally, in order to vacate an arbitration award, "any error of law must be 'so substantial that, but for the error, the award would have been substantially different.'" *Id.*, quoting *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998).

III. SPOUSAL SUPPORT

Defendant first argues that the arbitrator acted contrary to controlling law in awarding spousal support, by failing to take into account defendant's ability to pay. We disagree.

The objective of alimony is to "balance the incomes and needs of the parties in a way that will not impoverish either party[,]" and spousal support is to be based on what is "just and reasonable under the circumstances of the case." *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336, lv den 482 Mich 896 (2008). Specific facts to be considered in the award of spousal support are: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties;

(5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the prior standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Id.* at 726-727. The decision-maker should make specific factual findings regarding the relevant factors. *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010).

Here, the arbitrator made detailed findings of fact concerning spousal support. He began by concluding that "[t]he length of this marriage warrants a lengthy spousal support award." The arbitrator stated that he consulted, but did not rely on, computer software designed to analyze spousal support issues (*Id.*). The arbitrator then made detailed findings of facts based on the factors listed above.[1]

With regard to defendant's ability to pay, the arbitrator made the following findings:

> Defendant's 2009 W-2 income statement showed gross earnings of $111,494.51. His payroll stub for the period December 5, 2010 – December 18, 2010 showed year-to-date "Regular" pay of $101,222.98, from which I infer an annual base pay of $105,270. It appears he also is eligible to receive "Annual Incent . . . [sic]" and "Bonus" compensation. His "Gross Pay[sic] through 50 weeks of 2010 was $127,701.36.
>
> I calculated my spousal support award on a base salary of $111,000 for defendant and gave consideration the supplemental income he has demonstrated he is capable of earning. That $111,000 is also the average of defendant's annual income over the past three years as set forth in an enclosure I received with his counsel's April 22, 2011 letter.

In defendant's motion to correct errors in the arbitration decision, defendant alleged that the arbitrator had failed to take into account defendant's estimate that his monthly bills would total over $9,000 and thus, he would be forced to invade assets to pay the spousal support award. Defendant had previously submitted detailed monthly budgets to the arbitrator that indicated his monthly bills were in the range of $5,000 per month. The arbitrator, in considering defendant's contention, stated "I see no reason to adjust any of my decisions or awards on account of defendant's representation of his monthly bills totaling $9,009.63."

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[1] Although the arbitration decision provides ten enumerated subheadings for factors that the arbitrator considered in making the award, it is clear that all of the relevant factors were considered. For example, the "Past relations and conduct of the parties" sub-section incorporates both the past relations and conduct of the parties and each party's fault in causing the divorce. Additionally, the decision provides that the award shall be reviewable upon plaintiff's cohabitation with a romantic companion, which was apparently not an issue at the time of the arbitration.

It is thus apparent that, contrary to defendant's contention on appeal, the arbitrator considered defendant's representations as to his monthly bills in making his decision. Plaintiff suggests that perhaps the arbitrator's use of the word "representation" indicates that he found defendant's statement regarding his monthly bills not credible. It is not necessary or appropriate to attempt to divine the arbitrator's mental path in making the award, and we do not do so. *Krist*, 246 Mich App at 67. It is sufficient for us to conclude that the arbitrator considered defendant's monthly bills in determining defendant's ability to pay the spousal award.[2] Thus, we conclude that no evidence that the arbitrator acted in contravention of controlling law is discernible from the face of the award itself. *Washington*, 283 Mich App at 672, citing *Gavin*, 416 Mich at 429.

The case cited by defendant is distinguishable, because it involves this Court's review of a circuit court's determination, not an arbitration decision. See *Hammoud v Hammoud*, unpublished opinion per curiam of the Court of Appeals, decided May 17, 2011 (Docket Nos. 295098, 296480).[3] Circuit court factual findings are reviewable under a clear error standard, and this Court is charged with deciding whether a dispositional ruling of the court is fair and equitable in light of the facts. *Moore v Moore*, 242 Mich App 652, 655; 619 NW2d 723 (2000). However, as stated above, our review of an arbitration decision is narrowly prescribed by statute. MCL 600.5081(2). We find no error in the arbitrator's award of spousal support.

IV. DIVISION OF THE MARITAL ESTATE

Defendant next argues that the arbitrator exceeded his powers in dividing the personal property portion of the marital estate. Defendant assigns error to two different actions: the arbitrator's alleged failure to address defendant's request for personal property items to be deemed separate non-marital property, and the arbitrator's alleged failure to assign value to household furnishings. We disagree that the arbitrator exceeded his powers.

Defendant first argues that the arbitrator erred in making the personal property division by awarding each party all personal property currently in his or her possession or control. Defendant argues that the arbitrator acted in contravention of controlling principles of law by failing to make a detailed determination of whether individual property items were separate, rather than marital, property.

The goal of property division in a divorce is to reach an equitable distribution of property in light of all the circumstances. *Berger*, 277 Mich App at 716-717. Such a division need not be

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[2] We note that none of the documents provided to this court on appeal appear to contain this $9,009.63 per month figure. In fact, defendant's counsel admitted at the hearing on defendant's motion to vacate that the $9,009.63 figure may have included house payments and other duplicative expenses. Regardless, our review of the arbitrator's decision does not extend to a review of factual findings. *Gavin*, 416 Mich at 429. Thus, to the extent that defendant requests that this court engage in an independent calculation of the amount of support he can afford to pay, we decline to do so.

[3] In addition to being distinguishable, this case is, of course, not precedentially binding on this panel pursuant to MCR 7.215(C).

mathematically equal, but the decision-maker should clearly explain any significant departure from congruence. *Id.* at 717. To reach an equitable division, the decision-maker should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). The decision-maker must make specific findings of fact regarding the factors it determines to be relevant. *Id.* at 159.

Generally, marital assets are subject to division between the parties but the parties' separate assets may not be invaded. *Woodington v Shokoohi*, 288 Mich App 352, 358, 364; 792 NW2d 63 (2010). Generally, assets acquired or earned by a spouse during the marriage, whether they are received during the existence of the marriage or after the judgment of divorce, are properly considered part of the marital estate, and the appreciation of a premarital asset during the marriage is subject to division as part of the marital estate unless the appreciation was wholly passive. *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010). Separate assets may be invaded if one party demonstrates additional need, or had significantly contributed to the acquisition or growth of the separate asset. *Skelly v Skelly*, 286 Mich App 578, 582; 780 NW2d 368 (2009).

Here, the arbitrator considered the *Sparks* factors in making his property division. The arbitrator first found that "both parties contributed substantially to the creation and maintenance of their net worth." The arbitrator then found that "the durability of a marriage disappeared long ago due largely to hurtful choices defendant made" and stated that "I incorporate defendant's fault into my decision by giving plaintiff the benefit of the doubt on some close and contested valuation issues . . . . The ages and health of the parties, their life status, and the source of the property are neutral factors in the decision."

The arbitrator attached a list of personal property, designated Attachment 1, to the decision, awarding the parties all personal property currently within his or her possession or control, and ordered defendant to pay plaintiff $5,447 to equalize the value of these possessions. The arbitrator additionally stated:

> I also considered divergent representations both parties made about a substantial collection of collectibles and coin operated machines. Some of those were identified on a list defendant attached to a financial statement a decade ago. Defendant did not inspire confidence in the candor of his response to plaintiff's counsel's efforts to investigate these assets but I do not have sufficient evidence upon which to draw reasonable or reliable inferences about the existence or value of those assets. I find some measure of equity in the photographs of the personal property plaintiff retains at the marital home, which show some of those collectibles and in the allocation of the assets on Attachment 1.

In response to the parties' motions, the arbitrator stated that "[t]he evidence I have received does not warrant any change in my decision that each [party] receive all the personal property, including collectibles, currently in his or her possession or control."

At the trial court motion hearing, the trial court did correct an agreed-upon error in the valuation of a motor vehicle, and did modify the arbitration award to award the snowmobile and trailer to defendant.

It appears that the arbitrator considered the "divergent" representations made by the parties concerning personal property in their respective possession, and made findings of fact concerning these representations. The arbitrator's decision was also informed by his finding of fault on the part of defendant. For her part, plaintiff (through counsel) stated at the trial court motion hearing that certain items defendant received as gifts from his family, or that he acquired in his childhood, would be returned. These items were incorporated into the judgment of divorce, and defendant admits on appeal that these items were returned. We conclude that there is no error apparent from the face of the arbitration award that requires vacation of that award. Although defendant argues that the arbitrator erred in making his determination of separate versus marital property, it is clear that the arbitrator did consider the property and make such a determination. See *Krist*, 246 Mich App at 68 (finding the defendant's argument that the arbitrator failed to distinguish between marital and individual property to be "disingenuous" in light of evidence that the arbitrator considered and subsequently determined that property in the award was marital in character).

Although defendant argues that the findings of fact were not specific and detailed enough, a decision-maker's findings of fact regarding a property division are sufficiently specific if the parties are able to determine the approximate values of their individual awards by consulting the verdict along with the valuations to which they stipulated. *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). Here, the parties could consult the judgment, which specifically enumerated personal property to be given to each party, along with the arbitration decision and attached valuations, to determine the approximate values of their individual awards. Although defendant is clearly dissatisfied with the award, such dissatisfaction does not provide grounds for vacation of the award.

As to the arbitrator's alleged error in failing to assign values to the contents of real property, defendant argues that this error resulted in a payment to plaintiff of $3,909.55 and that the correct valuation would result in plaintiff paying defendant $3,940.50. Attachment 1 to the arbitrator's decision indicates that the values for "[h]ome contents," "[c]ottage contents," and "[r]ental contents" were listed at zero, with home contents assigned to plaintiff and the cottage and rental contents assigned to defendant. A decision-maker's valuation of particular marital assets is a finding of fact. See *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). Thus, we do not review the arbitrator's specific valuation of the contents of real property, but only determine if the arbitrator acted in contravention of controlling law. *Washington*, 283 Mich App at 672. Put another way, "claims that quarrel with a binding arbitrator's factual findings are not subject to appellate review." *Krist*, 246 Mich App at 67. It is clear that the arbitrator in fact considered the contents of real property in making the property division, as the arbitrator made specific reference to photographs of personal property in the marital home. The arbitrator additionally chose to give plaintiff "the benefit of the doubt" on some contested valuation issues. We find no material or substantial error in such an action. *Gavin*, 416 Mich 407.

V. TEMPORARY ORDER

Finally, defendant argues that the arbitrator erred in refusing to modify the temporary order issued by the trial court, and by failing to award reimbursement for defendant's payment of property taxes and mortgage principal on real property during the pendency of the divorce. We disagree.

The trial court's temporary order provided in relevant part that "Defendant shall maintain the family's budget, paying all bills per the budget he submitted at mediation (attached)" with certain enumerated exceptions. The list of exceptions did not include mortgage principal payments or property taxes. The order further provided that "[t]he budget issue shall be reviewed upon Plaintiff's obtaining full-time employment, or after 90 days, with the mediator [and arbitrator], Anthony Gauthier, Esq." The attachment to the temporary order, entitled "Monthly Bills paid by Bryan", lists a series of payments with either a "B" (for Bryan), a "K" (for Katharine), or a "?" handwritten next to each entry. The entries for "[h]ouse payment," "[c]ottage payment," and "[r]ental payment" have a "B" written next to them (*Id.*). The entry for "[p]roperty taxes house/cottage/rental" has a "?" written next to it.

Relative to this issue, the arbitrator's decision stated:

> 1. Defendant seeks reimbursement for principle [sic] reductions resulting from his payments on the three real estate mortgage notes. The temporary order does not provide for the relief defendant requests and I considered his request in my decisions on the disposition of the real estate as set forth above.
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> * * *
>
> 3. Real estate taxes—defendant's claim for reimbursement of real estate taxes he has paid cannot be sustained. He was assigned those payments in the Temporary Order without any provision for reimbursement.

In response to the parties' motions to correct errors, the arbitrator stated "I interpreted the Temporary Order to require defendant to "maintain the family's budget . . ." with specifically identified exceptions. Property taxes and insurance were not identified as exceptions."

Defendant asserts that the arbitrator erred by failing to realize that temporary orders can be retroactively modified. It is true that interim support orders may be modified. *Mitchell v Mitchell*, 198 Mich App 393, 396; 499 NW2d 386 (1993). However, we do not read the arbitrator's decision as being premised on the arbitrator's mistaken belief that he lacked the power to modify the temporary order. Such a belief is not apparent from the plain language of the award, and, again, we will not engage in a review of an "arbitrator's 'mental path leading to [the] award.'" *Krist*, 246 Mich App at 67.

Further, defendant asserts that a "likely drafting error" caused property taxes not to be mentioned as a specific exception to the obligation of defendant to pay the family budget. Defendant provides no support for this assertion; in any case, the arbitrator's decision to hold defendant to the language of the temporary order rather than modify it in defendant's favor was not an error requiring vacation of the award.

VI. CONCLUSION

We reiterate that our review of an arbitration decision is extremely limited by statute and precedent. MCL 600.5081(2); *Gavin*, 416 Mich at 429; *Washington*, 283 Mich App at 671. The United States Court of Appeals for the Sixth Circuit has recognized that "[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.'" *Way Bakery v Truck Drivers Local No. 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999). On the basis of that limited standard of review, we reject defendant's attacks on the arbitrator's factual findings, and determine that there is no error apparent on the face of the award that requires vacation of that award. The arbitrator accordingly did not exceed his powers.

Affirmed. Plaintiff may tax costs as the prevailing party. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra