STATE OF MICHIGAN

COURT OF APPEALS

HEATHER VISSER, Plaintiff-Appellee,	UNPUBLISHED July 15, 2014
v	No. 314185 Kent Circuit Court
DONOVAN VISSER, Defendant-Appellant.	LC No. 10-000350-DM

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant, Donovan Visser, appeals as of right the judgment of divorce that dissolved his marriage with plaintiff, Heather Visser. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

The parties were married in 2007, and had one child together in 2009. In January of 2010, plaintiff filed a complaint for divorce. The parties eventually agreed to submit the matter to arbitration in order to resolve, *inter alia*, issues relating to child custody, parenting time, child support, and the division of property. The parties agreed that, pursuant to MCL 600.5077(2), if child custody, child support, and/or parenting time were at issue, a court reporter would be hired to transcribe the portion of the arbitration proceedings affecting those issues. They likewise agreed that the arbitrator must adhere to the Michigan Rules of Evidence in rendering his decision.

The parties participated in mediation, which resulted in an agreement regarding custody and parenting time. The parties signed a stipulated order detailing their agreement. The trial court entered the stipulated order on October 16, 2012. The parties then proceeded to arbitration on October 31, 2012, to resolve the remaining contested issues of child support and the division of property. Without the presence of a court reporter, and admittedly without adhering to the Michigan Rules of Evidence, the arbitrator entered an arbitration award and proposed judgment.

Defendant moved for reconsideration, arguing that the arbitrator failed to apply the Michigan Rules of Evidence. After the arbitrator denied reconsideration, defendant moved the trial court to modify/vacate the arbitrator's award "with respect to child support and distribution

of property." Defendant asserted that the arbitrator exceeded his authority in failing to apply the Michigan Rules of Evidence and failing to hire a court reporter for the arbitration.

The trial court ruled in favor of plaintiff, entering the arbitrator's proposed judgment of divorce and denying defendant's motion to vacate the arbitration award. Defendant now appeals.

II. CHILD SUPPORT

A. STANDARD OF REVIEW

Defendant first contends that the arbitrator exceeded his authority by not complying with the arbitration agreement or applicable statutes. We review *de novo* a trial court's decision to enter a divorce judgment comporting with an arbitrator's award. *Miller v Miller*, 474 Mich 27, 30; 707 NW2d 341 (2005). "Pursuant to MCL 600.5081(2)(c), . . . a party seeking to prove that a domestic relations arbitrator exceeded his or her authority must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law." *Washington v Washington*, 283 Mich App 667, 672; 770 NW2d 908 (2009). Furthermore,

> A reviewing court may not review the arbitrator's findings of fact, any error of law must be discernible on the face of the award itself. By 'on its face' we mean that only a legal error that is evident without scrutiny of intermediate mental indicia, will suffice to overturn an arbitration award. Courts will not engage in a review of an arbitrator's mental path leading to the award. 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.* at 672-673 (quotation marks and citations omitted).]

B. MICHIGAN RULES OF EVIDENCE

The Michigan Supreme Court "has consistently held that arbitration is a matter of contract" and it "is the agreement that dictates the authority of the arbitrators." *Miller*, 474 Mich at 32 (quotation marks and citation omitted). "Rather than employ the formality required in courts, parties in arbitration are able to shape the parameters and procedures of the proceeding." *Id.* That is why "[h]istorically, judicial review of arbitration awards is highly limited." *Id.*

In the instant case, the parties' arbitration agreement provided that "the arbitrator will follow the substantive procedural case law, Rules of Evidence, and statutes of the State of Michigan in deciding the issues submitted to the arbitrator." When denying defendant's motion for reconsideration, the arbitrator conceded that he decided the issue of child support without adherence to Michigan Rules of Evidence. That is contrary to the parties' agreement, which defines the scope of the arbitrator's authority. *Miller*, 474 Mich at 32.

As the Michigan Supreme Court has cautioned, "by ignoring express and unambiguous contract terms, arbitrators run an especially high risk of being found to have exceeded their powers." *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982) (quotation marks omitted). The arbitrator explained that pursuant to the August 7, 2012 status conference, he was under the impression that the parties were mostly concerned with evidentiary

rules as they related to "the custody issue." However, not only is there no record evidence of such conversations, the written memorialization of the August 7th conference required the arbitrator to "adhere to the Michigan Rules of Evidence" during the hearing on "custody, parenting time, *child support*, and all other child-related issues[.]" (Emphasis added.) Thus, the arbitrator's decision was unsupported by the record, and runs contrary to the express terms of the arbitration agreement.[1]

Nonetheless, "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." *Washington*, 283 Mich App at 672 (quotation marks and citation omitted). Here, when denying defendant's motion for reconsideration, the arbitrator admitted that virtually all of the evidence he considered did not comport with the Michigan Rules of Evidence. Accordingly, the record supports a conclusion that but for the arbitrator's failure to apply the Michigan Rules of Evidence, the arbitration award would have been substantially different. *Washington*, 283 Mich App at 672.

Furthermore, the trial court's review of the arbitrator's decision was nothing more than a perfunctory conclusion that the arbitrator acted "in good faith." The trial court expressed its desire to avoid "micro-managing" the arbitrator or "mess[ing] with his fact finding in any way." There is no indication that the trial court analyzed the terms of the arbitration agreement to determine if the arbitrator exceeded his authority.

In light of the arbitrator's failure to comply with material provisions of the arbitration agreement, the trial court erred in refusing to vacate the provision of the arbitration award and proposed judgment of divorce pertaining to child support. *Miller*, 474 Mich at 29-30; *Washington*, 283 Mich App at 672.

C. COURT REPORTER

Defendant next argues that the arbitrator exceeded his authority when failing to hire a court reporter for the determination of child support at the October 31, 2012 arbitration hearing. The parties' arbitration agreement stipulated that, pursuant to MCL 600.5077(2),[2] "a court

[1] While plaintiff alleges that defendant's motion was untimely based on MCL 600.5081(4), that section pertains to allegations of corruption, fraud, or other undue means. "MCL 600.5081 does not contain a time requirement for when a motion to vacate on the basis that the arbitrator exceeded his or her powers must be filed." *Vyletel-Rivard v Rivard*, 286 Mich App 13, 20, 23; 777 NW2d 722 (2009). Moreover, although plaintiff argues that defendant waived this issue and the court reporter issue, discussed *infra*, there is no record evidence to support that contention. Further, simply because defendant submitted evidence that may have been inadmissible is not tantamount to a knowing waiver of the entire application of the rules of evidence.

[2] MCL 600.5077 provides: "(2) A record shall be made of that portion of a hearing that concerns child support, custody, or parenting time in the same manner required by the Michigan court rules for the record of a witness's testimony in a deposition."

reporter must be hired to transcribe the portion of the arbitration proceeding affecting" issues of "child custody, *child support*, and/or parenting time[.]" (Emphasis added). Following the August 7, 2012 status conference, the arbitrator clarified that he would not hire a court reporter for the October 3rd hearing relating to "property issues," but would for the October 15th and 16th hearing relating to "custody, parenting time, child support, and all other child-related issues."

It is uncontroverted that the arbitrator did not hire a court reporter for the October 31, 2012 arbitration proceedings, which dealt with a determination of child support. The arbitrator's failure to hire a court reporter violated the express language of the arbitration agreement and MCL 600.5077(2). Accordingly, we find that the arbitrator exceeded his authority as he "either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law." *Washington*, 283 Mich App at 672.

While generally we look to whether any error of law resulted in an award that would have been substantially different, *Washington*, 283 Mich App at 672, because we are remanding regarding the child support award as discussed *supra*, on remand the arbitrator should adhere to the terms of the agreement and statute regarding the court reporter.[3]

III. CUSTODY & PARENTING TIME

Defendant next suggests that reversal of the judgment of divorce is necessary because the trial court failed to make an independent best interest determination regarding child custody and parenting time.

Defendant has waived this issue. The parties reached an agreement regarding child custody and parenting time before arbitration and signed a stipulated order detailing the agreement that the trial court entered on October 16, 2012. The stipulated order stated: "It is the parties' intention that the terms of this Order settles the disputes regarding custody and parenting time and the provisions of this Order shall be included in a final Judgment of Divorce."

Defendant did not raise any objection below, nor did he seek to vacate the stipulated order in the trial court. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008) (quotation marks and citation omitted). Moreover, defendant does not provide any argument on appeal why the stipulated order was contrary to the minor's best interests, nor does he analyze the best interest factors. Ultimately, "[a] party may not harbor error as an appellate parachute by

[3] Because vacating the arbitrator's decision regarding child support is warranted, we decline to address defendant's specific objections to the calculation of the award. Defendant also failed to specifically identify or analyze issues relating to the property settlement, so we decline to speculate what his argument might have been. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

assenting to action in the lower proceeding and raising the issue as an error on appeal." *Wilcoxon v City of Detroit Election Comm*, 301 Mich App 619, 640 n 8; 838 NW2d 183 (2013).[4]

Defendant is not entitled to relief on the issues of custody and parenting time.

IV. CONCLUSION

The arbitrator exceeded the scope of his authority in violation of the arbitration agreement as it relates to child support. We therefore reverse the portion of the judgment of divorce pertaining to child support and remand this case to the trial court for entry of an order vacating the child support portion of the arbitration award and for further arbitration on that issue consistent with this opinion. See *Kirby v Vance*, 481 Mich 889, 889; 749 NW2d 741 (2008); MCL 600.5081(5).[5] Our remand is limited to the issue of child support and we caution the parties and the arbitrator that no other issues are subject to redetermination.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan

[4] We also note that "where the parties have agreed to a custody arrangement," a trial court is not required "to conduct a hearing or otherwise engage in intensive fact-finding." *Harvey v Harvey*, 470 Mich 186, 192; 680 NW2d 835 (2004).

[5] While plaintiff requests attorney fees for responding to this "duplicitous appeal," she cites no legal authority for that standard, and we decline to award her attorney fees.