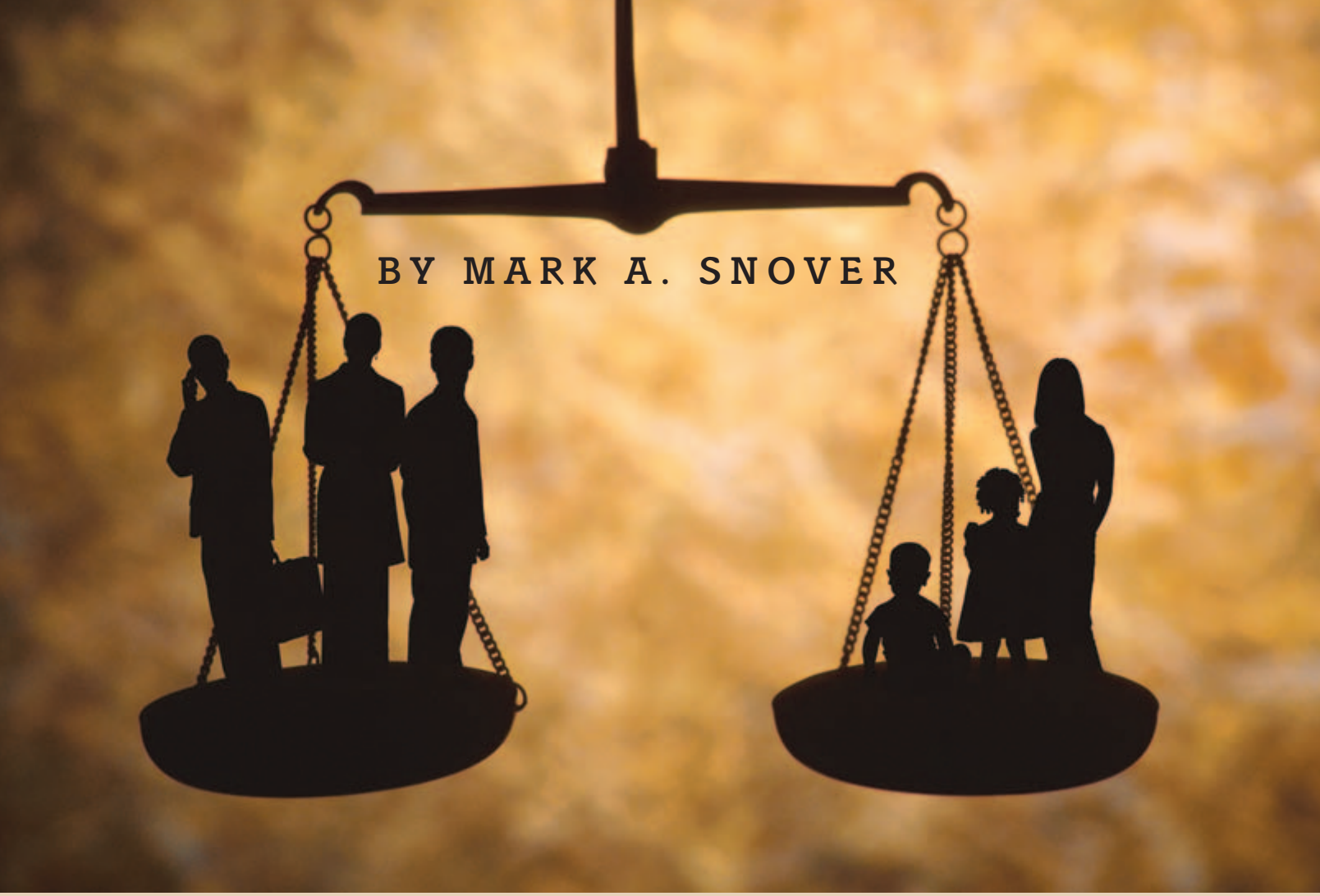

BY MARK A. SNOVER

Recent Case Law's Impact on Family Law Arbitration

In 2001, the Michigan Legislature enacted the Domestic Relations Arbitration Act (DRAA).[1] These are the only Michigan statutes that relate solely to arbitration of domestic relations cases. As with all new legislation, issues arose. Some of those issues were resolved by recent appellate court decisions, which will be discussed in this article.

The DRAA authorizes arbitration of child custody disputes.[2] The legislation also provides that "the circuit court shall not vacate or modify an order concerning . . . custody . . . unless the court finds the award is adverse to the best interests of the child . . . ."[3] Those provisions created controversy that required judicial interpretation.

Harvey v Harvey[4] was the first significant opinion dealing with this issue. In *Harvey,* the parties stipulated to binding arbitration. Among the issues to be arbitrated was the custody of the minor children. The arbitration order provided in part that:

> *7. Issues of custody, parenting time and child support shall be referred to the Oakland County Friend of the Court for an Evidentiary Hearing in front of a Referee.*
>
> *8. The decision of the Referee, after hearing, shall be binding on the parties and shall not be reviewable by the trial court. The Appellate rights to the Court of Appeals are again preserved.*

On its face, this order conflicted with the requirements of the DRAA.

In accordance with the arbitration order, an evidentiary hearing was held by the referee. The defendant was granted sole legal and physical custody of the minor children. The circuit court entered an order consistent with the referee's findings, over the objections of plaintiff. The plaintiff appealed as of right. The court of appeals vacated the custody order and remanded the case for a hearing de novo in the circuit court. The rationale of the court was as follows:

> *The Court discussed two statutory schemes that operate concurrently with the Child Custody Act to provide the parties with alternative methods of dispute resolution: the domestic relations arbitration act and the Friend of the Court Act. MCL 600.5070 et seq and 552.501 et seq.*
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> * * *
>
> *(1) Subject to subsection (2), the circuit court shall not vacate or modify an award concerning child support, custody, or parenting time unless the court finds that the award is adverse to the best interests of the child who is the subject of the award or under the provisions of section 5081.*
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> * * *
>
> *Alternatively, parties to a custody dispute can present the issue to a friend of the court referee. If they elect this option, the circuit court may review the referee's recommendation in accordance with MCL 552.507(5). That subsection provides that the circuit court "shall hold a de novo hearing on any matter that has been the subject of a referee hearing" if either party requests such a hearing within twenty-one days after receiving the referee's recommendation.*
>
> *The Court of Appeals concluded that, under either statute, the parties were entitled to have the circuit court review the custody determination. For this reason, it held, "an agreement for a binding decision in a domestic-relations matter with no right of review in the court, as in this case, is without statutory support under either scheme." 257 Mich App 278, 289; 668 NW2d 187 (2003).*

The court then vacated the trial court's order and remanded the case for a de novo hearing in the circuit court. The defendant appealed to the Supreme Court. He argued that a stipulation of the parties can restrict the circuit court's authority to decide a custody issue. The Supreme Court affirmed the court of appeals, but not for the reason stated by the court of appeals. The Supreme Court's rationale was that the Child Custody Act required the circuit court to determine the best interests of the children before entering an order resolving the custody dispute.

The Court also held that MCL 600.5080 requires the circuit court to review the arbitration award in accordance with the requirements of other relevant statutes. The *Harvey* court made it clear that the parties cannot waive the circuit court's authority under the Child Custody Act.

The *Harvey* case caused concern to practitioners who had welcomed the DRAA's license to arbitrate custody cases. It was not clear how the circuit court would ensure that an arbitrator's findings relating to child custody were in the child's best interests. To no one's surprise, *Harvey* was not the final word on this subject. Soon after, the court of appeals came down with a controversial opinion in *MacIntyre v MacIntyre.*[5] In *MacIntyre,* the case was submitted to arbitration pursuant to the DRAA, and a custody award was made by an arbitrator. The court of appeals held that the trial court erred when requested to set aside the arbitration ruling, by merely conducting a de novo review of the arbitration hearing record rather than conducting a de novo hearing regarding the custody issue. This case had a chilling effect on the family law bar. It seemed to bring a brief halt to the arbitration of child custody disputes.

It is now incumbent upon arbitrators to render opinions that will enable the trial court to determine the best interests of a child directly from a review of that opinion.

The Supreme Court then granted leave in *MacIntyre v MacIntyre.*[6] The Supreme Court, relying on its own interpretation of the *Harvey* case, ruled that the trial court is duty bound to exercise its own judgment by conducting a de novo hearing to determine what custody arrangement is in the child's best interest. They then reversed the opinion of the court of appeals in part. The Court held that

> *MCL 600.5080(2) requires a "review" of the child custody decision. The parties' agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is necessary to exercise its*

independent duty under the Child Custody Act, MCL 722.25. But as long as the circuit court is able to "determine independently what custodial placement is in the best interests of the children(,)" Harvey v Harvey, *470 Mich 186, 187 (2004), an evidentiary hearing is not required in all cases. In this case, the Oakland Circuit Court was able to make such an independent determination without a hearing.*

The Supreme Court's ruling in *MacIntyre* appears consistent with the legislation that enables child custody cases to be arbitrated. It is now incumbent upon arbitrators to render opinions that will enable the trial court to determine the best interests of a child directly from a review of that opinion.

After adoption of the DRAA, questions arose as to appropriate procedures for conducting an arbitration hearing under the Act. In *Miller v Miller,*[7] the arbitrator conducted an arbitration hearing, separating the parties in different rooms. He went from room to room and spoke to each party separately. He then concluded the process—over one party's objection that she had received neither the opportunity to present her entire case nor the ability to take testimony.

The appellate court reversed the trial court's denial of plaintiff's motion to set aside the award. They held that the DRAA provides numerous due process or procedural protections to a domestic relations party who agrees to binding arbitration. The court further held that most important to its ruling was the fact that the DRAA unambiguously provides:

*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.*[8]

Clearly, ex parte meetings do not meet this statutory requirement; a party that gives up its right to litigate a case in court, including substantial discovery and appellate rights, in exchange for binding arbitration may not be deprived of its right to present the case before a neutral arbitrator.

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. By this provision, the legislature clearly expressed its intention that the arbitrator and the parties would meet and prepare thoroughly for a full and fair hearing.

The court noted that if "the arbitrator refused to . . . hear evidence material to the controversy . . . ," the award had to be vacated.[9]

The *MacIntyre* and *Miller* cases have had a significant positive impact on the arbitration of domestic relations cases. Their holdings should make the domestic relations arbitration forum much more user-friendly.

On December 28, 2005, the Michigan Supreme Court (Opinion No. 127767) reversed the decision of the Michigan Court of Appeals in Miller v Miller.[10] *In reversing the court of appeals, the Court ruled that the Domestic Relations Arbitration Act does not require ". . . the formality of a hearing in arbitration proceedings . . ." and that "[a] procedure by which the arbitrator shuttles between the parties in separate rooms questioning and listening to them satisfies the act's requirements of a hearing." The Court continued in its ruling that ". . . no written agreement beyond the order for binding arbitration is required (1) if the parties stipulate to entry of the order and the order meets the criteria of MCL 600.5071 and MCL 600.5072(1)(e), and (2) if the parties satisfy MCL 600.5072(a) to (d) on the record." The Court reinstated the arbitration award issued by the arbitrator and the judgment of divorce entered by the trial court.* ◆

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Footnotes

1. MCL 600.5070, et seq.
2. MCL 600.5071(b).
3. MCL 600.5080(1).
4. 470 Mich 186; 680 NW2d 835, 837 (2004).
5. 264 Mich App 690; 692 NW2d 411 (2005).
6. 472 Mich 882; 693 NW2d 822 (2005).
7. 264 Mich App 497; 691 NW2d 788 (2004).
8. MCL 600.5074(1) (emphasis added).
9. MCL 600.5081(2)(d).
10. 264 Mich App 497, 691 NW2d 788 (2004).