STATE OF MICHIGAN

COURT OF APPEALS

PAUL MICHAEL TURKAL, Plaintiff-Appellant,	UNPUBLISHED April 17, 2012
v	No. 303574 Wayne Circuit Court
SARAH JO SCHWARTZ, Defendant-Appellee.	LC No. 04-465813-DP

Before: M. J. KELLY, P.J., and FITZGERALD and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right the order denying his motion to set aside an arbitration award and granting custody of the parties' minor son to defendant. We affirm.

Plaintiff first argues that the trial court failed to independently determine the issue of child custody following the arbitrator's decision and that the court should have conducted an evidentiary hearing. We disagree. An issue generally must have been raised before, and addressed and decided by, the trial court to be preserved for appellate review. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Here, plaintiff filed a motion to modify or vacate the arbitrator's award and implicitly raised the general argument that the trial court should independently determine the issue of child custody. Moreover, the trial court stated that it would make an independent custody determination regarding the best interests of the child. Thus, the general issue regarding the trial court's obligation to render an independent custody determination is preserved for appellate review.

However, plaintiff failed to request below that the trial court hold an evidentiary hearing on its independent child custody determination until he moved for reconsideration of the trial court's decision. In fact, when the trial court explicitly stated that it was not required to hold an evidentiary hearing, and would instead review the arbitrator's transcripts, plaintiff's counsel lodged no objection and stated that he would order the transcripts. The failure to request an evidentiary hearing until moving for reconsideration constitutes a forfeiture of the issue. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002). Thus, plaintiff failed to preserve his argument that the trial court was required to hold an evidentiary hearing in making its independent custody determination.

This Court reviews de novo a trial court's decision on a motion to vacate or modify an arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004). "In

custody cases, all orders and judgments by the trial court shall be affirmed unless 'the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.'" *Parent v Parent*, 282 Mich App 152, 154; 762 NW2d 553 (2009), quoting MCL 722.28. "The court's factual findings are against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *In re AP*, 283 Mich App 574, 590; 770 NW2d 403 (2009). "The trial court's discretionary decisions, such as its custody awards, are reviewed for an abuse of discretion." *In re Anjoski*, 283 Mich App 41, 50; 770 NW2d 1 (2009). "An abuse of discretion exists when the trial court's decision is palpably and grossly violative of fact and logic." *Dailey v Kloenhamer*, 291 Mich App 660, 664-665; ___ NW2d ___ (2011) (internal quotations, punctuation, and citation omitted). "This standard continues to apply to a trial court's custody decision, which is entitled to the utmost level of deference." *Berger v Berger*, 277 Mich App 700, 705-706; 747 NW2d 336 (2008). Questions of law are reviewed for clear legal error. *Id.* at 706. Clear legal error "occurs when the trial court incorrectly chooses, interprets, or applies the law." *Shann v Shann*, 293 Mich App 302; ___ NW2d ___ (2011).

Because plaintiff failed to preserve his argument that the trial court should have held an evidentiary hearing, this Court's review of that issue is limited to plain error. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Id*. Generally, a trial court's decision regarding whether to hold an evidentiary hearing is reviewed for an abuse of discretion. *Kernen*, 252 Mich App at 691. However, because plaintiff failed to timely request an evidentiary hearing below, there is no exercise of discretion on that issue to review.

"[T]he Child Custody Act [(CCA), MCL 722.21 *et seq*.] governs all child custody disputes and gives the circuit court continuing jurisdiction over custody proceedings." *Harvey v Harvey*, 470 Mich 186, 189; 680 NW2d 835 (2004). "The domestic relations arbitration act [(DRAA), MCL 600.5070 *et seq*.,] permits parties to agree to binding arbitration of child custody disputes." *Id*. However, "[r]egardless of the type of alternative dispute resolution that parties use, the [CCA] requires the circuit court to determine independently what custodial placement is in the best interests of the children." *Id*. at 187 (footnotes omitted).

A provision of the DRAA, MCL 600.5080, provides:

> (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.
>
> (2) A review or modification of a child support amount, child custody, or parenting time shall be conducted and is subject to the standards and procedures provided in other statutes, in other applicable law, and by court rule that are applicable to child support amounts, child custody, or parenting time.
>
> (3) Other standards and procedures regarding review of arbitration awards described in this section are governed by court rule.

Thus, "MCL 600.5080 authorizes a circuit court to modify or vacate an arbitration award that is not in the best interests of the child. It requires the circuit court to review the arbitration award in accordance with the requirements of other relevant statutes, including the [CCA]." *Harvey*, 470 Mich at 193. The CCA "impose[s] on the trial court the duty to ensure that the resolution of any custody dispute is in the best interests of the child." *Id*. at 192.

The trial court's duty to make an independent determination regarding child custody does not require the court to hold an evidentiary hearing in every case. "[A]s long as the circuit court is able to determine independently what custodial placement is in the best interests of the children, . . . an evidentiary hearing is not required in all cases." *MacIntyre v MacIntyre*, 472 Mich 882; 693 NW2d 822 (2005) (internal quotations, punctuation, and citation omitted). In *MacIntyre*, our Supreme Court concluded that the circuit court in that case was able to make an independent custody determination without an evidentiary hearing. *Id*. Parties may not agree to waive the availability of an evidentiary hearing if the circuit court determines that such a hearing is necessary to exercise its independent duty under the CCA. *Id*.

Here, the trial court made an independent determination regarding the best interests of the child, and an evidentiary hearing was not required to make an independent determination in this case. At the hearing on plaintiff's motion to vacate or modify the arbitration award, the court directed plaintiff to produce the arbitration transcripts, which comprised nearly 2,000 pages and covered 13 days of hearings. Plaintiff's counsel agreed to provide the transcripts and did not request an evidentiary hearing in circuit court. In addition, the arbitrator's 76-page report containing his findings was provided to the court. After the arbitration transcripts had been provided, the court entered an order indicating that it had reviewed the transcripts and the arbitrator's findings of fact regarding the child, and had independently reviewed each of the 12 best interest factors. The court indicated that it was satisfied with the arbitrator's conclusions on all of the factors except factor seven, the mental and physical health of the parties, which the court found slightly favored defendant in light of plaintiff's testimony that he has suffered from a brain tumor and possibly cancer in his breasts.[1] For those reasons, the court denied plaintiff's motion to vacate the arbitration award.

Accordingly, the record establishes that the trial court independently reviewed the voluminous transcripts of the evidentiary hearing held before the arbitrator, reviewed the arbitrator's lengthy report, and agreed with all but one of the arbitrator's findings. The court fulfilled its obligation to make an independent determination regarding what custodial placement

[1] In a footnote of his brief, plaintiff challenges the circuit court's finding regarding factor seven. However, plaintiff testified that in 1991 or 1992 he was diagnosed with a brain tumor that he treated with alternative medicine, including vitamins and herbs, that a 2006 MRI showed abnormalities, and that a neurologist could not say what the abnormalities were but concluded that plaintiff was healthy enough to obtain life insurance. In addition, plaintiff testified that he has had lumps in his breasts, for which he took imported alternative medicine. In light of this evidence, we conclude that the trial court's finding regarding factor seven was not against the great weight of the evidence.

was in the best interests of the child. An evidentiary hearing in circuit court was not required in order for the court to make its independent determination regarding custody.[2]

Plaintiff next argues that the trial court erred by adopting the arbitrator's decision without carefully examining the issue of arbitrator bias. We disagree.

"Judicial review of arbitration awards is usually extremely limited, . . . and that certainly is the case with respect to domestic relations arbitration awards." *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009) (citation and footnote omitted). "Indeed, . . . a court's review of an arbitration award is one of the narrowest standards of judicial review in all of American jurisprudence." *Id*. at 671 n 4 (internal quotations, punctuation, and citation omitted).[3]

MCL 600.5081(2) identifies four limited circumstances in which a court may vacate a domestic relations arbitration award:

> (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.

Partiality or bias that would warrant vacating an arbitration award under MCL 600.5081(2)(b) "must be certain and direct, not remote, uncertain, or speculative." *Bayati*, 264 Mich App at 601, quoting *Belen v Allstate Ins Co*, 173 Mich App 641, 645; 434 NW2d 203 (1988). An unfavorable ruling alone does not support the existence of bias. *Cain v Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996). Arbitrators are free to reject any testimony or

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[2] Defendant argues, as an alternative ground for affirmance, that plaintiff did not timely file his motion to vacate or modify the arbitration award. Although defendant was not required to file a cross-appeal to assert an alternative ground for affirmance, *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994), the issue regarding the timeliness of plaintiff's motion was not raised in and decided by the trial court. The issue thus is not properly before this Court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In any event, it is not necessary to reach this issue because, as discussed above, the trial court properly denied plaintiff's motion to vacate or modify the arbitration award on the merits.

[3] Of course, the limited nature of this review is qualified in custody matters by the trial court's independent duty to determine the best interests of the child, as discussed above.

arguments that they find unpersuasive. *Belen*, 173 Mich App at 645.[4] Thus, arbitrators are not required to give equal credence to all testimony. *Id*.

In *Bayati*, 264 Mich App at 600, the plaintiff argued that the arbitrator demonstrated bias against Middle Eastern men when discussing the willingness of the parties to foster a relationship between the children and the other parent. The arbitrator stated that the plaintiff's "testimony reflects antagonism, an aura of male dominance as is historic in European or Middle Eastern cultures, and plaintiff's general laizze-faire [sic] attitude toward his obligations, in general, and to defendant in particular." *Id*. This Court noted that although "[a]ny negative mention of a traditional aspect of a culture or ethnicity raises a flag of concern . . .," a close review of the arbitrator's statement demonstrated that there was no stereotypical meaning. *Id*.

> At most, the comment leaves one with a vague impression of possible bias or prejudice. There is no concrete indication of bias, and any attempt to demonstrate bias would be mere speculation. Because this is insufficient to allow a court to vacate an arbitration award, we conclude that the trial court did not err in denying plaintiff's motion. [*Id*. at 601.]

Here, plaintiff has presented no evidence of bias or partiality on the part of the arbitrator. Plaintiff contends that the arbitrator was biased because he credited testimony that favored defendant and rejected testimony that favored plaintiff. However, the factual predicate for plaintiff's argument is incorrect because the arbitrator did not uniformly credit the testimony of defendant and her witnesses. For example, the arbitrator found that *neither* party had proven that the other party abused the child. The arbitrator also found that whereas plaintiff and his wife had good control of the child, defendant had problems controlling him. In addition, the arbitrator found that plaintiff, his wife, defendant, defendant's mother, and defendant's sister were *all* biased witnesses whose testimony was "colored in favor of the party with whom they had a relationship." The arbitrator also found that *each* party's psychological witness was biased.

To be sure, the arbitrator did find that defendant was more credible than plaintiff, and that plaintiff was untruthful and used other people for his own benefit. Further, the arbitrator awarded full custody to defendant. However, the fact that the arbitrator's ruling was unfavorable to plaintiff does not by itself demonstrate bias or partiality. *Cain*, 451 Mich at 495-496. The arbitrator was not required to give equal credence to all testimony and was free to reject any testimony that he found unpersuasive. *Belen*, 173 Mich App at 645. Plaintiff's argument hinges entirely on speculation that the arbitrator's credibility choices arose from partiality. Unlike the plaintiff in *Bayati*, 264 Mich App at 601, plaintiff here has failed to identify any statement of the arbitrator that could create even a vague or indirect impression of bias or prejudice, let alone evidence of direct and certain bias that would merit vacating the arbitration award.

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[4] *Belen* involved an effort to vacate an arbitration award under former MCR 3.602(J)(1)(b) (now located at MCR 3.602(J)(2)(b)), *Belen*, 173 Mich App at 643-646, whereas the instant case involves MCL 600.5081(2)(b). However, because the language of the two provisions is the same, it is appropriate to apply the same standard for establishing partiality or bias. *Bayati*, 264 Mich App at 601.

The arbitrator's 76-page report reflects that he carefully reviewed the evidence presented over the course of 13 days of evidentiary hearings, made credibility determinations regarding the testimony of the various witnesses, and rendered a decision on the issues that were presented to him. We can discern no indication of partiality or bias in the arbitrator's findings or decision. Accordingly, we conclude that plaintiff has failed to establish partiality as a ground on which to vacate the arbitrator's award.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio