STATE OF MICHIGAN

COURT OF APPEALS

JACINTA LYNN VAN GIESEN,

Plaintiff/counterdefendant-Appellant,

v

BERT HENRY VAN GIESEN,

Defendant/counterplaintiff-Appellee.

UNPUBLISHED
May 20, 2003

No. 239513
Wayne Circuit Court
LC No. 99-932365-DM

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce entered by the circuit court after binding arbitration.[1] We affirm.

Plaintiff and defendant are the parents of two minor children. On October 13, 1999, plaintiff filed for divorce and on November 5, 1999, defendant filed a counter-claim for divorce. Both parties sought physical custody of the children. On May 17, 2000, the court entered an order granting plaintiff temporary custody of the minor children with defendant having visitation every other weekend and every Tuesday and Wednesday evening. On November 1, 2000, the court entered a stipulated order that the matter of custody of the minor children, including parenting time, be submitted to binding arbitration by Dr. Jack Haynes.

Haynes conducted an evaluation regarding parenting time and custody and concluded that five "best interest" factors, MCL 722.23, favored defendant, no factors favored plaintiff, four were neutral, and two were inconclusive. Haynes determined that physical custody should be with defendant, with substantial parenting time awarded to plaintiff. Plaintiff moved to vacate the award, and the trial court denied the motion. In the December 19, 2001 judgment of divorce, the parties were granted joint legal custody, and defendant was granted sole physical custody with parenting time granted to plaintiff consistent with Haynes' determination.

[1] The trial court refers to the arbitration in this case as binding mediation. Binding mediation, however, is the functional equivalent of arbitration. *Frain v Frain*, 213 Mich App 509, 511; 540 NW2d 741 (1995). Therefore, the same rules apply. *Id.*

On appeal, plaintiff challenges the trial court's failure to vacate the arbitration award. We review de novo a trial court's decision to enforce, vacate, or modify an arbitration award. See, generally, *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 496-497; 475 NW2d 704 (1991). Under MCR 3.602(J)(1), a court shall vacate a binding arbitration award if:

> (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; 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.

With regard to issues concerning whether an arbitrator has exceeded the scope of his authority, our review is limited to whether "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." *Dohanyos v Detrex Corp (After Remand),* 217 Mich App 171, 175-176; 550 NW2d 608 (1996). "Where it clearly appears on the face of the award or in the reasons for the decision, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion and that, but for such error a substantially different award must have been made, the award and decision will be set aside." *Id.* at 176. "The character or seriousness of an error of law that will require a court of law to vacate an arbitration award must be so material or so substantial as to have governed the award, and the error must be one but for which the award would have been substantially otherwise." *Id.*

Moreover, the existence and enforceability of an arbitration agreement are judicial questions that cannot be decided by an arbitrator. *Arrow Overall Supply Co v Peloquin Enterprises,* 414 Mich 95, 98-99; 323 NW2d 1 (1982); *Watts v Polaczyk,* 242 Mich App 600, 603; 619 NW2d 714 (2000). We review judicial questions de novo. See *Watts, supra,* at 603.

Plaintiff contends that the agreement to arbitrate the custody matter was void and unenforceable because it did not contain certain language required under MCL 600.5001 *et seq.* Specifically, plaintiff contends that the parties failed to agree and put in writing that "a judgment of the Circuit Court would be rendered upon the award made pursuant to the submission to Dr. Haynes." We disagree that an error requiring reversal occurred. "'The Michigan arbitration statute [MCL 600.5001(2)] provides that an agreement to settle a controversy by arbitration under the statute is valid, enforceable, and irrevocable *if the agreement provides that a circuit court can render judgment on the arbitration award*.'" *Hetrick v Friedman,* 237 Mich App 264, 268; 602 NW2d 603 (1999), quoting *Tellkamp v Wolverine Mut Ins Co,* 219 Mich App 231, 237; 556 NW2d 504 (1996) (emphasis supplied by *Hetrick*).[2] The agreement must clearly evidence

[2] Effective March 28, 2001, domestic relations arbitrations are subject to the Domestic Relations Arbitration Act, MCL 600.5070 *et seq.* The Act does not govern domestic relations arbitrations if before the effective date, i.e., March 28, 2001, "the court has entered an order for arbitration and all the parties have executed the arbitration agreement." MCL 600.5070(2). Because the agreement to arbitrate the custody matter was executed on October 27, 2000 and the trial court entered a stipulated order for arbitration of the custody matter on November 1, 2000, the Act does not apply to the instant arbitration.

an intent to submit to statutory arbitration by a contract provision "'"for entry of judgment upon the award by the circuit court."'" *Hetrick, supra* at 268, quoting *Tellkamp, supra* at 237, quoting *EE Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 237; 230 NW2d 556 (1975). As noted by defendant, it is not entirely clear whether these rules of law pertaining to statutory arbitration under general commercial contracts even apply in this case. However, even assuming that they do apply, we find that the required provision existed in the parties' agreement to arbitrate in this case.

Although the stipulated order did not contain an express written provision "for entry of judgment upon the award by the circuit court," the order incorporated the agreement made on the record.[3] On the record, after both parties acknowledged their understanding that the custody determination was subject to binding mediation, the court stated: "Once you complete your mediation and custody evaluations, a judgment will be submitted to me. I will sign the judgment, and at that point it will be final and your divorce will be final." Therefore, we find that the arbitration agreement, in connection with the record, included a provision for a judgment upon the arbitration award to be entered by a court in conformity with MCL 600.5001(1). See *Hetrick, supra* at 268-269. We reject plaintiff's contention that the trial court failed to ensure that she understood that the arbitrator's evaluation would be a binding decision that would be incorporated into a final judgment. Despite plaintiff's contention, the record indicates otherwise.[4]

Plaintiff additionally contends that the agreement to arbitrate was void as against public policy because the court did not ensure that she, by agreeing to arbitrate the custody matter, knew that she was waiving certain rights.[5] However, plaintiff cites no authority for the proposition that the trial court was specifically required to address each of the rights she lists in

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[3] The order specifically referred to the "[a]greement on the record."

[4] Indeed, we note that plaintiff's attorney questioned her as follows:

> *Plaintiff's Counsel:* You understand this matter is being sent to Donald McGinnis for binding mediation? He's going to make all the rulings on any property, spousal support, child support, et cetera? *And Doctor Haynes is going to do an evaluation for custody, and he's going to do it as to all custody and visitation issues. And that will be final unless he makes—either of them makes—some error as to law. There will be no review to this Court or any appellate court? Do you understand that?*
>
> *Plaintiff:* Yes, I do.

Thereafter, the trial court stated:

> Once you complete your mediation and custody evaluations, a judgment will be submitted to me. I will sign that judgment, and at that point it will be final and your divorce will be final. All right. [Emphasis added.]

[5] For example, plaintiff contends that the trial court failed to ensure that she understood that she was waiving "her right to the procedural protections afforded by the Rules of Evidence."

her appellate brief. Accordingly, the issue is waived. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Moreover, the record reveals that plaintiff knowingly submitted to arbitration. No basis for reversal is apparent.

Plaintiff next claims that the arbitrator exceeded his scope of authority because he failed to address whether an established custodial environment existed and therefore contravened controlling legal principles.

The existence or nonexistence of an established custodial environment directly affects the burden of proof to be applied in custody decisions. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). If an established custodial environment exists, a trial court can change physical custody only upon a showing of clear and convincing evidence that the change serves the best interests of the child. *Id.* at 6. Otherwise, the court may change custody by determining, by a preponderance of the evidence, that the change is in the best interests of the child. *Id.* at 6-7.[6] Accordingly, a court must address whether an established custodial environment exists before it makes a determination regarding the child's best interests. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

We find that the arbitrator did err by failing to explicitly address whether an established custodial environment existed. Because a temporary custody order existed and both parents sought physical custody, the arbitrator, pursuant to controlling principles of Michigan law, should have made a determination whether an established custodial environment existed. However, because, in the instant case, the custody matter was determined pursuant to binding arbitration, judicial review "is strictly limited by statute and court rule." *Krist v Krist*, 246 Mich App 59, 66; 631 NW2d 53 (2001). "[T]he party seeking to vacate or modify an arbitrator's award must establish that an arbitrator displayed a manifest disregard of the applicable law 'but for which the award would have been substantially otherwise.'" *Id.* at 67, quoting *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). We find that it is not apparent on the face of the award that the arbitrator, by failing to indicate whether an established custodial environment existed, was led to the wrong conclusion and that the award would have otherwise been substantially different. *Dohanyos, supra* at 176. To the contrary, given that the arbitrator's conclusions regarding the best interest factors overwhelmingly favored defendant,[7] it cannot be said that the arbitrator, even if he had identified an established custodial environment with plaintiff, would have awarded custody to plaintiff. Significantly, the arbitrator concluded that five factors favored defendant and none favored plaintiff. Therefore, we find that it is not evident from the face of the award that the award would have substantially differed had the arbitrator made a determination whether an established custodial environment existed before considering the best interest factors. *Krist, supra* at 67. Reversal is unwarranted.

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[6] MCL 722.27(1)(c) provides, in pertinent part: "the court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child."

[7] An arbitrator's factual findings are not subject to judicial review. *Krist, supra* at 67.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot

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JANSEN, J. (*concurring in part and dissenting in part*)

I concur with the majority in affirming the judgment of divorce, except for the portion regarding the custody matter. I respectfully dissent from my colleagues' conclusion that a valid and enforceable arbitration agreement existed with regard to the custody matter. Unlike the majority, I believe that the parties in this case did not have an arbitration agreement, which contained terms that are fundamentally required based on the binding nature of a binding arbitration.

The parties to a divorce action may consent to submit the issue of child custody to binding arbitration. *Dick v Dick*, 210 Mich App 576, 582-583, 588; 534 NW2d 185 (1995). However, there is a question, in this case, as to whether there was a binding agreement to arbitrate the custody matter. See *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98-99; 323 NW2d 1 (1982). An arbitration agreement must "clearly evidence" by a contract provision the parties intent "for entry of judgment upon award by the circuit court." *Hetrick v Friedman*, 237 Mich App 264, 268; 602 NW2d 603 (1999), quoting *Tellkamp v Wolverine Mut Ins Co*, 219 Mich App 231, 237, quoting *EE Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 237; 230 NW2d 556 (1975) (internal quotations omitted). In *Arrow Overall Supply Co*, *supra*, this Court explained a defense against the validity of an alleged agreement to arbitrate as follows:

> The defense of "no valid agreement to arbitrate" is a direct attack on the exercise of jurisdiction of both the arbitrator and the circuit court. The decision to submit disputes to arbitration is a consensual one. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *J Brodie & Son, Inc v George A Fuller Co*, 16 Mich App

> 137, 145; 167 NW2d 886 (1969), quoting *Atkinson v Sinclair Refining Co*, 370 US 238; 82 S Ct 1318; 8 L Ed 2d 462 (1962). It follows that a valid agreement must exist for arbitration to be binding. [*Arrow Overall Supply Co, supra*, 414 Mich 98.]

On October 27, 2000, a stipulated order signed by plaintiff's counsel and defendant's counsel states "Jack Haynes, Ph.D. is hereby appointed to do a third-party psychological evaluation. And further, the cost of this evaluation shall be advanced from the Olde account. The parties agree to be bound by the evaluation." Following the stipulation, on the record, plaintiff's counsel proceeded to question plaintiff as follows:

> *Plaintiff's Counsel:* You understand this matter is being sent to Donald McGinnis for binding mediation? He's going to make all the rulings on any property, spousal support, child support, et cetera? And Doctor Haynes is going to do an evaluation for custody, and he's going to do it as to all custody and visitation issues. And that will be final unless he makes—either of them makes—some error as to law. There will be no review to this Court or any appellate court? Do you understand that?
>
> *Plaintiff:* Yes, I do.

Thereafter, the trial court stated:

> Once you complete your mediation and custody evaluations, a judgment will be submitted to me. I will sign that judgment, and at that point it will be final and your divorce will be final. All right.

Following the statements on the record, a stipulated order signed by both plaintiff's counsel and defendant's counsel, on November 1, 2000, adds "parties, per their agreement on the record, shall accept Binding Mediation of the custodial matter and psychological evaluation of Dr. Jack Haynes, to include parenting time."

The majority found that an agreement to arbitrate the custody matter was articulated on the record. Clearly, Haynes' authority, according to the stipulated order, was to be derived from the parties' agreement on the record. The majority noted and emphasized, in support of its holding, the above stated portion of the record which indicated that Haynes was performing a "custody evaluation" or an "evaluation for custody." In Michigan, evaluation is typically known as a non-binding process. See MCR 2.403; *Fritz v St Joseph Co Drain Comm'r*, 255 Mich App 154, 160; __ NW2d __ (2003). The majority suggests that plaintiff acknowledged the custody determination was subject to binding mediation because plaintiff stated that she affirmatively understood that Haynes would do an "evaluation for custody" and it would be final.

A close look at the record, from which the majority derived the agreement to arbitrate the custody matter, reveals that the terms used when discussing Donald McGinnis and Haynes are totally different. In the above stated portion of the trial court record, when referring to McGinnis, plaintiff's counsel refers to "binding mediation" and when referring to Haynes, plaintiff's counsel refers to "an evaluation for custody." The trial court when recognizing the parties came to an agreement again used separate terms "mediation and custody evaluations." It

is recognized that plaintiff's counsel and the trial court both stated "will be final." The trial court indicated, "your divorce will be final." However, there are no specifics of what will be final. Yet, the majority found that the record indicates the trial court ensured that plaintiff understood Haynes' evaluation would be final.

A review of the record suggests that the parties and the trial court recognized two distinct duties for McGinnis and for Haynes, one as an evaluator and the other as an arbitrator. The duties were clearly separated, one as conducting "binding mediation" and the other as performing a "custody evaluation." Additionally, there was no written agreement containing specifics, as there was regarding the binding mediation for the property and child support, which was before McGinnis.[1] Nothing in the excerpt of the record stated above, specifically, reveals the scope of Haynes' authority or suggests that the Haynes' evaluation was to be binding arbitration. Rather, a view of the colloquial between plaintiff's counsel and plaintiff is confusing and appears to set forth a hybrid of binding arbitration, mediation, and evaluation.

I would find that there was no clear evidence that there was an agreement, with regard to the custody matter, for entry of judgment upon the award by the circuit court. *Hetrick*, *supra*, 237 Mich App 268; See also *Arrow Overall Supply Co*, *supra*, 414 Mich 98. It was not even clear that the parties were waiving their right to a trial before the trial court. The record is confusing as to what is binding with McGinnis and with Haynes, and as to what exactly an "evaluation" that is "final" means with regard to binding arbitration. It does not comport with standards of arbitration for a person who is conducting a psychological evaluation, to also be the person who is making findings of fact. Further, evaluation is process that is known to be non-binding in Michigan. See MCR 2.403; *Fritz*, *supra*, 255 Mich App 160.

In the present case, based upon the above analysis, I would find there was no valid agreement to submit the custody issue to binding arbitration. Unlike in *Dick*, *supra*, where the parties specifically agreed, in writing, that the arbitrator would "be a substitute for the Circuit Judge . . . accorded all of the powers, duties, rights, and obligations of the Circuit Judge, including . . . determination of all issues present in this divorce action . . . and judgment matters involving the parties litigation and their minor child," the parties in the present case had no similar written agreement or even a similar consensual agreement on the record. *Id*. at 578-579. Further, unlike in *Dick*, *supra*, where there was a comprehensive agreement to submit custody to binding arbitration, in the present case there was no agreement that would rise to the level of agreement required to submit a custody decision for binding arbitration. A trial court cannot simply adopt an arbitrator's recommendations if the arbitrator had no authority to decide the issues. Thus, I believe that the trial court erred in adopting and failing to vacate Haynes' arbitration award that was made beyond the authority that was granted to him by the parties.

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[1] On September 6, 2001, a stipulated order was entered regarding the binding arbitration with McGinnis, which, specifically, included what matters were being submitted to binding arbitration and included an explanation of what binding arbitration was. This order was signed by plaintiff, defendant, both counsel, and the trial judge.

In conclusion, based on the above analysis, I would affirm the judgment of divorce, except for the portion regarding the custody matter. I would reverse the custody matter, and remand to the trial court for further proceedings.

/s/ Kathleen Jansen