

STATE OF MICHIGAN
COURT OF APPEALS

ANDREW M. MAYROS,

Plaintiff-Appellant,

v

BARBARA A. MAYROS,

Defendant-Appellee.

UNPUBLISHED

June 20, 1997

No. 198003

Wayne Circuit Court

LC No. 94-433095-DM

Before: Smolenski, P.J., and Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging several provisions of the parties' October 19, 1995 judgment of divorce, which was entered by the Wayne Circuit Court. We affirm the judgment of divorce and remand for further proceedings.

The parties were married on October 13, 1990, and had one child, born on June 13, 1993. Plaintiff filed for divorce on November 17, 1994. A consent order was entered on June 6, 1995, referring the case to binding arbitration. The order directed the arbitrator to decide the issue of property settlement in lieu of trial and make recommendations as to the issues of custody, support and visitation. The arbitrator issued his decision on September 13, 1995, indicating that two hearings were held where both parties and their counsel actively participated, and that counsel submitted arbitration summaries and a number of exhibits. Prior to the decision, the original trial judge in this matter ("trial judge"/"trial court") entered a temporary order awarding physical custody of the child to defendant with specific visitation to plaintiff. Noting that the friend of the court recommended an award of physical custody to defendant, the arbitrator recommended that the court award physical custody to defendant and that the court adopt the recommendation of the friend of the court with regard to visitation. The arbitrator also recommended joint legal custody of the child. The arbitrator found that, based on testimony and exhibits from both sides, plaintiff had substantial other income from "side jobs," and, therefore, recommended that the court impute income to plaintiff and award child support at the rate of \$145.00 per week. In dividing the marital property, the arbitrator recognized that the parties disagreed on the value of certain property and determined the values based on the blue book values and appraisals submitted by the parties. The arbitrator also made recommendations to the court on the

issues of alimony and attorney fees. The arbitrator's decision stated that neither party mentioned alimony, and therefore neither party should be entitled to any alimony from the other party. The arbitrator found that plaintiff should pay defendant \$750 in attorney fees because all the motions filed in the proceedings were required by plaintiff's conduct.

On October 19, 1995, the trial court entered a judgment of divorce which incorporated the arbitrator's decision, including his property division and recommendations regarding custody, visitation, alimony and attorney fees. The trial court referred the issue of visitation to the friend of the court and continued its temporary order of support.

Plaintiff claimed that he subsequently discovered that defendant had failed to disclose one of her pension accounts and substantially undervalued another pension account. Plaintiff also claimed that he discovered two conflicts of interest in the case, alleging that the trial judge failed to reveal her relationships with the arbitrator and defendant's counsel. Plaintiff filed a motion to set aside the divorce judgment, for a new trial, for a stay of enforcement of the proceedings, and for an evidentiary hearing.

At a hearing on the motion, the trial court acknowledged that the arbitrator's award of attorney fees was beyond the scope of his authority, and reserved that issue as well as the issue whether defendant misrepresented the value of her pension. The trial court ordered the arbitrator to file an affidavit stating whether he had an opportunity to review and consider the value of defendant's pension prior to issuing the arbitration decision. The issues of custody, support and visitation were referred to the friend of the court.

Although the arbitrator filed an affidavit with the court regarding the issue of defendant's pension, the trial court found that it was unclear whether the arbitrator considered certain matters pertaining to the pension. Accordingly, the court granted plaintiff an evidentiary hearing on the issue. However, before that hearing could be held, the trial judge disqualified herself from hearing any further proceedings in the matter and the case was reassigned to Wayne County Circuit Court Judge Arthur Lombard. Plaintiff then apparently discovered that the arbitrator was a member of Judge Lombard's election campaign committee. Plaintiff believed that this relationship created an appearance of impropriety because Judge Lombard was being asked to decide whether the arbitrator was biased and had failed to follow the applicable law, and moved to disqualify Judge Lombard.

After several meetings in chambers with counsel, motion hearings were held before Judge Lombard. With regard to plaintiff's alleged conflicts of interest, Judge Lombard found that the trial judge was not being represented by defendant's counsel's law firm at the time she was assigned this case and therefore there was no duty to disclose the relationship. With respect to the alleged relationship between the trial judge and the arbitrator, Judge Lombard noted that a personal relationship between a judge and a lawyer is not per se grounds for disqualification, and that there is a duty to disclose the relationship only when it results in prejudice or gives rise to an appearance of prejudice. The judge found that there was not even an appearance of prejudice in this case. With regard to plaintiff's claim that the arbitrator had supported Judge Lombard's campaign, the judge stated that several others had also supported his campaign and that he had never discussed the substance of the case with the arbitrator. Judge Lombard determined that the parties had presented their case to the

arbitrator, that the arbitrator properly issued his decision on the basis of the materials before him, and that plaintiff had failed to meet his burden in seeking to set aside the arbitration decision.

Judge Lombard further found that because defendant had acknowledged that a portion (\$1,014.80) of her pension was not disclosed, \$750 should be awarded in favor of plaintiff. Because much of the time and effort spent in the case was based on unfounded or frivolous arguments raised by plaintiff, Judge Lombard felt that defendant should be awarded attorney fees in the amount of \$3,250. The judge found no grounds for an evidentiary hearing on the pension issue. At a subsequent hearing, Judge Lombard refused to disqualify himself from the case. An order incorporating the judge's decisions was entered on September 6, 1996. Plaintiff now appeals that order and the judgment of divorce.

First, plaintiff argues that the trial judge had a duty to disclose her relationships with the arbitrator and defendant's counsel, and that the lack of disclosure as well as *ex parte* communications between the arbitrator and defendant's counsel so tainted the proceedings that the divorce judgment and arbitration decision should be vacated. We disagree and find that the alleged conflicts of interest did not warrant setting aside the arbitration decision or judgment of divorce.

This Court's review of an arbitrator's award is very limited. *Berrien County Probate Judges v AFSCME*, 217 Mich App 205, 208; 550 NW2d 859 (1996). The Court may not pass on the findings of fact or conclusions of the arbitrator reached on the merits of the case. *Id.* The Court determines whether the arbitrator exceeded his contractual authority, or whether he made an error of law on a controlling issue that is apparent on the face of the award. *Id.* A court's power to vacate an arbitration award is limited by court rule. Pursuant to MCR 3.602(J)(1), an arbitration award may be vacated if (1) the award was procured by corruption, fraud, or other undue means; (2) there was evident partiality by an arbitrator, corruption of an arbitrator, or misconduct prejudicing a party's rights; (3) the arbitrator exceeded granted powers; or (4) 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. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 174-175; 550 NW2d 608 (1996).

This Court reviews a decision on a motion for disqualification for an abuse of discretion. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). Disqualification is appropriate when a judge cannot impartially hear a case, including when the judge is personally biased or prejudiced for or against a party or attorney. MCR 2.003(B)(1). A showing of actual bias or prejudice is required before a trial judge will be disqualified. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). The party who challenges a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *Id.* A judge is disqualified when the judge cannot impartially hear a case, including instances in which the judge is personally biased or prejudiced for or against a party or attorney, the judge has personal knowledge of disputed facts, the judge has been involved in the case as a lawyer, the judge was a partner of a party or lawyer within the preceding two years, the judge knows that he or she or a relative has an economic interest in the proceeding or a party to the proceeding, the judge or a relative is a party or party

principal, the judge or a relative is acting as a lawyer in the proceeding, or the judge or a relative is likely to be a material witness in the proceeding. MCR 2.003(B).

Plaintiff argues that the trial judge's personal relationship with the arbitrator impeded her ability to fairly review plaintiff's complaints with regard to the arbitration decision. Plaintiff's claim of such a relationship is not supported by any evidence in the record and need not be reviewed. MCR 2.003(B). Moreover, the relationship alleged by plaintiff is not sufficiently analogous to any of the situations enumerated in the court rule as ground for disqualification. As Judge Lombard noted, both the trial judge and the arbitrator were involved in the proceedings as neutral parties. In reviewing this issue, Judge Lombard noted that a personal relationship between a judge and a lawyer is not per se grounds for disqualification, and that a duty to disclose a relationship arises only when it might result in prejudice or give rise to an appearance of prejudice. Judge Lombard found that there was not even an appearance of prejudice in this case. Compare *Reno v Gale*, 165 Mich App 86, 90; 418 NW2d 434 (1987). The alleged relationship does not establish actual bias or prejudice on the part of the trial judge and does not warrant setting aside the arbitration decision or judgment of divorce.

In addition, the fact that the trial judge was represented in the past by a lawyer from defendant's counsel's law firm on an unrelated matter was insufficient to show actual bias or prejudice. As Judge Lombard found, there was no duty to disclose the relationship because the trial judge was never represented by defendant's attorney and was not being represented by any member of defendant's counsel's law firm at the time she was assigned this case. Judge Lombard did not err in refusing to set aside the arbitration decision on this basis.

Plaintiff also argues that the arbitrator had a duty to disclose *ex parte* communications with defendant's counsel which occurred before the arbitration decision was issued. An arbitrator's failure to disclose certain facts which might reasonably lead to an impression of bias constitutes grounds for vacating the award. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 120; 440 NW2d 907 (1989). However, the failure to disclose does not per se require that the award be vacated. To overturn the arbitration award, the partiality or bias must be certain and direct, not remote, uncertain or speculative. *Id.* at 120-121.

Although plaintiff presented the trial court with a copy of the arbitrator's telephone bill which indicated that there were three calls to or from defendant's counsel's office on the day before the arbitration decision was issued, defendant's counsel denied taking part in any *ex parte* communications with the arbitrator and informed the trial court that the arbitrator had been involved with other attorneys in her office on other matters. We do not believe that such evidence of partiality or bias on the part of the arbitrator can be considered certain and direct. Therefore, reversal of the arbitration decision on this basis was not required.

We agree with plaintiff that the trial court erred in incorporating the arbitrator's recommendations as to custody, support and visitation into the divorce judgment without holding an evidentiary hearing on those issues. When reviewing an order of child custody, an appellate court must affirm the order unless the findings of fact were against the great weight of the evidence, the

discretionary rulings constituted an abuse of discretion, or the legal rulings constituted clear legal error. MCL 722.28; MSA 25.312(8); *Soumis v Soumis*, 218 Mich App 27, 33; 553 NW2d 619 (1996).

The award of child support rests in the sound discretion of the trial court. *Thames v Thames*, 191 Mich App 299, 306; 477 NW2d 496 (1991). The court's exercise of that discretion is presumed to be correct, and the party appealing a support order bears the burden of showing an abuse of discretion. *Milligan v Milligan*, 197 Mich App 665, 667; 496 NW2d 394 (1992). In determining the amount of child support, the trial court is to consider the needs of the child and the parents' abilities to pay. *Thames*, *supra* at 306. Although appellate review is de novo, the trial court's factual findings are reviewed for clear error. *Id.* at 307. The party appealing the support order bears the burden of showing that a mistake was made. *Id.*

Visitation disputes are governed by the Child Custody Act, MCL 722.21 *et seq.*; MSA 25.312(1) *et seq.* This Court's review of a visitation order is de novo, but the order will not be reversed unless the trial court made findings of fact against the great weight of the evidence, committed a palpable abuse of discretion, or committed clear legal error. *Deal v Deal*, 197 Mich App 739, 741; 496 NW2d 403 (1993). Visitation should be granted if it is in the best interests of the child and in a frequency, duration and type reasonably calculated to promote a strong relationship between the parent and the child. MCL 722.27a(1); MSA 25.312(7a)(1). The controlling factor in determining visitation rights is the best interests of the child. *Deal*, *supra* at 742.

On February 10, 1995, based upon the recommendation of a referee, the trial court issued a temporary order giving the parties joint legal custody of the child and awarding physical custody to defendant with specific visitation to plaintiff. The court also ordered plaintiff to pay child support of \$100 per week subject to a pending friend of the court review and recommendation. The matters were then referred to the friend of the court for a full investigation, report and recommendation. The arbitrator subsequently noted in his decision that the friend of the court recommended an award of physical custody to defendant. The arbitrator recommended that the trial court award physical custody to defendant and adopt the recommendation of the friend of the court with regard to visitation. The arbitrator also recommended joint legal custody of the child. The arbitrator recommended that the court award child support at the rate of \$145.00 per week. Although the trial court incorporated the arbitrator's recommendations on custody and visitation into the divorce judgment, the trial court indicated that the issue of visitation would be referred to the friend of the court for a recommendation and did not adopt the arbitrator's support recommendation of \$145 per week but required plaintiff to pay support in the amount of \$100 per week pending a full evidentiary hearing.

Defendant argues that the trial court did not err in continuing the temporary order of custody and incorporating the arbitrator's recommendations as to visitation and support into the judgment of divorce pending a friend of the court investigation, report and recommendation and an evidentiary hearing. However, as plaintiff asserts, there is no indication in the divorce judgment that the trial court's decision as to custody was merely temporary. In addition, the court referred the issue of visitation to the friend of the court for a recommendation, but no evidentiary hearing was mentioned. Only the issue of support was to be subject to an evidentiary hearing. The court later also referred the issue of custody

to the friend of the court for investigation and recommendation, but no evidentiary hearing was held on this matter.

We note that Judge Lombard reminded plaintiff several times that the issue of custody remained open, invited plaintiff to request a custody adjudication and chided plaintiff for being far more concerned about monetary decisions than about custody issues. In any event, plaintiff is clearly raising the issue of custody at this time. Because no evidentiary hearing was held in the trial court on the issues of custody, support or visitation, there is no record for the Court to review. See *Crampton v Crampton*, 178 Mich App 362; 443 NW2d 419 (1989); *Stringer v Vincent*, 161 Mich App 429, 432-433; 411 NW2d 474 (1987). Therefore, the case is remanded for an evidentiary hearing and findings and conclusions on these issues.

We also agree with plaintiff that a trial court cannot simply adopt an arbitrator's recommendations if the arbitrator had no authority to decide the issues. Unlike the arbitration agreement in *Dick v Dick*, 210 Mich App 576; 534 NW2d 185 (1995), where the parties agreed to submit all issues, including the division of property, child custody and support, to binding arbitration, the parties in the present case only agreed to refer the issues of custody, support and visitation to the arbitrator for recommendation. Unlike the arbitration decision in *Dick*, which was comprehensive and detailed and included findings of fact regarding the best interest factors set forth in MCL 722.23; MSA 25.312(3), the arbitrator in the present case considered only the parties' arbitration summaries and the friend of the court recommendation and did not set forth any findings regarding the best interest factors. Therefore, while it was proper in *Dick* for the trial court to enter a judgment fully incorporating the arbitrator's conclusions, such incorporation was not proper in this case.

Plaintiff also contends that the divorce judgment failed to fully and finally resolve the issues of custody, support and visitation, and, therefore, it violates the non-bifurcation rule established by this Court in *Yeo v Yeo*, 214 Mich App 598; 543 NW2d 62 (1995). *Yeo* is distinguishable from the present case. In *Yeo*, the judgment of divorce reserved the division of property of the parties to a later date. The Court found that the trial court had improperly bifurcated the proceedings because MCR 3.211(B)(3) expressly provides that a judgment of divorce must include a determination of the property rights of the parties. *Id.* at 601. In this case, the trial court did not reserve the division of property in violation of MCR 3.211(B)(3), but reserved the issues of support and visitation so that recommendations could be made by the friend of the court. Contrary to plaintiff's suggestion, MCR 3.211(C) does not require that a divorce judgment include a custody determination in the same way that MCR 3.211(B) requires that a divorce judgment include a determination of the property rights of the parties.

Plaintiff argues that the arbitration award should be set aside because the arbitrator exceeded his powers by making recommendations with regard to the issues of attorney fees and alimony. Although the trial court properly found that the arbitrator exceeded his authority in deciding the issue of attorney fees, we find that error and the arbitrator's recommendation that neither party should receive alimony were not so material or substantial as to have governed the arbitration decision and, therefore, do not require that the decision be set aside.

The appropriate standard of review for determining whether an arbitrator has exceeded the scope of his authority was set forth in *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982), and *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991). *Dohanyos, supra* at 175. An arbitrator derives his authority from the parties' contract and arbitration agreement and is bound to act within those terms. Therefore, an arbitrator has exceeded his powers whenever he acts beyond the material terms of the contract from which he primarily draws his authority, or in contravention of controlling principles of law. *Id.* at 176. The character or seriousness of an error of law that will require a court 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.*

Although the consent order for binding arbitration directed the arbitrator to decide the issue of property settlement and make recommendations as to the issues of custody, support and visitation, the arbitrator also made recommendations on the issues of alimony and attorney fees. The arbitrator's decision stated that neither party had mentioned alimony, and therefore neither party should be entitled to any alimony from the other party. The arbitrator found that plaintiff should pay defendant \$750 in attorney fees because all the motions filed in the proceedings were required by plaintiff's conduct. Although the judgment of divorce incorporated the arbitrator's recommendations regarding alimony and attorney fees, the trial court subsequently acknowledged that the arbitrator's award of attorney fees was beyond the scope of his authority and reserved that issue for the court's determination. With regard to the issue of alimony, defendant asserts that neither party sought to receive or pay alimony in their pleadings and arbitration summaries and the fact that the arbitrator simply recommended that neither party receive or pay alimony was consistent with the position of the parties. Plaintiff does not argue that he or defendant is entitled to alimony. Therefore, we find the errors did not substantially affect the validity of the arbitration decision and do not warrant setting it aside.

Plaintiff also argues that the arbitrator ignored the applicable law by failing to consider all of the assets and debts of the parties, failing to consider the pre-marital status of certain assets, and by making a disproportionate property award without good cause. As noted, this Court's review of an arbitrator's award is very limited, and the Court may not pass on the findings of fact or conclusions of the arbitrator reached on the merits of the case. *Berrien County Probate Judges, supra* at 208. The Court determines whether the arbitrator exceeded his contractual authority, or whether he made an error of law on a controlling issue that is apparent on the face of the award. *Id.*

We do not agree that the arbitrator ignored the applicable law in dividing the marital assets. In determining the property division, the arbitrator indicated that he considered all of the exhibits, testimony and arguments of counsel, and that blue book value variables, appraisals and values submitted by the parties were used in determining the fair market value of certain property. The arbitrator found that plaintiff's other relationship was the significant precipitating factor in the breakdown of the marriage, and that plaintiff earned substantial additional funds by "moonlighting." In considering the parties' debts, the arbitrator indicated that plaintiff had been awarded significant unencumbered assets and had a greater earning capacity than defendant. It appears that the arbitrator fairly distributed the marital property

under the circumstances of the case. See *McDougal v McDougal*, 451 Mich 80, 88-89; 545 NW2d 357 (1996) (while the property division need not be equal, it must be equitable).

Plaintiff argues that the trial court erred in refusing to hold an evidentiary hearing with regard to defendant's failure to disclose the true value of her pensions to the arbitrator. We disagree. Pensions are considered part of the marital estate subject to award upon divorce. *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996). Generally, the party seeking to include a pension for distribution in the property settlement bears the burden of proving the reasonably ascertainable value of the pension. *Id.* at 165. If that party does not meet this burden, then the pension should not be considered an asset subject to distribution. *Id.* Parties should be required to disclose all assets in the early stages of a divorce action. *Sands v Sands*, 192 Mich App 698, 704; 482 NW2d 203 (1992). A party's attempt to conceal assets is a relevant consideration in determining an equitable division of property, but does not result in automatic forfeiture. *Sands v Sands*, 442 Mich 30, 36-37; 497 NW2d 493 (1993).

This Court recently stated that longstanding Michigan case law requires that when a party makes a motion alleging that fraud has been committed on the court, an evidentiary hearing is required. *Williams v Williams*, 214 Mich App 391, 394; 542 NW2d 892 (1995) (citing *Parlove v Klein*, 37 Mich App 537, 544-545; 195 NW2d 3 (1972)). However, as the *Williams* Court noted, MCR 2.119(E)(2) provides:

When a motion is based on facts not appearing in the record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition. [*Id.*]

An evidentiary hearing was initially granted to plaintiff on the pension issue by the trial court. Although the arbitrator filed an affidavit with the trial court indicating that he considered defendant's pension in determining the property distribution and in particular a letter faxed from defendant's pension administrator two days before the arbitration decision was issued, the trial judge found that it was unclear whether the arbitrator considered certain matters pertaining to the pension. An evidentiary hearing was not held on the issue after the case was reassigned to Judge Lombard because he found no grounds for a hearing. Judge Lombard found that the failure to disclose the proper value of defendant's pension was the failure of the pension administrator, that plaintiff should have known of the existence of the pension, and that from the beginning defendant had been willing to make appropriate restitution. Defendant acknowledged that a portion (\$1,014.80) of her pension was not disclosed, and, as a result, \$750 was awarded in favor of plaintiff by Judge Lombard. We find that an evidentiary hearing was unnecessary because plaintiff's claim of fraud was insufficient.

Finally, plaintiff argues that Judge Lombard improperly assessed attorneys fees against him. Attorney fees are authorized when the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). A trial court has the discretion to award such fees as are necessary and reasonable, and a court's determination in this regard will not be

reversed on appeal absent an abuse of that discretion. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992).

Judge Lombard reasonably found that plaintiff's conduct during the course of the litigation forced defendant to incur greater expense than she otherwise would have incurred. Noting that plaintiff had challenged the divorce judgment for over nine months, he awarded defendant attorney fees in the amount of \$3,250 because much of the time and effort spent in the case was based on unfounded or frivolous arguments raised by plaintiff. In light of the many motions filed by plaintiff we find that it was not an abuse of discretion to assess \$3,250 attorney fees against plaintiff.

The judgment of divorce is affirmed and the case is remanded for an evidentiary hearing and findings and conclusions on the issues of custody, support and visitation. We do not retain jurisdiction.

No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

Affirmed and remanded.

/s/ Michael J. Smolenski

/s/ Michael J. Kelly

/s/ Roman S. Gribbs