

STATE OF MICHIGAN
COURT OF APPEALS

LYNDA KOSIUR,

Plaintiff-Appellant,

v

JAMES KOSIUR,

Defendant-Appellee.

UNPUBLISHED
April 22, 2014

No. 314841
Kent Circuit Court
LC No. 10-012019-DM

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right from the December 14, 2012, order denying her motion to set aside an arbitration order in this divorce action. We affirm.

The parties married on July 29, 2001, and plaintiff filed for divorce on November 22, 2010. The parties entered into a stipulation for binding arbitration on August 10, 2011. The arbitrator issued an opinion on September 11, 2012. On September 28, 2012, plaintiff filed a motion to vacate, and on January 4, 2013, she filed a motion for reconsideration, both of which the trial court denied.

We review de novo a trial court's decision concerning a motion to modify or vacate a statutory arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). MCL 600.5081 (dealing with domestic-relations arbitration) states, in part:

(1) If a party applies to the circuit court for vacation or modification of an arbitrator's award issued under this chapter, the court shall review the award as provided in this section or section 5080.

(2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:

(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.

See also MCR 3.602(J). “[A]rbitrators can fairly be said to exceed their power whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.” *Detroit Auto Inter-Ins Exchange v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). If the face of an arbitration decision clearly demonstrates that the arbitrator made an error of law and that, in the absence of this error, a substantially different award would have been made, the award will be set aside. *Id.* at 443-445.

Because no record was made of the arbitration proceedings, plaintiff argues that the arbitrator violated MCL 600.5077(2), which states that, in domestic-relations arbitrations, “[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.” Plaintiff contends that the arbitrator substantially undervalued defendant’s annual income. Plaintiff argues that without the statutorily mandated record, “it is impossible for [the Court of Appeals] to meaningfully ‘review’ the arbitrator’s income determination or analysis of the child support issue.” By failing to make a record, plaintiff argues, the arbitrator exceeded his powers.

We find no basis upon which to vacate the award. MCL 600.5078(3) states:

An arbitrator under this chapter retains jurisdiction to correct errors or omissions in an award until the court confirms the award. Within 14 days after the award is issued, a party to the arbitration may file a motion to correct errors or omissions. The other party to the arbitration may respond to such a motion within 14 days after the motion is filed. The arbitrator shall issue a decision on the motion within 14 days after receipt of a response to the motion or, if a response is not filed, within 14 days after expiration of the response period.

Plaintiff did not file a motion under this provision. On September 28, 2012, plaintiff did file a motion to set aside the award, but in this motion she did not raise the current issue regarding a failure to record. She raised the current issue only by way of her motion for reconsideration. Under these circumstances, the issue is not preserved, and thus we decline to address it. *Vushaj v Farm Bureau Ins Co*, 284 Mich App 513, 519; 773 NW2d 758 (2009) (“where an issue is first presented in a motion for reconsideration, it is not properly preserved”).

Even if we were to address this issue, we would find no basis for reversal. The arbitrator’s “ruling” concerning child support, custody, or parenting time was: “A Temporary Order [was] entered on February 25, 2011 providing the parties with joint legal and physical custody of [the child]. . . . Child support shall continue at the rate of \$1,500.00 per month until further order of the court.” Defendant asserts the following:

In the initial arbitration agreement in this case, the parties had agreed to arbitrate custody and child support. However, because the necessary psychological evaluations and vocational assessment of Plaintiff had not yet been

completed, the parties stipulated to continue the support, custody and parenting time provisions earlier established by the Temporary Order entered by the circuit court, and to arbitrate these issues at a later time. Thus, the Judgment of Divorce provides that these issues will be arbitrated later.

Plaintiff complains that defendant does not support this assertion by citations to the record, but the October 5, 2012, judgment of divorce does indeed indicate that issues of “custody, parenting time and child support” would be arbitrated at a later date.¹ The judgment states:

It is further ordered that the issues of custody, parenting time and child support may be amended without any showing of changed circumstances by petition of either party following the completion of [p]laintiff’s independent psychological evaluation . . . and [d]efendant’s evaluation . . . and the parties shall arbitrate these issues

The judgment of divorce and the wording of the arbitration award concerning child support indicate that the arbitrator did *not* in fact arbitrate the child-support issue and that plaintiff’s appellate argument is without merit.

Plaintiff contends that the arbitrator refused to hear evidence relevant to the controversy, specifically, evidence pertaining to bonuses allegedly received by defendant. See MCL 600.5081(2)(d). The documents provided by plaintiff in support of her argument show that the arbitrator was confident that additional testimony was unnecessary and that he had “enough testimony about bonuses, accrued bonuses, and ten years of income from the exhibits already in the record.” Significantly, the arbitrator also stated that plaintiff’s desired witness had “already testified.” Under the circumstances, plaintiff has failed to adequately demonstrate a refusal to hear evidence relevant to the controversy. Moreover, as noted by defendant, this Court will not review an arbitrator’s “mental path” in reaching the arbitration award, see *Krist v Krist*, 246 Mich App 59, 67-68; 631 NW2d 53 (2001), and we therefore will not second-guess the spousal-support award or award of attorney fees, as plaintiff urges us to do.

Plaintiff contends that the “the arbitrator both exceeded its powers and conducted the arbitration in a manner substantially prejudicial to [plaintiff’s] rights” by “precluding [plaintiff] from obtaining necessary discovery on [d]efendant’s income” See MCL 600.5081(2)(c)

¹ Plaintiff argues that “bifurcating” the issues in this fashion violated *Yeo v Yeo*, 214 Mich App 598; 543 NW2d 62 (1995). This argument is unpersuasive because *Yeo, id.* at 600-601, indicated only that a divorce judgment must deal with the issue of *property distribution* and not leave it to a later date. Plaintiff also takes issue with the fact that the judgment of divorce contains the provision, “the issues of custody, parenting time and child support may be amended without any showing of changed circumstances by petition of either party” Plaintiff states that “without a record, there is no feasible way” for this Court to review the above provision. However, plaintiff makes no argument against this provision, but simply states that there is no way to review it. At any rate, it seems apparent that the provision was included because the parties had agreed to arbitrate the issues of custody, parenting time, and child support.

and (d). Plaintiff cites the following statement by the arbitrator: “Discovery was extended until April 25, 2012 to permit [p]laintiff to provide additional relevant exhibits and a spreadsheet relating to household expenses incurred since November/December 2011.” Plaintiff contends that this statement contradicts a March 5, 2012, order wherein the arbitrator stated that “[p]laintiff’s Motion to Extend Discovery is hereby DENIED.” We first note that the arbitrator acted fully within his rights in making the March 5, 2012, ruling (which prohibited the taking of various depositions) because plaintiff had violated the March 2, 2012, discovery deadline. See MCL 600.5074(2)(b) (arbitrator has authority over discovery matters). The arbitrator found that both parties “had ample time to conduct and complete discovery proper to March 2, 2012” and that “both sides were dilatory . . . and a Motion to Extend Discovery, filed the day before the expiration date, is untimely.” In the same March 5, 2012, order, the arbitrator stated that each party was to submit to the arbitrator (but not to the opposing party²) a sworn statement, “within 30 days of March 5, 2012, together with copies of documents,” setting forth various assets and liabilities. As such, the arbitrator did extend “discovery,” to a certain extent, in the manner described in the arbitration opinion. Even assuming that the arbitrator misstated a date in referring to “April 25, 2012,”³ there is simply no evidence of the arbitrator having exceeded his powers or having prejudiced plaintiff’s rights.

Plaintiff also argues that the arbitrator erred in “reliev[ing] [defendant’s] bank of the necessity of providing copies of his personal financial statements in relation to a subpoena dated March 1, 2012.” This argument is specious because the very document plaintiff refers to in support of her argument indicates that the subpoena was served on March 16, 2012, after the close of discovery.

Plaintiff argues that the arbitration award was based on fraud, see MCL 600.5081(2)(a), because defendant failed to disclose three bank accounts—at Founder’s Bank & Trust, Comerica Bank, and Fifth Third Bank—during the proceedings. With regard to Founder’s, the documents to which plaintiff refers in support of her argument show a balance of \$3,800 at Founder’s in 2009 and further show that this information was provided to the arbitrator; plaintiff merely contends that the arbitrator “refused to look at” it. With regard to Fifth Third, plaintiff claims that defendant received a bonus check for approximately \$25,000 that was issued from this bank. However, in her supporting documentation she admits that the arbitrator “had a copy of the bonus check” We find no “fraud based on failure to disclose” with regard to these “accounts.” With regard to Comerica, the documents cited by plaintiff show a balance of \$610.81 that was withdrawn (with a resultant closing of the account) on August 31, 2007. Given the amount involved and the date of closure, we find no fraudulent failure to disclose.

² Defendant represents on appeal that the arbitrator delivered his sworn statement and exhibits to plaintiff’s counsel.

³ We note that it is likely that this was *not* in fact a misstatement but was instead a reference to an agreement that took place off the record during one of the many adjournment hearings requested by plaintiff.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro