

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS D. BURLESON,

Plaintiff-Appellant,

v

MARY E. BURLESON,

Defendant-Appellee.

UNPUBLISHED

March 3, 2000

No. 207621

Macomb Circuit Court

LC No. 95-003328 DO

Before: Jansen, P.J., and Collins and J.B. Sullivan*, J.J.

PER CURIAM.

Plaintiff appeals as of right from the judgment of divorce entered by the trial court confirming an arbitration award dividing the parties' property. We affirm.

Plaintiff first argues that the arbitrator made several errors in distributing the parties' assets, and that the arbitration award should therefore be set aside. However, plaintiff's claim of error is not preserved for this Court's review. "It is well established that 'having invoked binding arbitration, the parties are required to proceed according to the applicable statute and court rule.'" *Konal v Forlini*, 235 Mich App 69, 73-74; 596 NW2d 630 (1999), quoting *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995).¹ Accordingly, in order to avoid confirmation of the arbitration award, plaintiff was required to utilize the procedure for vacating or modifying the award as set forth in MCR 3.602(J) and (K), which provide that an application to vacate or modify an award must be filed within twenty-one days after delivery of a copy of the award to the applicant. MCR 3.602(J)(2), (K)(1). Plaintiff failed to file an application to vacate or modify the arbitration award; instead, he simply submitted objections to the proposed judgment submitted by defendant pursuant to MCR 2.602(B)(3), and, when the trial court entered the proposed judgment, brought the instant appeal. Therefore, because the issue whether the arbitration award should be vacated was neither raised before nor addressed by the trial court, it is not preserved for appellate review. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998); *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).²

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In any event, plaintiff has failed to establish the existence of grounds sufficient to justify vacating the arbitration award. MCR 3.602 “governs statutory arbitration under MCL 600.5001-600.5035; MSA 27A.5001-27A.5035.” MCR 3.602(A). MCR 3.602 provides a circuit court with only three options when an arbitration award is challenged: It may (1) confirm the award, (2) vacate the award if obtained through fraud, duress, or other undue means, or (3) modify the award or correct errors that are apparent on the face of the award. *Konal, supra* at 74. MCR 3.602(J)(1) provides that a court may not vacate an award unless:

- (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.

MCR 3.602(J)(1) further provides that “[t]he fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.”

In this case, only subsection (c) of MCR 3.602(J)(1), whether the arbitrator exceeded his powers, could provide plaintiff relief, and plaintiff does not argue to the contrary. Arbitrators exceed their powers whenever they act beyond the material terms of the contract from which they draw their authority. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 496; 475 NW2d 704 (1991); *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176-177; 550 NW2d 608 (1996). Where it clearly appears on the face of the award or the reasons for the decision as stated, being substantially a part of the award, that the arbitrator through an error in law has been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, a reviewing court may set aside the award and decision. *DAIIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982); *Dohanyos, supra* at 176. However, “[i]t is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable.” *Gavin, supra* at 429. Moreover, a general principle of arbitration precludes courts from upsetting an award for reasons that concern the merits of the claim, *Gordon Sel-Way, supra* at 500; *Dohanyos, supra* at 177, and “reviewing a decision to determine if the [arbitrator] has exceeded his powers should not be used as a ruse to review the [arbitrator’s] decision to see if he merely made an error,” *Frain v Frain*, 213 Mich App 509, 512; 540 NW2d 741 (1995), citing *Gordon Sel-Way, supra* at 497.

Here, plaintiff’s claim that the arbitrator erred in awarding defendant any portion of (1) the increase in value of plaintiff’s General Motors savings plan, (2) the increase in value of the marital home, and (3) the parties’ income tax refunds for the years 1993 and 1994, is nothing more than a claim that the arbitrator erred in distributing the parties’ property, an issue which is not reviewable by this Court. *Frain, supra* at 512. The arbitration order stated that “[a]ll issues in the divorce case are referred to

binding arbitration,” that the arbitrator “shall decide each and every existing issue in this case, including, but not limited to property identification, evaluation and division, attorney fees and costs, expert witness fees and the like . . .,” and that a “Judgment of Divorce shall be entered by this Court based on the Arbitrators [sic] award after the issuance of the Arbitration award.” The arbitrator clearly did not exceed his power in identifying, evaluating and distributing the increases in value of the marital home and plaintiff’s stock plan which occurred during the marriage and were therefore marital assets, and in distributing the income tax refunds which occurred not only during the marriage but also as a result of the joint filing of the parties’ taxes which were incurred during the marriage. Indeed, the arbitration contract *required* the arbitrator to make those determinations. We find no basis for vacating the arbitrator’s award. *Dick, supra* at 589.

Plaintiff additionally contends that the arbitrator erred by failing to consider defendant’s stock savings plan, automobile, and debt reduction when apportioning the parties’ assets. However, in determining whether vacation of an arbitration award is warranted due to an error of law, this Court may not look beyond “the face of the award or the reasons for the decision as stated.” *Gavin, supra* at 443; see also *Dohanyos, supra* at 176. Accordingly, because these items are not addressed in the arbitrator’s opinion and award, no error is clearly apparent, and there is no basis for vacating the award.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan

¹ We note that paragraph nine of the arbitration order, providing that “[e]ach party shall retain appellate rights as if the case was tried before a Circuit Judge in the County of Macomb,” does not operate to alter the scope of this Court’s review of the arbitration award. See *Dick, supra* at 589.

² Plaintiff argues that he preserved his claim for appeal by filing written objections to the proposed judgment submitted by defendant pursuant to the “seven-day rule,” MCR 2.602(B)(3). However, plaintiff did not allege in his objections any of the grounds for vacating or modifying an arbitration award as provided in MCR 3.602(J)(1) and (K)(1); rather, plaintiff claimed only that the arbitrator had made “mathematical” errors and had erred in excluding defendant’s automobile from the marital estate. We find, therefore, that the filing of objections to the proposed judgment was not sufficient to preserve plaintiff’s claim of error for appeal.