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UNPUBLISHED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.

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