

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM D. JOHNSON,

Plaintiff/Counter-Defendant-
Appellant,

v

LILLIAN B. JOHNSON,

Defendant/Counter-Plaintiff-
Appellee.

FOR PUBLICATION

June 7, 2007

9:00 a.m.

No. 261919

Wayne Circuit Court

LC No. 03-336703-DO

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

FORT HOOD, J.

Plaintiff/counter-defendant appeals as of right from the trial court’s order granting defendant/counter-plaintiff a default judgment of divorce.¹ We affirm in part and reverse in part.

Plaintiff and defendant were married in the south in 1968 and resided in North Carolina for approximately ten years before moving to Michigan. In 1978, defendant moved to Michigan with her six children, and plaintiff followed a short time later. Defendant testified that she moved here to start a new life because plaintiff was abusing alcohol and had inappropriate relationships with other women. Defendant testified that initially the couples’ relationship improved, but in 1982, she packed a suitcase with plaintiff’s clothing because of his continuing inappropriate conduct.

The parties’ testimony regarding the relationship substantially diverged. Plaintiff testified that defendant packed a suitcase with some of his belongings on two occasions. On the first occasion, he simply moved back into the marital home. However, on the second occasion, he moved in with a friend. Plaintiff stayed with the friend for approximately one year before moving into a home owned by his girlfriend’s mother. Plaintiff and his girlfriend had a son during the course of the relationship. Plaintiff testified that his family, including defendant and his children with defendant, knew of his ongoing relationship and the child from that

¹ For ease of reference, we will utilize the term “plaintiff” to refer to plaintiff/counter-defendant and “defendant” to refer to defendant/counter-plaintiff.

relationship. He asserted that defendant refused to file for divorce because of her religious beliefs, but had no objection to the filing of a petition by plaintiff. However, plaintiff testified that he never “got around” to it.

Between 1982 and 2000, plaintiff worked as a fire fighter for a tank arsenal, stayed at the firehouse at various times, and was promoted to chief. However, he did suffer from numerous health problems, and in 2000, was admitted to the hospital for an amputation. During this hospital stay, plaintiff asserted that defendant did not express any concern for his condition and had filed a claim for his benefits. This action purportedly served as the basis for the filing of the petition for divorce.

On the contrary, defendant and some of her children testified that plaintiff was living two lives with two families and two homes. Defendant admitted that she packed a suitcase for plaintiff, but he returned to the marital home after a short separation. She testified that he received his paycheck on a Thursday or Friday, but would not come home until Sunday without any funds to support the family. Consequently, she filed a request for aid from state agencies. Additionally, she testified that plaintiff stayed at the marital home three to four nights per week and explained any absences by stating that he was working overtime. The couple ate meals together, filed a joint tax return on two occasions, and took vacations together. Marital relations continued until one week before plaintiff’s hospitalization.

Defendant testified that she learned of the existence of plaintiff’s illegitimate son when he was two years old. She forgave defendant for the indiscretion, but testified that she believed that the child was the product of a “one night stand” and did not believe that the child’s mother had a continued presence in plaintiff’s life. Defendant testified that she learned of the relationship between plaintiff and his mistress at the time of the hospitalization from a social worker. Thereafter, defendant refused to speak to plaintiff, but did not file for divorce because she did not have the financial resources. Although plaintiff helped defendant pay the mortgage on the marital home before his hospitalization, she testified that she was able to pay the mortgage with the help of her children after she cut ties to plaintiff.

The petition was assigned to a circuit court judge (“the first judge”). On the date of trial, the case was heard by a visiting judge (“the second judge”). The second judge inquired whether the issue in the trial was the date of separation and whether all issues would “fall into place” once that question was decided. Defense counsel indicated that the date of separation was not dispositive, but was an important factor that the first judge would employ when resolving the case. When plaintiff’s counsel sought to respond to that assertion, the second judge stated:

Apparently that’s why you all can’t working [sic] anything through here. You can’t even agree on what the problem is. Let’s just hear the witnesses, and I’ll make decisions. Now you folks have absolutely lost control; now it’s my decision.

Counsel for each party then gave a brief opening statement that addressed the issue of the date of separation. Testimony at trial focused on whether plaintiff left the marital home in 1982, when defendant packed his suitcase or whether the marital relationship continued until 2000, when defendant alleged that she discovered plaintiff’s mistress.

After the conclusion of two dates of testimony regarding the date of separation, the second judge denied plaintiff's request to present rebuttal witnesses or rebuttal testimony. This second judge also admonished the parties for failing to present evidence regarding the key issues necessary to resolve the divorce such as property assets and valuations. Defense counsel stated that the parties sought a ruling regarding the date of separation and "then we go back and litigate the divorce." The second judge advised the parties that he was not bound by decisions rendered by the first judge and told the parties to produce written orders regarding the prior decision, stating:

What's the matter with these lawyers did I just tell you. You're not going to go walking out here today and say we'll see you some day in the future. This is over with. So I'm not sure where you're going from here. This is the trial. This isn't a piece of a trial. *** Court's speak through their orders. Show me any orders. I don't know what you're going to do. I couldn't figure what you were up to from the beginning. And I didn't hear any competent evidence about anything else. All I've heard is you got a house with a mortgage on it and you got a pension. *** There's nothing to ask [the first judge]. Court's speak through their orders. I don't understand what's been going on and I've been waiting to hear testimony about the rest of the property in this case. And nobody, neither one of you, presents any competent evidence on the rest of it. I don't get that at all.

Now both of you are exposed; it isn't a one-sided exposure. It's the simplest thing [in] the world to say I know how to deal with that. So my suggestion is both of you, running some rather interesting bits of exposure, had best talk to each other. But if you don't want to, you don't have to. I'll deal with it. *** I told you [that] you need to work this problem through. One of you would run a risk – the court's ruled. You just got a ruling. I will also suggest as to the balance I'm inclined to split 50/50. You may want to meet and talk over the balance of your problems and [I] invite everyone to be back here nine o'clock tomorrow morning.

The second judge rendered a ruling with regard to the proofs submitted. This judge expressly held that the testimony of the couple's children was credible and that plaintiff led two lives with two separate families. Consequently, the date of separation was the year 2000, at the time of plaintiff's hospitalization. The second judge further held that this ruling entitled defendant to half of plaintiff's pension for the eighteen-year period.

The next day, the parties reported to the second judge that they would proceed to binding arbitration. The ruling regarding the date of separation and the pension would "stand." The parties indicated that the first judge held that the issue of spousal support was "off the table." The parties agreed to file a motion before the first judge to determine if that issue remained foreclosed. The second judge indicated that he would take proofs that there was a breakdown in the marital relationship and the division of assets was reserved for binding arbitration. The only instruction provided to the parties by the second trial judge was:

Both of you folks understand that what the lawyers have said, and they have put a lot of time in with you, I'm sure, this afternoon, is that the balance of the items that are at issue, and this isn't a decision one way or the item [sic], but a couple of

houses, the possibility of alimony or not, what they used to call alimony, spousal support, that needs to be straightened out with [the first judge]. Property down South, I think, in the Carolinas. I may be missing something, but those are the things that are now – they’re all property issues, and they’re all going to go to an arbitrator who will be the final word, whatever he or she decides, that it will go no further.

The case was not returned to the first judge. Rather, another visiting judge, the third judge, presided over the case and entered orders. The written order provided that the division of the balance of the marital property was submitted to binding arbitration with each party responsible for half the fee. Although discovery had closed and trial had occurred, the third judge also granted a motion by defendant to require asset disclosure. Both parties were to complete an asset disclosure form available from the first judge and submit it before arbitration. When the time for arbitration arrived, plaintiff refused to participate, alleging that it encompassed issues to which he had not agreed. Plaintiff also requested a new trial. The motion for new trial was denied, and a default judgment of divorce was entered by the first judge after plaintiff refused to participate in the arbitration. Plaintiff appeals as of right.

In the present case, domestic relations arbitration is governed by statute. Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Under the plain meaning rule, “courts should give the ordinary and accepted meaning to the mandatory word ‘shall’ and the permissive word ‘may’ unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole.” *Browder v Int’l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

MCL 600.5072 governs domestic relations arbitration and provides, in relevant part:

(1) The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:

- (a) Arbitration is voluntary.
- (b) Arbitration is binding and the right of appeal is limited.
- (c) Arbitration is not recommended for cases involving domestic violence.
- (d) Arbitration may not be appropriate in all cases.
- (e) The arbitrator’s powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

(f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

(g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

(h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.

(i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration.

"The domestic relations arbitration act permits parties to agree to binding arbitration of ... disputes. It contains numerous protections for them, including mandatory prearbitration disclosures and detailed procedural requirements. MCL 600.5072." *Harvey v Harvey*, 470 Mich 186, 189; 680 NW2d 835 (2004).

MCL 600.5072(1) provides that the trial court "shall" not order a party to participate in arbitration unless there is an acknowledgment on the record or in writing that: the submission to arbitration is voluntary; the outcome of the arbitration will be binding and appellate review is limited; and arbitration is not recommended for domestic violence or other domestic cases. MCL 600.5072(1)(a)-(d). Additionally, the court shall inform the parties in plain language of the arbitrator's powers and duties, the court's enforcement of the decisions rendered by the arbitrator, the need for consultation with an attorney before entering into or during arbitration, the availability of free legal services for arbitration, and the responsibility of the costs of arbitration whereas court resolution does not have an additional fee requirement. MCL 600.5072(e)-(i). Because the plain language of the statute utilizes the mandatory term "shall," the protections set forth in the statute are mandatory prearbitration disclosures delineating the procedural requirements for voluntary submission to binding arbitration. *Harvey, supra*; *Browder, supra*.

Review of the record reveals that the mandatory prearbitration disclosures were not satisfied. On the record, the second judge advised the parties that the property issues were being submitted to the arbitrator and that the decision would be the final word. This statement failed to apprise the parties that appellate review was available, but limited. Moreover, it is unclear if the agreement to arbitrate delineated the fact that spousal support or alimony was held in reserve for the first judge to resolve. The written and oral statements did not provide that the arbitration was voluntary, and in light of the trial court's admonishment to the parties that the case would be resolved the next day, it is unclear if the decision to arbitrate was voluntary. Further, the second judge did not advise the parties that the fee for arbitration was unnecessary if they elected to proceed to have the court resolve the matter. Under these circumstances, the first judge erred in allowing the default judgment premised on plaintiff's failure to participate in arbitration when he was not advised of the statutory criteria for voluntary submission.

Plaintiff next alleges that the trial court erred in determining that the date of separation was in the year 2000 when the great weight of the evidence did not support that factual finding. We disagree. The trial court's factual findings in a divorce case are reviewed for clear error. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made after reviewing all of the evidence. *Id.* Although this standard is less rigorous than the standard applied to a jury determination, it does not authorize the reviewing court to substitute its judgment for that of the trial court. *Id.* "This Court gives special deference to a trial court's findings when they are based on the credibility of the witnesses." *Draggoo v Draggoo*, 223 Mich App 425, 429; 566 NW2d 642 (1997).

Review of the record reveals that the trial court's factual findings were not against the great weight of the evidence. The second judge was presented with two diametrically opposed versions of events. Plaintiff and his witnesses alleged that he had separated from defendant in 1982, and that his family was aware of his relationship with his girlfriend and their child. On the contrary, defendant and her witnesses opined that plaintiff continued to reside at the marital home on a part-time basis and attributed his absence from the home to his work schedule. Because of the nature of his employment as a fire fighter and later as chief, it was plausible that plaintiff would be required to remain at work for periods of time. The defense asserted that the child was not hidden, but the continued relationship with plaintiff's mistress was not disclosed. Rather, it was asserted that plaintiff indicated that the child was the product of a one-night stand and that he did not have a continuing relationship with the child's mother. The second judge assessed the credibility of the witnesses and concluded that the testimony presented by the children of the parties was to be believed. Under the circumstances, we cannot conclude that the factual finding regarding the date of separation was clearly erroneous. *Beason, supra.*

Plaintiff alleges two additional issues regarding the determination of value of the marital assets and whether the final judgment was equitable. Our conclusion that the default judgment must be set aside in light of the noncompliance with MCL 600.5072 renders these issues moot.²

² We are in agreement with the second judge that the court speaks through its written orders. *In re Gazella*, 264 Mich App 668, 677; 692 NW2d 708 (2005). Furthermore, the circuit court is bound to follow the published decisions of the Court of Appeals and Michigan Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). There is no requirement that a circuit court judge follow the decision of another. *Id.* If the first judge agreed to allow the parties to bifurcate trial and to decide the issue of the date of separation in a separate hearing, a written order to that effect should have entered and would have guided the second judge with regard to the nature of the trial when the parties could not agree on the first judge's preliminary ruling. Moreover, although it appeared that discovery had closed, there did not appear to be any indication that the parties could have proceeded to address assets and valuation, particularly in light of the fact that a motion to disclose assets was filed after the trial regarding the date of separation. It is imperative that the rule regarding written orders be followed to allow a visiting judge to step in and handle matters in place of the original trial judge. Moreover, the first judge should have made clear whether discovery was extended in light of the bifurcation of the issues at trial. If discovery had been completed and written orders regarding the posture of the case had

(continued...)

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

(...continued)

issued, the procedural irregularity in this case arguably would have been avoided.