

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

No. 261919
Wayne Circuit Court
LC No. 03-336703-DO

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

O’CONNELL, J. (*concurring*).

I concur with the majority opinion. I write separately to emphasize the restrictions that our Legislature has placed on judges to protect litigants from confusion and protect the court system from abuse. Even before the recent drafting of the domestic relations arbitration act (DRAA), MCL 600.5070 *et seq.*, judges had no authority to order a party to submit a domestic relations matter to arbitration, and instead, the court could only mandate arbitration in accordance with an express written stipulation of the parties. *Balabuch v Balabuch*, 199 Mich App 661, 662; 502 NW2d 381 (1993); *Marvin v Marvin*, 203 Mich App 154, 156-157; 511 NW2d 708 (1993). If the parties failed to put their agreement to arbitrate in writing, or failed to acknowledge their intent that a circuit court may enforce the arbitrator’s award, then the agreement would not fall within the Michigan arbitration act, MCL 600.5001 *et seq.*, and the agreement to arbitrate would be revocable by the unilateral act of either party until the arbitrator issued a judgment. *Wold Architects & Engineers v Strat*, 474 Mich 223, 234-235; 713 NW2d 750 (2006); cf. MCL 600.5001(1), MCL 600.5011.

Now MCL 600.5072(1) states, “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 a litany of rights and conditions, including the right to go to trial, the limited ability to appeal a decision, and the requirement that the parties must have signed a written arbitration agreement spelling out the arbitrator’s authority and obligations. The parties concede that the trial court neglected to notify the litigants of the nine distinct rights enumerated in MCL 600.5072(1), and neither side has presented any written arbitration agreement spelling out the arbitrator’s “powers and duties.” MCL 600.5072(1)(e). In fact, it was an unresolved dispute over the arbitrator’s authority that led plaintiff to withdraw his consent to arbitrate on the record and within moments after the trial court accepted the

representations of the parties' attorneys that they would arbitrate certain property issues.¹ The trial court's failure to comply with the mandatory procedure outlined in the statute meant that it unquestionably erred when it ordered the case to arbitration.

The dissent concludes that even if the trial court failed to comply with the DRAA, a default can be entered because plaintiff disobeyed the court's order to participate in arbitration. Under the peculiar facts of this case, I respectfully disagree. This was not a case in which a party was required to forfeit money pending appeal, or even leave a cloud on a title to property until an appellate court could sort out the trial court's mistake. In this case, plaintiff was ordered to forego recourse to our primary institution of justice, surrender his rights, and submit the substance of his legal dispute to the discretion of an unknown, unelected, unappointed, and largely unaccountable third party. Although our courts have always respected a party's consent or contractual freedom to take a more streamlined approach to dispute resolution, they have never shirked their constitutional duty by requiring litigation in an alternative, unofficial forum. Moreover, our laws have always recognized that unwritten agreements to arbitrate are unilaterally revocable, so that a party who feels delayed remorse over an oral acquiescence to submit to arbitration may always safely retreat to the courts. *Wold Architects, supra*.

Domestic relations necessarily involve personal, rather than pecuniary, issues, so our legal system has been especially slow to sanction extrajudicial resolution of any of these matters, even when founded on the parties' mutual assent. Recently, the Legislature adequately quieted this nagging reluctance by instituting simple, statutory safeguards, including informed, unequivocal, and written assent to the arbitration process. MCL 600.5072(1). That assent to the waiver of each right and the acknowledgment of the governing written instrument must be reflected on the record. This was not done here. To ignore the mandatory nature of the statute leaves plaintiff, and those like him, with a remediless error. According to the dissent, plaintiff was required to submit the matter to arbitration and prepare to file an appeal after the trial court entered the arbitrator's judgment.² After successfully appealing, he could, perhaps, return to court to get the full and complete trial he should have received years earlier.³ Adopting the

¹ Although another judge had provided some explanation about the arbitration process to plaintiff in an earlier proceeding, it does not appear the he was even present when a later judge signed the order requiring the parties to submit to arbitration.

² I agree with the dissent that a party disobeys a court order at his or her peril, but I also note that statutes are no less deserving of obedience. Moreover, a trial court generally has less draconian measures available for enforcing its orders than default, and "a trial court abuses its discretion by employing default as a sanction without determining, on the record, whether less drastic alternative sanctions are appropriate" *Gawlik v Rengachary*, 270 Mich App 1, 9; 714 NW2d 386 (2006). In my opinion, the default entered in this case was not an appropriate sanction for plaintiff's failure to adhere to the trial court's erroneous order, and the trial court's failure to consider any other sanction on the record forecloses further consideration of the issue.

³ Divorce cases are not supposed to be resolved piecemeal, see *Dobrzanski v Dobrzanski*, 208 Mich App 514, 515-516; 528 NW2d 827 (1995), and MCR 3.211(B), and we generally oppose splitting adjudicative responsibilities between a court and an arbitrator like the trial court did in this case. See *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 305-306; 690 NW2d 528 (2004).

dissent's approach ignores plaintiff's unilateral right to withdraw from arbitration, allows a court to sanction a party by compounding the party's proceedings and litigation expenses, and fails to acknowledge any restriction on the trial court's authority to mandate arbitration in a divorce case. This complication of the process invites delay and other abuses of the system, and the trial court's entanglement in this case exemplifies why courts should simply adhere to the plain and unambiguous language in the statute.

Rather than encourage confusion, sloppiness, and abuse, we must enforce the statute as written and place plaintiff in the position he would have been in if the error had not occurred: before a trial court, prepared to adjudicate his legal rights. Our court rules reiterate these principles. They require a court to excuse a party's failure to attend an alternative dispute resolution hearing and refrain from entering a default order if the court finds that entering a default order would cause manifest injustice. MCR 2.410(D)(3)(b)(i). In this case, it was manifest injustice for the court to default plaintiff for his failure to follow the statutorily defective and otherwise infirm order, but the trial court did not consider any other sanction on the record. *Gawlik v Rengachary*, 270 Mich App 1, 9; 714 NW2d 386 (2006). This error alone requires reversal. *Id.* Although I agree with the dissenting opinion that the delay caused by plaintiff's indecisiveness or gamesmanship warrants some sanction, perhaps for defendant's costs, default was not a self-evident resolution to this matter. Therefore, I concur with the majority opinion's resolution of this case.

/s/ Peter D. O'Connell