Circuit Court for Anne Arundel County
Case No. C-02-FM-16-001876

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2268

September Term, 2017

PETER MARTINO

v.

MANELLE MARTINO

Fader, C.J.
Reed,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 3, 2020

During the pendency of divorce proceedings in the Circuit Court for Anne Arundel County, appellant, Peter Martino, and appellee, Manelle Martino, agreed to submit disputed financial issues to arbitration. Following submission of the arbitrator's memorandum opinion to the parties and the court, appellant moved to have the arbitrator modify or correct the arbitration award. That motion was denied by the court and the arbitration report was confirmed and, ultimately, incorporated into the judgment of divorce. It is from the court's denial of his motion to modify or correct the arbitral award that appellant has noted this appeal.[1]

In his *pro se* opening brief, appellant raises five challenges[2] for our review, from which we have distilled the following:

[1] Appellant has noted three separate appeals as the court has ruled on specific issues during the long life of this litigation. We are satisfied that his second amended appeal—the third and final appeal following the entry of judgment of absolute divorce—provides our jurisdiction to consider his assertions regarding the arbitration process and conclusion.

[2] Appellant's brief presents the five challenges as follows:

1. Was the trial court's denial of the Appellant's Motion to Modify or Correct Arbitrator's Opinion and Award or, in the Alternative, to Vacate Arbitration Award, legally correct when Arbitrator exceeded the scope of her authority by resolving matters outside the scope of the arbitration as agreed by the parties?

2. Was the trial court's denial of the Appellant's Motion to Modify or Correct Arbitrator's Opinion and Award or, in the Alternative, to Vacate Arbitration Award, legally correct when the Trial Court abrogated its responsibility to exercise independent judgment regarding the best interests of the children?

3. Was the trial court's denial of Appellant's Motion to Modify or Correct Arbitrator's Award, or in the Alternative, to Vacate the Arbitration Award legally correct when the marital award and the attorney's fees awards contained in the Arbitrator's opinion represent completely irrational decisions tantamount to the Arbitrator exceeding her powers?

1. The arbitrator exceeded the scope of her authority.

2. The trial court committed legal error in its denial of his Motion to Modify or Correct the award.

We shall affirm the judgment of the circuit court in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

For reference, we provide a summary of the relevant aspects of the litigation.

Appellant, plaintiff below, filed suit for divorce in May 2016, which was timely answered by appellee. Issues concerning child access, including custody and visitation, were resolved by the entry of a consent order in April 2017. That order was endorsed by the parties and the children's best interest attorney. Also, in April 2017, the parties and their respective counsel entered into an agreement to arbitrate that provided, in relevant part, that "[t]he issues to be submitted to the arbitrator shall be any and all financial issues which could have been decided by the Circuit Court in a divorce action[.]" The parties selected Leslie G. Billman, a member of the Anne Arundel County bar, to conduct the arbitration.

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4. Was the trial court's denial of Appellant's Motion to Modify or Correct Arbitrator's Award, or in the Alternative, to Vacate the Arbitration Award legally correct when the Arbitrator's Opinion and Award should be vacated under Maryland Common Law on the grounds of a mistake so gross as to imply bad faith or lack of honest judgment?

5. Was the trial court's denial of Appellant's Motion to Modify or Correct Arbitrator's Award, or in the Alternative, to Vacate the Arbitration Award legally correct when the trial court denied Appellant's Motion without a hearing as required by Maryland Rule 2-311(f)?

Significant to the issues raised in this appeal the arbitration agreement provided:

> 1. Arbitration: The parties shall submit to and participate in binding arbitration from which there shall be no appeal and in which the decision of the arbitrator shall be conclusive and binding. The parties agree that the results of the arbitration shall be entered as one or more appropriate orders in the Case.
>
> 2. Scope of the Arbitration: The issues to be submitted to the arbitrator shall be any and all financial issues which could have been decided by the Circuit Court in a divorce action, including but not limited to alimony, child support, resolving all disputes with respect to the ownership of personal property, determination of the marital/non-marital character of property and their values, monetary award, distribution of marital property and attorney's fees among others.

The arbitration commenced on May 23, 2017, and continued on June 19 and September 14, 15, 22, and 26. The parties and their counsel participated fully in the arbitration sessions. By agreement, counsel submitted written closing arguments to the arbitrator on October 6, 2017.

Ms. Billman filed her "Arbitrator's Memorandum of [sic] Opinion" on October 16, 2017, consisting of 12 single-spaced type-written pages and, where appropriate, worksheets. In response, appellant, by counsel, filed a Motion Requesting that Arbitrator Modify and/or Correct Arbitration Award, followed some days later by a 14-page Memorandum of Argument.

Ms. Billman declined to either modify or correct the award.

Thereafter, appellant moved that the court modify or vacate the award. That motion was denied by the court and an order was entered confirming the award "as to all aspects."

Appellant now asserts that the arbitrator exceeded the scope of her authority by including in the award certain matters relating to child support. At this juncture, it is

important to highlight the scope of the arbitration, as agreed to by the parties in a joint stipulation submitted pre-arbitration. We so do in summary form and note that the issues to be considered by the arbitrator included all matters of property, both real and personal; marital award; alimony; child support; and attorneys' fees.[3] We further recall that the Agreement to Arbitrate provided that "[t]he parties shall submit to and participate in binding arbitration from which there shall be no appeal and in which the decision of the arbitrator shall be conclusive and binding."

A court may modify an arbitration award if "[t]he arbitrators have awarded upon a matter not submitted to them …." Maryland Code (1974, 2013 Repl. Vol.), Courts and Judicial Proceedings Article (CJP), § 3-223(b)(2), or a court may vacate an arbitration award if "[t]he arbitrators exceeded their powers[.]" CJP § 3-224(b)(3). That said, however, Maryland courts have granted great deference to arbitral awards.

For a discussion of judicial deference to arbitral awards, we look to *Amalgamated Transit Union, Local 1300 v. Maryland Transit Admin.*, ____ Md. App. ____, No. 1591, slip op. at 4-5, Sept. Term 2017 (filed Dec. 23, 2019) (Kehoe, J.), in which we said:

> The scope of judicial review of arbitral awards is "very narrowly limited." *Prince George's County Police Civilian Employees Ass'n. v. Prince George's County,* 447 Md. 180, 192 (2016) (quoting *Downey v.*

[3] We also note, the joint stipulation of facts executed by the attorneys for both parties provides that: "The issues to be decided upon in Arbitration are the following[] … [p]ayment of Private Schooling (including home schooling): already decided in the April 15, 2017 Consent Order …." Appellant's written closing arguments submitted to the arbitrator also reiterated that "[t]he issues before the Arbiter are as follows[] … [p]ayment of private school costs …." This would indicate that the issues before the arbitrator may have included its consideration of the private school payments, however, without the transcripts of the proceedings, it is unclear how the issue was presented, if at all, and addressed.

Sharp, 428 Md. 249, 268 (2012)). Indeed, the standard of review in this context is "among the narrowest known to the law." *Letke Security Contractors, Inc. v. United States Surety Co.*, 191 Md. App. 462, 472 (2010) (quoting *Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7*, 886 F.2d 275, 276 (10th Cir. 1989)). We generally defer to an arbitrator's findings of fact and her application of the law, *Baltimore County v. Mayor and City Council of Baltimore*, 329 Md. 692, 701 (1993), even when these are erroneous, *Downey*, 428 Md. at 266.

The rationale for this general rule of deference is twofold. The first reason is practical, often cast in terms of a public policy of encouraging arbitration as an efficient means of extrajudicial dispute resolution. *See, e.g., American Union of Baptists, Inc. v. Trustees of the Particular Primitive Baptist Church at Black Rock, Inc*., 335 Md. 564, 571 (1994) ("This Court has long held arbitration to be a favored method of dispute resolution; consequently, we have generally deferred to the arbitrator's findings of fact and applications of law." (cleaned up)). Maryland courts encourage arbitration because "it provides an informal, expeditious, and inexpensive alternative to conventional litigation." *Prince George's County Police Civilian Employees Ass'n*, 447 Md. at 192 [(internal citation omitted)]. If arbitral awards were constantly subjected to judicial second-guessing, arbitration would cease to be a "simple and inexpensive" way to resolve disputes. *WSC/2005 LLC v. Trio Ventures Assoc.*, 460 Md. 244, 254 (2018) (cleaned up).

The second reason for deference to the arbitrator is more conceptual: we rarely disturb an arbitral award because the parties have bargained for an arbitrator's—and not a court's—resolution of the dispute submitted to arbitration. The arbitrator is the parties' "jointly designated decider," there to resolve issues generated …." [(citation omitted)]. This point was well made … in *Local 453, International Union of Electrical Workers v. Otis Elevator Co.*, 314 F.2d 25[,] [28] (2d Cir. 1963) …:

> Having bargained for the decision of the arbitrator on the question …, the parties are bound by it, even if it be regarded as unwise or wrong on the merits[.]

To that rule of judicial deference, we add that the parties before us agreed to arbitration on a broad scope of enumerated financial and property issues "in which the

decision of the arbitrator shall be conclusive and binding[]" and from which "there shall be no appeal …."

Relying on the parties' agreement of finality of the arbitral award, appellee urges us to either dismiss the appeal for want of a sufficient record, or to affirm the judgment of the circuit court. For several reasons, we agree with appellee except, as we will explain, as to child support.

Because of the application, generally, of judicial deference to arbitral awards, we would be disinclined to consider appellant's arguments. On its face, the award reveals that the arbitrator dealt fully with the subjects submitted to arbitration pursuant to the arbitration agreement and the joint stipulation of facts. Because the parties did not timely tender an application for transcription of the arbitration proceedings for the court's use in consideration of the motion to modify arbitrator's award, as they were entitled to do, pursuant to CJP § 3-220, neither the trial court, nor this Court, were provided with a transcript.[4] Indeed, because the parties intended and agreed that the arbitral award would be binding and non-appealable there would have been no reason to request a transcript of the proceedings.

[4] The statute governing transcripts of arbitration proceedings is CJP § 3-220, which provides that:

> (a) The arbitrators may, and on application of a party shall, order that part or all of the proceedings be transcribed.
>
> (b) The record made from the transcript shall be available to either side for purpose of appeal or otherwise.

Appellant, belatedly recognizing the need of a transcription of the arbitration had moved the circuit court to compel the arbitrator to provide a transcript, asserting that the entirety of the proceedings was recorded on her cellular phone.[5] Indeed, appellant filed a similar motion with this Court, which we denied on May 23, 2018. Appellant's first documented inquiry in the record concerning the recordings of the arbitration proceedings was in a January 9, 2018 letter to Ms. Billman, inquiring as to the easiest way to go about obtaining copies of the recordings for transcription. This letter was sent almost a month after his filing of the motion to modify with the circuit court, wherein the motion stated that: "[appellant] is requesting a transcript of the arbitration proceeding …." In fact, it was not until appellant filed a reply to appellee's response to the motion, that the initial inquiry letter was sent to Ms. Billman. Nothing having been filed with the circuit court at that point about the recordings or transcripts and having nothing in the record to consider other than the filings, the circuit court denied appellant's motion to modify.[6]

We do not, as the circuit court did not, have the recordings or transcripts of the arbitration proceedings in the record. As we have consistently emphasized, it is improper to supplement the record with documents or evidence that were not offered to or considered by the circuit court. *See Franklin Credit Mgmt. Corp. v. Nefflen*, 208 Md. App. 712, 724

[5] The circuit court declined to rule on the pending motion to compel until the disposition of this appeal.

[6] We note, appellant filed his motion to compel the release and transcription of the arbitration proceedings on January 15, 2018, which occurred in the interim between the court's signing of the order denying his motion to modify and confirming the arbitrator's award on January 11, 2018, and the order being entered on January 18, 2018.

(2012) (noting that, "'an appellate court must confine its review to the evidence actually before the trial court when it reached its decision'" (quoting *Cochran v. Griffith Energy Service Inc*., 191 Md. App. 625, 663 (2010))).

In *Kovacs v. Kovacs*, 98 Md. App. 289 (1993), we said that

> A party asserting that error was committed by an arbitration panel bears the burden of showing, by the record, that the error occurred. Mere allegations and arguments contesting the validity of an award, unsubstantiated by the record, are insufficient to meet that burden. The failure to provide the court with a transcript warrants summary rejection of the claim of error.

98 Md. App. at 303 (citations omitted). We therefore affirm the trial court's judgment with respect to the determination of the amount of the marital award and attorney's fees.

We find no error in the trial court's denial of appellant's untimely request that the court order the arbitrator to produce a transcript.

Child support

In his assertions of error, appellant posits that the trial court "abrogated its responsibility to exercise independent judgment regarding the best interests of the children." Particularly, appellant argues that the arbitrator, in establishing child support *vis-à-vis* the children's attendance at a private school in the arbitral award, decided the best interests of the children. We agree that the court did not exercise independent judgment as to the child support award and shall remand for further review of child support issues.[7]

In *Kovacs*, we determined that the best interests of the children include issues of both custody and child support. Here, however, we are concerned only with child support

[7] Indeed, appellee acknowledges in her brief that appellant may be entitled to such relief.

as the question of child access was resolved by a Consent Order and, moreover, was excluded by agreement from the ambit of the arbitrator's authority. We have also pointed out that "[t]he failure of a chancellor to exercise independent judgment with respect to matters concerning the best interests of children constitutes a neglect of the duty of *parens patriae* entrusted to the circuit court." *Kovacs*, 98 Md. App. at 301.

We find, therefore, that the circuit court erred in confirming the arbitral award without first making its own independent judgment on the matter of child support, as required, and later incorporating the arbitral award from the arbitrator's memorandum opinion into the judgment of absolute divorce without having done so.

Therefore, we shall issue a limited remand to the circuit court for the court's independent review of the arbitral award relating to child support. We shall affirm in all other respects.

JUDGMENT OF THE CIRCUIT COURT AFFIRMED IN PART; CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS ASSESSED 3/4 TO APPELLANT AND 1/4 TO APPELLEE.