S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

FRANCIS JERROD MASON, Plaintiff-Appellee,	UNPUBLISHED May 15, 2007
v	No. 266357 Washtenaw Circuit Court Family Division
ELLIN G. GUTIERREZ-MASON, Defendant-Appellant.	LC No. 04-001268-DO

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce. We affirm.

Before their marriage in 1987, the parties entered into a prenuptial agreement. Plaintiff filed for divorce in 2004, and moved to compel arbitration pursuant to the prenuptial agreement. The trial court ruled that, except for a provision contemplating defendant's continued employment, the prenuptial agreement was valid and enforceable. The case proceeded to arbitration, and the trial court entered a judgment of divorce adopting the decisions of the arbitrator in their entirety and incorporating them by reference.

Defendant first argues that the trial court erred in enforcing the arbitration provision in the parties' prenuptial agreement. We review de novo as a question of law the existence of a contract to arbitrate and the enforceability of its terms. *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 99; 323 NW2d 1 (1982). Defendant argues that arbitration provisions in prenuptial agreements are unenforceable under the Domestic Relations Arbitration Act (DRAA), MCL 600.5070 *et seq*. The DRAA "provides for and governs arbitration in domestic relations matters." MCL 600.5070(1). Indeed, the DRAA provides that "[p]arties to an action for divorce . . . may stipulate to binding arbitration by a signed agreement that specifically provides for an award with respect to [e]nforceability of prenuptial and postnuptial agreements." MCL 600.5071(g). However, the DRAA "does not apply to arbitration in a domestic relations matter if, before the effective date of the act, the court entered an arbitration order and all the parties executed the arbitration agreement." *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003). Likewise, it logically follows that the DRAA is also inapplicable to arbitration in a domestic relations matter if, before the effective date of the act, the parties entered into a valid prenuptial agreement containing an arbitration provision, as was the case

here. Indeed, the parties entered into the prenuptial agreement in 1987, 14 years before the DRAA was enacted in 2001.

Defendant urges this Court to retroactively apply the DRAA to invalidate the arbitration provision contained in the parties' prenuptial agreement. However, "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." *Selk v Detroit Plastic Products,* 419 Mich 1, 9; 345 NW2d 184 (1984). And there is a "strong presumption against the retroactive application of statutes in the absence of a clear expression by the Legislature that the act be so applied." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 588; 624 NW2d 180 (2001). Accordingly, whether the arbitration provision in the parties' prenuptial agreement was enforceable under the DRAA is irrelevant. The enforceability of the arbitration clause must be determined under MCL 600.5001(2), which governs enforcement of arbitration agreements. Here, the provision in the prenuptial agreement to settle disputes by arbitration was valid, enforceable, and irrevocable, where no grounds existed upon which to invalidate it. The parties entered into a prenuptial agreement that contained an arbitration clause 14 years before the DRAA was enacted, and the trial court did not err in enforcing the arbitration clause contained in the prenuptial agreement.

Defendant next argues that trial court erred in enforcing the prenuptial agreement. We review for an abuse of discretion a trial court's determination that a prenuptial agreement is enforceable. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). Michigan courts have held that prenuptial agreements are enforceable in the context of divorce. *Rinvelt*, *supra* at 379. To be enforceable, prenuptial agreements must be "fair, equitable, and reasonable under the circumstances, and must be entered into voluntarily, with full disclosure, and with the rights of each party and the extent of the waiver of such rights understood." *Id*. at 378-379. Additionally, the agreement "should be free from fraud, lack of consent, mental incapacity, or undue influence." *Id*. at 379. "The party challenging the agreement bears the burden of proof and persuasion." *Id*. at 382.

Defendant argues that the trial court erred in its determination that the prenuptial agreement was enforceable because her affidavit raised questions of fact regarding the conscionability of the prenuptial agreement, which required an evidentiary hearing or trial. However, defendant's affidavit amounted to nothing more than belated complaints that the prenuptial agreement did not ultimately inure to her benefit, and did not raise factual questions which would warrant a hearing. The trial court commented that the prenuptial agreement was straightforward and standard, and determined that defendant failed to meet her burden of showing a significant issue regarding the unconscionability of the document itself. Moreover, it considered individual provisions of the document. It concluded that the provision of the prenuptial agreement contemplating defendant's continued employment would render the agreement unfair, and specifically voided that provision.

Defendant argues, however, that the trial court erred when it voided the specific provision of the prenuptial agreement contemplating her continued employment, and that it should have instead invalidated the entire prenuptial agreement. It is well settled that "[c]ourts cannot make contracts. They can only construe them," and "it necessarily follows that parties who negotiate and ratify antenuptial agreements should do so with the confidence that their expressed intent will be upheld and enforced by the courts." *Reed v Reed*, 265 Mich App 131, 145; 693 NW2d 825 (2005) (internal quotation and citation omitted). Accordingly, the trial court invalidated the

offending provision and properly enforced the remainder of the prenuptial agreement as written, adhering to the clause providing that "[s]hould one or more provisions of this Agreement be determined not to be valid by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect." See *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005).

Defendant also argues that the trial court erred in enforcing the prenuptial agreement without evaluating whether changed circumstances existed that would render its enforcement unfair and unreasonable. This Court has explained that "in analyzing whether changed circumstances might justify refusing to enforce a prenuptial agreement . . . [the] focus [is] on whether the changed circumstances were foreseeable when the agreement was made." *Reed*, *supra* at 144. "[F]or a change of circumstances to be uncontemplated, the event must not have been reasonably foreseen by the parties prior to or at the time of the making of the agreement." *Id*. (internal quotations and citations omitted). Contrary to defendant's assertion, the trial court specifically evaluated whether changed circumstances existed that would render enforcement of the prenuptial agreement unfair or unreasonable, and determined that, with the exception of the clause contemplating defendant's continued employment, no such changes existed. A review of the record reveals that the trial court did not clearly err in its "thorough[] evaluat[ion] [of] the relevant considerations" set out in *Rinvelt*, *supra* at 382, and that it did not abuse its discretion in determining that, with the exception of the clause contemplating the parties' continued employment, the prenuptial agreement was enforceable.

Defendant next argues that the trial court erred in denying her motion to determine whether the arbitrator's award enforcing the prenuptial agreement was unfair and unenforceable. We review de novo a trial court's decision on a motion to enforce, vacate, or modify an arbitration award. *Bayati v Bayati*, 264 Mich App 595, 597-598; 691 NW2d 812 (2004).

"Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). "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." *Id*. "Courts may not engage in contract interpretation, which is a question for the arbitrator." *Id*.

Here, defendant urged the trial court to award her additional property or support to bring about a more equitable result than that decided by the arbitrator. The trial court noted the limited review of arbitration awards, and determined that defendant did not meet the threshold for setting aside the arbitration award. Indeed, defendant did not point to any basis on which the arbitration award should be vacated under MCR 3.602(J).

Defendant maintains that she was entitled, under *Rinvelt*, to a determination whether enforcing the prenuptial agreement was unfair or unreasonable. Defendant equates fairness and reasonableness with a disposition to her benefit, regardless of the terms of the prenuptial agreement. And, defendant ignores the complete inquiry whether "the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Reed*, *supra* at 142-143. This Court has explained that the primary focus is on foreseeability, which is an approach taken to "preclude[] the judiciary from substituting their own subjective views of 'fairness' contrary to an express written agreement." *Id*. at 144. The

trial court determined that, aside from the fact that defendant did not work as contemplated by the parties, no changed circumstances existed to render the agreement unfair and unreasonable to enforce. Accordingly, the trial court properly determined that defendant did not meet the threshold for setting aside the arbitration award.

Defendant next argues that the trial court erred in submitting the issue of spousal support to arbitration and in declining to award her spousal support. We review de novo whether an issue is subject to arbitration. *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 591; 637 NW2d 526 (2001). The prenuptial agreement specifically provided that "[n]either party has any right to support or other compensation from the other party as a consequence of their marriage or of this Agreement. No agreement for support by one party or the other shall be effective unless in writing signed by both parties." The prenuptial agreement also provided that "any other dispute arising out of this Agreement . . . shall . . . be submitted to . . . arbitration." Accordingly, the arbitrator found that "[n]o award of spousal support is issued to [defendant] as such support is expressly barred by the terms of the Pre-Nuptial Agreement." The trial court incorporated the arbitrator's decision into the judgment of divorce: "[p]ursuant to the Decision of the Arbitrator in this matter, neither plaintiff nor defendant is entitled to alimony. Alimony is forever barred."

Defendant maintains that, assuming the prenuptial agreement was valid, only the issue of property should have been referred to the arbitrator. However, defendant ignores the plain language of the prenuptial agreement, which provides that, in addition to property, any other dispute arising out of the agreement, which included a clause barring spousal support, shall be submitted to arbitration. Indeed, "Michigan's public policy favors arbitration in the resolution of disputes. Arbitration clauses in contracts are to be liberally construed," and "[a]ny doubts about the arbitrability of an issue should be resolved in favor of arbitration." *Omega Constr Co, Inc v Altman*, 147 Mich App 649, 655; 382 NW2d 839 (1985).

Defendant further argues that the trial court should have reviewed the waiver of spousal support in the prenuptial agreement to determine if it was valid under *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000). A special conflict panel in *Staple* concluded that the statutory right to seek modification of spousal support under MCL 552.28 could be waived where the parties to a divorce specifically gave up their statutory right to petition the trial court for modification and agreed that the spousal support provision was final, binding, and nonmodifiable. *Id*. at 564, 578. However, "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." *United Steel Workers of America v Warrior & Gulf Navigation Co,* 363 US 574, 582; 80 S Ct 1347; 4 L Ed 2d 1409 (1960). Likewise, a party is required to submit to arbitration any dispute which she agreed so to submit, as was the case with spousal support here.

We find that defendant's argument concerning the applicability of *Staple* is essentially "a ruse to induce the court to review the merits" of the arbitrator's decision. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). But, judicial review of an arbitrator's decision is limited, and a court may not review an arbitrator's factual findings or decision on the merits. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143, 150; 393 NW2d 811 (1986). "This policy of judicial deference is grounded in the recognition that an arbitrator's authority is conferred by the parties' contractual agreement." *Service Employees Int'l Union, Local 466M v Saginaw*, 263 Mich App 656, 660-661; 689 NW2d 521 (2004). Defendant entered into a valid prenuptial agreement that contained a provision waiving

spousal support, as well as a provision agreeing to submit any disputes arising out of the agreement to arbitration. Defendant is bound by the terms of the agreement, and the arbitrator correctly enforced the valid waiver of spousal support contained in the prenuptial agreement.

Defendant next argues that even if the waiver of spousal support was binding, the trial court erred in upholding the arbitrator's decision to enforce it, where enforcement was unfair and unreasonable under *Rinvelt*. However, as noted above, defendant ignores the complete inquiry whether "the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Reed*, *supra* at 142-143. The trial court determined that, aside from the fact that defendant did not work as contemplated by the parties, no changed circumstances existed to render the agreement unfair and unreasonable to enforce. Accordingly, the trial court did not err in referring the issue of spousal support to arbitration and in affirming the arbitrator's determination that spousal support was barred based on the plain language of the prenuptial agreement.

Finally, defendant takes issue with the trial court's denial of her motion for attorney fees, as well as the arbitrator's award of attorney fees to plaintiff for costs incurred in his motion to compel arbitration, and the trial court's incorporation of that award into the judgment of divorce. However, defendant cites no authority to support her argument why the trial court's ruling was erroneous, and "[i]t is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we decline to address this issue.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra