STATE OF MICHIGAN

COURT OF APPEALS

CAROL L. BORKE,

Plaintiff-Appellee,

v

LARRY W. KINNEY,

Defendant-Appellant.

UNPUBLISHED
November 23, 2021

Nos. 350809; 354237
Livingston Circuit Court
LC No. 11-044443-DM

Before: RICK, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

In these consolidated appeals,[1] in Docket No. 350809, defendant appeals the trial court's order confirming an arbitration award. In Docket No. 354237, defendant appeals the trial court's order adopting the report and recommendation of a Friend of the Court referee regarding calculation of annual adjustment payments to plaintiff for 2017 and 2018. We affirm.

I. BACKGROUND

This case arises from the divorce of plaintiff and defendant. During their marriage, plaintiff and defendant had five children together, who were born on dates ranging from March 10, 1994 to November 12, 2001. The parties reached a settlement regarding the calculation and payment of child support and spousal support after plaintiff filed for divorce in 2011. Specifically, the parties agreed on a base level of support, which presumed that defendant earned an income of $250,000 per year and that plaintiff earned an income of $88,000 per year. The agreement also took into consideration that defendant's income could increase and that his company, Datapak Services

[1] *Borke v Kinney*, unpublished order of the Court of Appeals, entered September 17, 2020 (Docket Nos. 350809 and 354237).

Corporation, had a tax benefit that could be used in future years to setoff profits of the business. The agreement provided as follows:

> The annual payments from Defendant to Plaintiff shall be made within thirty (30) days from filing his personal tax return, and in no event later than November 15 of each year. Defendant shall file his tax returns timely and no later than October 15 of each year.
>
> The Net Operating Loss (NOL) carry[ing] forward as of 12/31/2011 will be divided between the parties—2/3 by Defendant and 1/3 by Plaintiff, subject to [Internal Revenue Service (IRS)] Allowable.

Attached to the agreement was a document titled Schedule (A), which was a "Schedule of Projected Support & Alimony Payments." In January 2012, the trial court entered a consent judgment of divorce, which adopted the parties' settlement agreement by reference. The parties were awarded joint legal and physical custody of the minor children.

In September 2015, plaintiff moved the trial court to enforce the terms of the settlement agreement in part due to defendant's failure to pay annual adjustment payments. The parties disagreed regarding the calculation of defendant's income as related to his business income from Datapak and the NOL. In particular, since the settlement agreement had been reached, plaintiff discovered that she could not use her one-third share of the NOL.[2] In March 2016, plaintiff moved the trial court to modify child support on the basis of a change of overnight visits for some of the minor children. The trial court referred the matter to arbitration. In relevant part, the parties agreed to arbitrate " 'Annual Adjustment' payments based upon Defendant's compensation pursuant to the Settlement Agreement," "the [NOL] issue and child support," and the "[d]etermination of child support going forward, based on the change of custody[.]"

After a lengthy arbitration, which was conducted over five separate hearings ending on April 12, 2017, the arbitrator issued an award on September 6, 2018.[3] First addressing the NOL issue, the arbitrator determined that only defendant was able to claim the tax benefit of the NOL under IRS regulations. Therefore, the arbitrator awarded defendant the full NOL. However, the arbitrator concluded that the NOL could not be used to lower defendant's income for purposes of annual adjustment payments and ordered that defendant's income would be adjusted dating back to 2012. The arbitrator also found that defendant had attempted to artificially lower his income by overpaying his new spouse for her work at Datapak and by using business funds to pay for two vehicles. Thus, when calculating the annual adjustment payments, the arbitrator concluded that defendant had to (1) "[a]dd back into his income for the year he paid to his new spouse anything above $28,000" and (2) "add back $6,000 for 2015, 2016, and 2017" for the vehicle. The arbitrator incorporated an exhibit by reference, which showed calculations of the annual adjustment payments for each year from 2012 to 2016 on the basis of the findings by the arbitrator and on Schedule (A) of the settlement agreement. That total amount was $655,459. The arbitrator also

[2] The NOL was valued at $2.1 million at the time of the divorce.

[3] It is unclear from the record why there was a delay in the arbitrator issuing the award.

modified the child support formula to reflect the new custody situation and ordered that the recalculated child support amount would be made retroactive to January 1, 2016.

Defendant moved the arbitrator to correct errors that defendant believed had been made by the arbitrator when he calculated the award. The arbitrator denied defendant's motion. Defendant then moved the trial court to vacate or modify the arbitration award. Defendant argued that the arbitrator had exceeded his authority by effectively rewriting the parties' settlement agreement on the basis of equitable determinations related to the calculation of defendant's income and clearly erred as a matter of law when he improperly retroactively modified support by changing the calculation of defendant's income back to 2012.

The trial court granted defendant relief in part after determining that the modification of child support back to January 1, 2016, was improper when plaintiff did not move for such relief until March 24, 2016. In all other respects, the trial court disagreed with defendant's arguments. The trial court remanded the matter to the arbitrator, and the arbitrator corrected the modification of child support as directed by the trial court. Defendant thereafter moved the trial court to vacate or modify the newly amended arbitration award for the same reasons he had argued previously. The trial court disagreed with defendant's claims of error and confirmed the arbitration award and the arbitrator's supplemental ruling. Defendant's appeal in Docket No. 350809 followed.

While that appeal was pending, litigation before the trial court continued. Plaintiff moved the trial court to enter an order requiring defendant to pay a specific amount in annual adjustment payments. For the years 2012 to 2016, plaintiff asserted that the amounts had already been calculated in the exhibit to the arbitration award. For 2017 and 2018, plaintiff urged the trial court to calculate defendant's income on the basis of the rules for doing so set out in the arbitration award and to order defendant to pay specific annual adjustment payments for those years. Defendant contended, again, that the amounts listed in the arbitration award were incorrect because they failed to consider that some of the children had reached the age of majority. Defendant also reiterated that the calculation of his income in the arbitration award was incorrect, and he indicated that the improper calculation should be corrected on appeal.

The trial court referred the issue to a referee, who held an evidentiary hearing on the topic. A significant portion of the evidentiary hearing pertained to whether the settlement agreement and Schedule (A) contemplated reducing child support as the children reached the age of majority. The referee indicated that he would not include support for any child after he or she reached the age of 18 years for the purposes of calculating the annual adjustment payments for 2017 and 2018. In a report and recommendation, the referee concluded that defendant owed child support annual adjustment payments of $364,021 for 2017 and $28,884 for 2018. Defendant filed objections with the trial court, primarily arguing that the referee had improperly ignored the formula in Schedule (A) of the settlement agreement and instead reverted to the Michigan Child Support Formula (MCSF) for calculating annual adjustment payments. The trial court disagreed and adopted the referee's calculation of annual adjustment payments for child support for 2017 and

2018. Defendant's appeal in Docket No. 354237 followed, and the two appeals were consolidated. We stayed the lower court proceedings pending the outcome of this appeal.[4]

II. ARBITRATION

Defendant argues the trial court erred by declining to vacate or modify the arbitration award because the arbitrator exceeded his authority, committed clear errors of law, and made evident miscalculations. We disagree.

A. STANDARDS OF REVIEW

"In general, courts have a limited role in reviewing arbitration awards. This Court reviews de novo a circuit court's decision whether to vacate an arbitration award." *TSP Servs, Inc v Nat'l-Std, LLC*, 329 Mich App 615, 619-620; 944 NW2d 148 (2019). "In addition, this Court also reviews de novo issues of law involving statutory construction, as well as the proper interpretation and application of a court rule[.]" *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 532; 866 NW2d 817 (2014) (citations omitted).

B. GENERAL LAW

"Judicial review of an arbitrator's decision is narrowly circumscribed." *Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). Such limited judicial review "certainly is the case with respect to domestic relations arbitration awards." *Washington v Washington*, 283 Mich App 667, 671; 770 NW2d 908 (2009). "[A]rbitration in domestic relations matters," like this one, is "provide[d] for and govern[ed] by" statute. MCL 600.5070(1). See also *Cipriano v Cipriano*, 289 Mich App 361, 367; 808 NW2d 230 (2010) (stating that "[d]omestic-relations arbitration is governed by the specific statutory scheme set forth in the domestic relations arbitration act (DRAA)"), citing MCL 600.5070 *et seq*. Nevertheless, "[a]rbitration proceedings . . . are also governed by court rule except to the extent those provisions are modified by the arbitration agreement or [the DRAA]." MCL 600.5070(1).

The statutory scheme, which is found in MCL 600.5081(2),[5] provides specific circumstances for when a trial court is permitted to vacate an arbitration award:

> (2) If a party applies under this section, the court shall vacate an award under any of the following circumstances:
>
> > (a) The award was procured by corruption, fraud, or other undue means.

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[4] *Borke v Kinney*, unpublished order of the Court of Appeals, entered October 16, 2020 (Docket Nos. 350809 and 354237).

[5] Notably, the language in MCL 600.5081(2) is substantively identical to the language used in MCR 3.602(J)(2), which discusses vacating arbitration awards not necessarily related to domestic relations case.

> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

In this litigation, defendant cites only to MCL 600.5801(2)(c) as a reason for vacating the arbitration award.

Defendant also argues, however, that the arbitration award should have been modified by the trial court. As noted, the statute related to arbitration in domestic relations cases states such proceedings "are also governed by court rule except to the extent those provisions are modified by the arbitration agreement or [the DRAA]." MCL 600.5070(1). One such court rule is MCR 3.602(K)(2)(a), which requires a trial court to "modify or correct the award if . . . there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award[.]"

C. APPLICABLE LAW AND ANALYSIS

1. ARBITRATOR'S AUTHORITY TO CALCULATE DEFENDANT'S INCOME

Defendant argues that the trial court erred in refusing to vacate the arbitration award because the arbitrator exceeded his authority and committed a clear error of law by effectively rewriting the parties' settlement agreement when determining how defendant's income should be calculated. To support his claim, defendant relies solely on MCL 600.5801(2)(c), which relates to whether "[t]he arbitrator exceeded his or her powers."

> [MCL 600.5801(2)(c)] is the codification of a phrase used for many years in common-law and statutory arbitrations. Indeed, our Court has repeatedly stated that arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law. Pursuant to MCL 600.5081(2)(c), then, a party seeking to prove that a domestic relations arbitrator exceeded his or her authority must show that the arbitrator either (1) acted beyond the material terms of the arbitration agreement or (2) acted contrary to controlling law. [*Washington*, 283 Mich App at 672 (quotation marks and citations omitted).]

As to whether an arbitrator acts outside the terms of the agreement, "this Court has consistently held that arbitration is a matter of contract and that the arbitration agreement is the agreement that dictates the authority of the arbitrators." *Cipriano*, 289 Mich App at 376. With respect to whether an arbitrator acts contrary to controlling law, we have held that "[i]n order for a court to vacate an arbitration award because of an error of law, the error must have been so substantial that, but for the error, the award would have been substantially different." *Id*. at 368.

Furthermore, "any error of law must be discernible on the face of the award itself[.]" *Washington*, 283 Mich App at 672 (citation omitted). "By on its face we mean that only a legal error that is evident without scrutiny of intermediate mental indicia, will suffice to overturn an arbitration award." *Id*. (quotation marks and citation omitted). In other words, "[c]ourts will not engage in a review of an arbitrator's mental path leading to [the] award." *Id*. (quotation marks and citations omitted; alteration in original).

While the caselaw above provides grounds on which a trial court *can* vacate an arbitration award, there are also grounds on which a trial court *cannot* do so. When the arbitration involves interpretation or construction of an underlying contract, "only the arbitrator can interpret the contract." *Brucker v McKinlay Transp, Inc*, 454 Mich 8, 15; 557 NW2d 536 (1997); see also *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999) ("Courts may not engage in contract interpretation, which is a question for the arbitrator."). Furthermore, a reviewing "court may not review an arbitrator's factual findings[.]" *TSP Servs*, 329 Mich App at 620 (quotation marks and citation omitted). Indeed, "even if the [arbitration] award was against the great weight of evidence or was not supported by substantial evidence, this Court would be precluded from vacating the award." *Fette v Peters Constr Co*, 310 Mich App 535, 544-545; 871 NW2d 877 (2015).

In that regard, this Court has stated, "[i]t is simply outside the province of the courts to engage in a fact-intensive review of how an arbitrator calculated values, and whether the evidence he relied on was the most reliable or credible evidence presented." *Washington*, 283 Mich App at 675. Moreover, and importantly, although a reviewing court is permitted to consider whether an arbitrator acted contrary to controlling law, a reviewing court is not permitted to review the legal merits of an arbitrator's decision. Considering that distinction, "once we have recognized that the arbitrator utilized controlling law, we cannot review the legal soundness of the arbitrator's application of Michigan law." *Washington*, 283 Mich App at 674. Consequently, "an allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrator's decision." *Id*. at 675 (quotation marks and citation omitted).

Defendant contends that the arbitrator exceeded his authority under the arbitration agreement because the arbitrator was only permitted to consider and enforce the settlement agreement, not effectively rewrite it. Defendant argues that the arbitrator effectively rewrote the settlement agreement by creating a new formula for calculating defendant's income for purposes of annual adjustment payments. We disagree.

"Because arbitration is a matter of contract, when interpreting an arbitration agreement, we apply the same legal principles that govern contract interpretation[.]" *Lichon v Morse*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket Nos. 159492 and 159493); slip op at 10 (quotation marks, alteration, and citations omitted). "Our goal in interpreting a contract is to ascertain the intent of the parties at the time they entered into the agreement. *Id*. at ___; slip op at 10 (quotation marks and citation omitted).

As relevant to this issue, the arbitration agreement granted the arbitrator the authority to decide the following issues: "Plaintiff's Motion for Relief Pursuant to Judgment and Settlement Agreement filed September 17, 2015, including the [NOL] issue and child support;" and " 'Annual Adjustment' payments based upon Defendant's compensation pursuant to Settlement

Agreement[.]" Thus, the arbitration agreement broadly provided the arbitrator authority to determine annual adjustment payments, to calculate defendant's compensation, and to decide the NOL issue. Although the arbitration agreement does not specifically mention other business expenses and tax deductions, such as those for a business vehicle or salary paid to employees, those issues are impliedly included in the calculation of defendant's compensation. Importantly, review of the arbitration agreement reveals no specific terms limiting the arbitrator regarding the decisions discussed above. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991) (holding that "an award will be presumed to be within the scope of the arbitrators' authority absent express language to the contrary"). The only potential limitation on the arbitrator in the arbitration agreement is that the annual adjustment payments, which are computed on the basis of defendant's compensation, must be decided "pursuant to Settlement Agreement."

It is clear that the arbitrator considered the settlement agreement when deciding the issue of annual adjustment payments. The clearest example is in the section of the arbitration award regarding calculation of the annual adjustment payments related to child support, which provided as follows:

> The purpose of the formula [contained in the settlement agreement] was to provide a reasonable formula for properly determining Defendant's income in order to provide proper support to Plaintiff and the children. I am duty bound to follow the intent of the parties in arriving at the proper income for the Defendant[.]

Consequently, defendant's argument that the arbitrator exceeded his authority by violating the terms of the arbitration agreement is without merit.

Defendant also argues, however, that the arbitrator exceeded his authority by making his decisions "in contravention of controlling principles of law." In particular, defendant contends that the arbitrator failed to abide by the law related to the interpretation of contracts. The law regarding such interpretation was recently restated by this Court in *Barshaw v Allegheny Performance Plastics, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 350279); slip op at 3 (quotation marks and citations omitted), which outlined the core principles of contract interpretation:

> In interpreting a contract, our obligation is to determine the intent of the contracting parties. . . . Once discerned, the intent of the parties will be enforced unless it is contrary to public policy.

Defendant asserts that the arbitrator violated the law by ignoring the terms of the parties' settlement agreement and by choosing to act equitably instead. However, when discussing the calculation of defendant's income, the arbitrator stated that his calculation of defendant's income was based on "the intent of the parties" as reflected in the settlement agreement and on the testimony presented at the hearings. Notably, Michigan caselaw with respect to contract interpretation provides that the "obligation is to determine the intent of the contracting parties," and "the intent of the parties will be enforced unless it is contrary to public policy." *Barshaw*, ___ Mich App at ___; slip op at 3 (quotation marks and citation omitted). Thus, considering the arbitrator's repeated references to the settlement agreement, consideration of the terms used in the

settlement agreement, and stated purpose of determining and enforcing the intent of the parties, there is nothing on the face of the award to suggest that the arbitrator made a clear error of law.

A close examination of defendant's arguments on appeal make it clear that defendant is actually arguing that the arbitrator erred in interpreting the settlement agreement. Indeed, defendant focuses on the language used in the settlement agreement and its meaning as related to the tax code and business deductions. However, as this Court has previously held, "once we have recognized that the arbitrator utilized controlling law, we cannot review the legal soundness of the arbitrator's application of Michigan law." *Washington*, 283 Mich App at 674. Stated differently, because the arbitrator considered controlling Michigan law regarding the interpretation of a contract, the trial court and this Court are not permitted to review whether the arbitrator actually applied the law correctly, see *id.*, because this would amount to an analysis of the arbitrator's decision on the merits, see *TSP Servs*, 329 Mich App at 620 ("A court may not review an arbitrator's factual findings or decision on the merits.") (Quotation marks and citation omitted.) This Court and our Supreme Court have stated, "[c]ourts may not engage in contract interpretation, which is a question for the arbitrator." *Konal*, 235 Mich App at 74, citing *Brucker*, 454 Mich at 17-18. To grant defendant the relief he seeks, we would be required to substitute our judgment for that of the arbitrator regarding the proper interpretation of the settlement agreement. This is simply not allowed under applicable law: "[C]ourts may not substitute their judgment for that of the arbitrator['s] . . . ." *Washington*, 283 Mich App at 675 (quotation marks and citation omitted).

To summarize, the arbitrator had the authority to determine defendant's income for purposes of calculating annual adjustment payments under the terms of the settlement agreement, which the arbitrator did by utilizing the law of contract interpretation. Thus, the trial court did not err in deciding to confirm the award of the arbitrator. As contemplated in *Gordon Sel-Way*, 438 Mich at 497, defendant's arguments regarding the arbitrator purportedly exceeding his authority were "a ruse to induce the court to review the merits of the arbitrator[']s decision," and the trial court properly refused to do so.

2. RETROACTIVITY OF SUPPORT MODIFICATION

Defendant next argues that the trial court should have vacated the arbitration award because the arbitrator violated Michigan statutory law with respect to the retroactivity of child support and spousal support. Defendant claims that the arbitrator acted contrary to controlling law by making his support obligations retroactive to 2012, despite plaintiff only having moved for modification of child support in March 2016 and never having moved for modification of spousal support. We disagree.

MCL 552.603(2) states, in pertinent part, as follows:

> Retroactive modification of a support payment due under a support order is permissible with respect to a period during which there is pending a petition for modification, but only from the date that notice of the petition was given to the payer or recipient of support.

"MCL 552.603(2) was drafted to reflect the public policy of ensuring the enforceability of support orders for the protection of children." *Malone v Malone*, 279 Mich App 280, 288-289;

761 NW2d 102 (2008). Considering the language of MCL 552.603(2), this Court has explained that the statute "prohibits both retroactive increases and decreases in child support payments," but allows such "for the period during which there is a pending petition for modification, commencing from the 'date that notice of the petition was given to the payer or recipient of support,' MCL 552.603(2)." *Clarke v Clarke*, 297 Mich App 172, 187; 832 NW2d 318 (2012) (citation omitted). As stated in *Cipriano*, 289 Mich App at 374, the language in MCL 552.603(2) also applies to spousal support orders.

We disagree that the portions of the arbitrator's decision dating back to 2012 were retroactive modifications of child support or spousal support. Instead, the arbitrator was considering annual adjustment payments specifically contemplated by the parties in the settlement agreement. The record establishes that the consent judgment of divorce and settlement agreement contained terms requiring the payment of spousal support at a rate of $21,600 per year for the first three years, and $18,000 per year afterward. Those same documents showed that child support would be calculated on the basis of imputing an income of $250,000 per year to defendant. A uniform child support order (UCSO) was entered in February 2012 after the consent judgment of divorce was entered, and the UCSO order reflected those calculations. No other UCSO order was ever entered purporting to modify child support dating back to 2012, nor was there any order purporting to modify spousal support dating back to 2012.

Instead, in addition to the terms of the settlement agreement and consent judgment of divorce already noted, the parties agreed that defendant would be responsible for annual adjustment payments on the basis of his actual—as opposed to his imputed—income. The settlement agreement specifically contemplated that the annual adjustment payments would be calculated after defendant filed his personal federal income taxes. This is obvious because the calculation of his income, at least in part, relied on data from his tax returns each year. Indeed, the settlement agreement stated, "[f]or each annual adjustment, Defendant shall pay this adjustment directly to Plaintiff within thirty (30) days from filing his personal tax return."

As discussed above, the arbitrator was authorized by the parties to determine " 'Annual Adjustment' payments based upon Defendant's compensation pursuant to Settlement Agreement." In the arbitration award and the arbitrator's order after remand from the trial court, the arbitrator clearly stated that he was calculating defendant's income for the purpose of determining annual adjustment payments—not for the purpose of retroactively modifying child support and spousal support obligations dating back to 2012. Defendant's argument that the arbitrator exceeded his authority by clearly violating the law relies on there being a retroactive modification of support in the arbitration award; his claim fails because there was no such modification.

Furthermore, even if defendant was correct that the arbitrator's calculation of his income and his ordering of annual adjustment payments were a retroactive modification of support, defendant's claim would still fail because there is an exception to the rule regarding retroactive modification of support in the same statute relied upon by defendant. Specifically, MCL 552.603(5) provides that "[t]his section does not prohibit a court approved agreement between the parties to retroactively modify a support order."

In this case, there is no dispute that the parties had an "agreement" for defendant to pay annual adjustment payments related to child support and spousal support up to 11 months after the

year in question ended. Indeed, the settlement agreement specifically provided for such, and the trial court "approved" it by adopting it in the consent judgment of divorce. Therefore, even if this Court were inclined to agree with defendant that the annual adjustment payments amounted to a retroactive modification of support, defendant's claim would still fail. See MCL 552.603(5). Consequently, the arbitrator had legal authority to award plaintiff annual adjustment payments on the basis of defendant's income whether or not those annual adjustment payments constituted a retroactive modification of support. We therefore conclude that the trial court properly confirmed the arbitration award with respect to the annual adjustment payments.

3. EVIDENT MISCALCULATION

Defendant next argues that the trial court should have vacated or modified the arbitration award because it contained an evident miscalculation related to child support and the children reaching the age of majority. We disagree.

When considering a claim of an evident miscalculation of figures, "[t]his Court has repeatedly emphasized that it must carefully evaluate claims of arbitrator error to ensure that they are not being used as a ruse to induce this Court to review the merits of the arbitrator's decision." *Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222, 229-230; 792 NW2d 59 (2010). This Court has clarified that "MCR 3.602(K)(2)(a) allows for modification or correction of an award only when it is based on a mathematical miscalculation, such as where an arbitrator erred in adding a column of numbers, or an evident mistake in a description." *Id*. at 230. The rule is not implicated when a party's "alleged error concerns the interpretation of the underlying contract, and not descriptions or mathematical calculations[.]" *Id*.

The arbitration award had an exhibit attached to it which contained calculations regarding the annual adjustment payments owed for each year from 2012 to 2016 as related to child support. The exhibit refers to Schedule (A) of the settlement agreement, which created the formula used by the arbitrator to calculate the annual adjustment payments. Schedule (A) reflects that, when defendant's income is more than $250,000 in a given year, the amount that he should provide for child "Support & Medical" also increases. Schedule (A) contains specific values of the "Support & Medical" for potential earnings levels that defendant might reach in a given year. For example, in a year that defendant made $350,000, he was to pay $58,584 in "Support & Medical," which was $13,944 more than the base amount listed in the settlement agreement. In the line of Schedule (A) regarding "Support & Medical," there is a footnote, which provides:

> The amount for Support & Medical is based on current status and ages of dependents. The total payment amount will be adjusted based on dependent status. Years with compensation in excess of $750,000 will calculate incremental Support & Medical at 10% of compensation in excess of $750,000 [subject to adjustments footnote (a)]. [Brackets in original.]

The exhibit attached to the arbitration award contained calculations of annual adjustment payments for each year from 2012 to 2016 for child support. The values listed in Line 7 comport with the "Support & Medical" amounts from Schedule (A) as related to defendant's income for each year. For example, in 2014, when defendant made more than $350,000, the "Support & Medical" value was listed at $58,584. The "Support & Medical" calculated at Line 7 of the exhibit

does not abate as the years progress and as the children reach the age of majority. A note to Line 7, footnote [C], provides that the values were "based upon calculated Income Available for Support as well as . . . Schedule A to the Settlement Agreement dated January 20, 2012 []."

Defendant argues the values in Schedule (A) were supposed to abate as the children reached the age of majority. Therefore, defendant contends that, because the arbitration award failed to allow for a reduction in "Support & Medical" as the children aged out, the arbitrator made an "evident miscalculation" requiring correction under MCR 3.602(K)(2)(a). However, we "must carefully evaluate claims of arbitrator error to ensure that they are not being used as a ruse to induce this Court to review the merits of the arbitrator's decision." *Nordlund & Assoc*, 288 Mich App at 230. This is the case here because, on the face of the arbitration award, there is no evident miscalculation. Instead, the arbitrator's decision could be explained by an interpretation of the contract with which defendant disagrees.

Defendant's argument presumes that child support must stop when a minor reaches the age of majority, which generally is true. See MCL 552.605b(1) ("A court that orders child support may order support for a child after the child reaches 18 years of age[.]"). However, "[a] provision contained in a judgment or an order . . . that provides for the support of a child after the child reaches 18 years of age is valid and enforceable if . . . [t]he provision is contained in the judgment or order by written agreement signed by the parties." MCL 552.605b(5)(c). The consent judgment of divorce references the settlement agreement and Schedule (A) when listing child support requirements. The consent judgment of divorce does not reference whether defendant agreed to pay child support after the children reached the age of majority. The settlement agreement, likewise, discusses child support and references Schedule (A) for the calculation. The main portion of the settlement agreement, i.e., not the schedule attached to it, does not reference any event linked to the children reaching the age of majority.

Indeed, when reviewing the consent judgment of divorce, the settlement agreement, and Schedule (A), the only place this issue is even remotely referenced is in footnote (a) to Schedule (A). As already stated, that footnote provides that "[t]he amount for Support & Medical is based on current status and ages of dependents." Given that the parties distinguished between age and status, it is reasonable to conclude that the parties did not view the two terms to be analogous. This is an important distinction because the next statement of the footnote provides that "[t]he total payment amount [for Support & Medical] will be adjusted based on dependent status." Thus, it appears that the parties agreed that the "Support & Medical" payments would be adjusted on the basis of the "status" of the dependents, but not on the basis of the "age" of the dependents.

This language indicates that the arbitrator may have interpreted the parties' written and signed agreement to allow for child support after the children turned 18 years old. Consequently, to correct the "evident miscalculation" identified by defendant, we and the trial court would have to revisit the arbitrator's factual analysis and reasoning as related to contract interpretation. However, "MCR 3.602(K)(2)(a) allows for modification or correction of an award only when it is based on a mathematical miscalculation, such as where an arbitrator erred in adding a column of numbers, or an evident mistake in a description," and the rule is not implicated when a party's "alleged error concerns the interpretation of the underlying contract, and not descriptions or mathematical calculations[.]" *Nordlund & Assoc*, 288 Mich App at 230. Despite defendant's best

effort to present it as a mere mathematical error, defendant's argument is in regard to the language in the underlying contract. Consequently, his argument must fail. See *id.*

III. REFEREE'S CALCULATION OF ANNUAL ADJUSTMENT PAYMENTS FOR 2017 AND 2018

Defendant next argues that the trial court erred by adopting the referee's calculation of annual adjustment payments for 2017 and 2018 for child support because the referee improperly ignored the parties' contract. We disagree.

A. STANDARDS OF REVIEW

To the extent this issue "involves questions regarding the proper interpretation of a contract, this Court's review is de novo." *Johnson v USA Underwriters*, 328 Mich App 223, 233; 936 NW2d 834 (2019). "A divorce judgment entered upon the settlement of the parties . . . represents a contract, which, if unambiguous, is to be interpreted as a question of law." *Holmes v Holmes*, 281 Mich App 575, 587; 760 NW2d 300 (2008) (quotation marks and citation omitted; alteration in original). "[W]hether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law." *Id.* at 586-587 (quotation marks and citation omitted).

B. LAW AND ANALYSIS

At the outset, we note that the parties' agree that the referee did not use the settlement agreement when calculating the annual adjustment payments for child support for 2017 and 2018. Indeed, from the record provided, the referee's formula for calculating the annual adjustment payments is not clear. However, because the parties generally agree that the referee did not use the formula from the settlement agreement, but instead used the MCSF, the required outcome in this case is clear—the trial court must be affirmed.

"A consent judgment is in the nature of a contract, and is to be construed and applied as such." *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). However, "[t]his Court strongly disfavors deviations from the child support formula premised on private agreements that *limit* a parent's obligation to pay child support." *Holmes*, 281 Mich App at 590. This is because, "[p]arents may not bargain away a child's welfare and rights, including the right to receive adequate child support payments. An agreement by the parties regarding support will not suspend the authority of the court to enter a support order." *Id.* (quotation marks and citation omitted). Stated differently, "[i]t is a well-established principle in Michigan that parties cannot bargain away their children's right to support." *Laffin*, 280 Mich App at 518. When "enforcement of [an] arrangement would deprive the parties' children of the child support they are entitled to by law," the arrangement in question is "void as against public policy[.]" *Id.* at 519.

As related to the trial court's adoption of the referee's calculation of annual adjustment payments for 2017 and 2018,[6] defendant asserts that the referee's use of the MCSF instead of the formula in the settlement agreement required him to pay an additional amount in child support for those years. Specifically, defendant contends that the referee ordered him to pay $402,217 in annual adjustments of child support for the two years in question,[7] while the settlement agreement's Schedule (A) would have required him to only pay $206,305.08 for the two years in question. In light of this factual basis for defendant's argument, it is clear that his claim must fail. Because defendant believes that he had an agreement with plaintiff that would save him nearly $200,000 in child support, such agreement "is void as against public policy, because parties cannot bargain away their children's right to support." See *Laffin*, 280 Mich App at 519. Therefore, the trial court did not err when it denied defendant's objection to the referee's report and recommendation, considering they were on the basis of an argument precluded by public policy. See *id.*

Affirmed.

/s/ Michelle M. Rick
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron

[6] In the annual adjustment payments calculated by the arbitrator for each year from 2012 to 2016, there is no dispute that the amount that defendant had to pay in child support exceeded the amount that he would have paid under the MCSF. Indeed, in Schedule (A) to the settlement agreement, there is a direct comparison showing that defendant was agreeing to pay more than he would under the MCSF. Therefore, it is clear why such an agreement was enforceable. See *Holmes*, 281 Mich App at 592 (holding that "a contract enhancing a parent's child support obligation should be enforced absent a compelling reason to forbear enforcement").

[7] The referee actually ordered defendant to pay "a child support adjustment award of $392,905[.]"