No. 09-11-00200-CV

IN THE TEXAS COURT OF APPEALS
NINTH DISTRICT
BEAUMONT, TEXAS

ARTHUR F. PRESTON,

Appellant,

v.

STEPHANIE ANN DYER,

Appellee.

On Appeal from the 418th Judicial District Court,
Montgomery County, Texas

BRIEF AND APPENDIX OF APPELLEE STEPHANIE ANN DYER

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ISSUES PRESENTED

1. Did an arbitrator exceed his power by awarding spousal support under a prenuptial agreement when the parties placed the question before him, and he did nothing more than find facts and interpret the agreement?

2. Should an arbitrator's award be vacated as untimely when the complaining party did not raise the issue until after the arbitrator rendered his award, and the parties agreed to follow a schedule permitting the later award?

3. Did the district court err by incorporating an arbitrator's award of child support in its divorce decree when the parties previously agreed the award would be confirmed and entered as a court order, and Texas law requires judicial approval and entry of child support awards?

4. Did the district court err by awarding attorneys' fees to the prevailing party in a family law and contract case when the Family Code, Civil Practices and Remedy Code, and AAA rules all permit such an award and both parties requested fees?

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not believe oral argument is necessary. The issues raised by this appeal are not exceptional or novel but involve routine challenges to a trial court decision confirming an arbitral award. There is no reason to believe the Court's decisional process would benefit from argument.

INTRODUCTION

Arthur Preston and Stephanie Dyer signed a prenuptial agreement, married, and later filed for divorce. Their agreement obligated Preston to make certain spousal support payments to Dyer. Because it also included a broad arbitration clause, the district court referred the parties' dispute over what Dyer owed in spousal support to arbitration. Unhappy with the arbitrator's decision, which the court confirmed, Preston now asks this Court to revisit and overturn it.

The invitation should be declined because, as in most such cases, it flunks the extremely rigorous test governing review of arbitral awards. Preston himself recognized the difficulty of challenging such an award. During the arbitration hearing, the arbitrator referred at one point to an appeal, to which Preston's counsel responded: "You've got to be kidding... appealing an arbitration." Clerk's Record ("CR") 1507 (at p. 250). Preston was right, and he offers no grounds now that would justify the rare step of upsetting the award. He claims the arbitrator lacked power to adjudicate Dyer's claim for spousal support, but both the prenuptial agreement and Preston's later submissions committed this issue to arbitration. In resolving it, as Preston asked, the arbitrator did not exceed his power – he merely made a conventional determination of fact and law. Preston also claims the arbitrator missed mandatory deadlines for issuing his award, but Preston waived this complaint by laying low, seeing if the award suited him, and only later claiming untimeliness. The deadlines he cites are also inapplicable.

This Court should therefore affirm the judgment.

STATEMENT OF FACTS

I. Preston's and Dyer's Prenuptial Agreement

A few weeks before marrying in 2001, Preston and Dyer executed a prenuptial agreement entitled "Separate Property Preservation and Definition Agreement" ("the Agreement"). CR 1084 (Preston App., Tab 2). The Agreement commits Preston to pay child and spousal support to Dyer according to eight mutually exclusive alternatives that hinge on how long they remained a couple. CR 1100-05. Because Preston and Dyer were married for more than seven years, "Alternative Eight" governs. CR 1104-05, 1501 (at p. 228). It provides:

> ALTERNATIVE EIGHT
>
> Mr. Preston agrees in the event the parties marry each other, remain continuously married for more than seven years, and thereafter he dies or the marriage is terminated and a child of which he is the father is then alive, that he will perform or cause to be performed the following:
>
> 1. in the event the termination proceeding is, in the sole opinion of Mr. Preston, contentious and if Ms. Dyer is awarded joint or sole Managing Conservatorship of the child with the exclusive right to determine the primary residence of the child he will pay child support as determined under item 1 of Alternative Three, spousal support, the amount of which will be determined under item 2 of Alternative Three, and he will pay Ms. Dyer the sum of One Hundred Thousand and 00/100 ($100,000.00) dollars per year for five years, with each $100,000.00 payment being due on the anniversary of the date the Court signs the order terminating the marriage;

CR 1104. Alternative Three, incorporated into this clause, requires Preston to pay the child support owed by someone with net resources of $6,000/month and spousal support of "$15,000 per month less sums paid in child support until such

monthly payments and child support payments total $2,160,000." C.R. 1102. Alternative Eight also provides for a second option by which Preston would pay more in support if he decided the termination proceeding was "not contentious," CR 1104-05, but Preston did find it to be contentious. C.R. 971.

The Agreement features a broad arbitration clause:

> It is agreed that all disputes, controversies, and questions as to rights and obligations relating to this agreement are subject to arbitration and such arbitration shall be governed by the provisions of the Texas Arbitration Statute, Civil Practice and Remedies Code section 171.001 et seq.

CR 1113. The Agreement also provides for arbitration of "all issues concerning [its] interpretation or enforceability." CR 1116.

The Agreement includes detailed procedural rules for arbitration, which "shall be conducted in accordance with the rules of the American Arbitration Association applicable to Commercial Disputes." CR 1115. It further provides:

> If the arbitrators selected shall fail to reach an agreement within two hundred seventy (270) days of the date of demand for arbitration, they shall be discharged, and three new arbitrators shall be appointed and shall proceed in the same manner and the process shall be repeated until a decision is finally reached by a single or at least two of the three arbitrators selected. Each subsequent arbitrator or panel of arbitrators shall have two hundred seventy (270) days from the date the prior panel is discharged within which to be appointed and reach a decision.

CR 1117-18.

II. The Parties' Separation and the Referral to Arbitration

Preston and Dyer separated on December 4, 2008. CR 1437. Sometime in February 2009, Preston submitted the AAA's demand form insisting that Dyer

arbitrate their marital dispute. CR 964. The form is dated "Feb. __ 2009." *Id.* According to Preston, the AAA returned his demand. CR 897 n. 1.

On February 24, 2009, Preston also filed a petition in district court to terminate the marriage and compel arbitration pursuant to the Agreement. CR 4-9 (Dyer App., Tab 1). He asked the court to "submit the issues between the parties to binding arbitration, as agreed upon in the Property Agreement," and sought to enjoin Dyer from seeking an order "concerning the marriage relationship," including "spousal support," until their disagreements could be arbitrated under the Agreement. CR. 7. On Preston's application, the court entered a temporary restraining order containing such an injunction. CR 24 (Dyer App., Tab 2). Dyer then answered, counterpetitioned for divorce, and requested that the court compel arbitration "to award and divide the marital estates" under the Agreement. CR 51.

Following Dyer's answer, Preston filed an "Amended Verified Plea to Stay Further Proceedings and to Compel Arbitration." CR 153-57 (Dyer App., Tab 3). In that pleading, he asked the court to abate the lawsuit and stated: "All disputes in the divorce proceeding relate to the Agreement and must be submitted to arbitration. Petitioner has consistently requested that all matters in dispute be submitted to arbitration." CR 154. He then filed a notice of hearing stating: "Petitioner and Respondent should be ordered to submit the issues between them to binding arbitration." CR 182 (Dyer App., Tab 4).

At the same time Preston sought to compel arbitration, Dyer initiated custody proceedings in family court in Kentucky because she and her son with

Preston, Cole, live there. CR 266-71. Preston opposed Dyer's application and sought to have the court in Texas retain jurisdiction over custody issues and refer them to arbitration. CR 296-309. After conferring with the family court judge in Kentucky, however, the district court found that "all parties had previously stipulated that Kentucky is the home state of the child," and dismissed all custody proceedings in Texas in favor of their resolution in Kentucky. CR 631. On April 21, 2010, the Kentucky family court entered a decree awarding joint custody over Cole pursuant to a separation agreement executed by the parties. CR 1143-49 (Preston App., Tab 4). Cole continues to live in Kentucky with Dyer, CR 1484 (at p. 159), and Preston, who resides in Texas, exercises his joint custodial right to be with Cole by returning to Kentucky to see him there. CR 1468 (at p. 97).

On September 24, 2009, the district court entered an agreed order referring to arbitration "all claims, disputes, controversies, and questions as to the rights and/or obligations of Petitioner and Respondent, which have been raised or could be raised, relating to above proceeding and/or to the 'Separate Property Preservation and Definition Agreement,'" excepting only the custody determination then still pending in Kentucky family court. CR 681-82 (Dyer App., Tab 5). The order appointed Warren Cole as sole arbitrator and dictated that, along with other rules, the arbitration would be governed by "any arbitration rules required by Warren Cole and/or as agreed upon by the parties." *Id.*[1] The

[1] Because Preston's and Dyer's son is named Cole, the Arbitrator Warren Cole will be referred to as "the Arbitrator."

order memorialized the parties' agreement that "the schedule to be followed by the parties will be determined by the arbitrator." *Id.*

III. The Arbitration Hearing

On February 17, 2010, Preston's counsel wrote the Arbitrator outlining the issues to be resolved in arbitration and noted: "Assuming custody and property are resolved as described above, we will be down to child support and to a determination of whatever 'Support Living Expenses' rights Stephanie has under the pre-nup." CR 1443 (Dyer App., Tab 6). At the hearing, which occurred on May 26, 2010, the parties testified regarding Dyer's entitlement to spousal support, among other issues. CR 1446-1501. For example, Dyer testified:

> Q. (BY MR. BRESEHAN). Can you point to any place in this particular document [the Kentucky court custody decree] where you are appointed joint or sole managing conservator?
>
> A. They don't use that terminology in Kentucky.
>
> Q. So it wouldn't be there?
>
> A. No it wouldn't.
>
> Q. Can you point to any place in that document that appoints you sole or –
>
> A. Again, they don't use that terminology.
>
> Q. – would give you the exclusive right to determine the child's residence?
>
> A. *Well, I've already done that by nature of this document being in Kentucky.*
>
> Q. Well, can you show me something in that piece of – that document –

A. That uses this terminology, no.

CR 1467 (at pp. 91-92) (Dyer App., Tab 7) (emphasis added).

The Arbitrator also heard extended legal argument on Dyer's claim for spousal support. CR 1501-07 (Dyer App., Tab 7). Dyer stressed that the Agreement is ambiguous in light of the fact that a Texas court did not decide custody. CR 1502-03 (at pp. 233-35). He also argued that Alternative Eight applied since the parties shared custody and Dyer had established Cole's residence in Kentucky:

> The residence of this child was established by the home state analysis and it was established by Ms. Preston. Mr. Preston fought long and hard to keep it here and then admitted in pleadings that Kentucky was the home state... She is a JMC [joint managing conservator]. There is no doubt he's the JMC, she's the JMC. They have an equal time sharing arrangement. But she's establishing the domicile and the domicile of the child got established by her maintaining residence in Kentucky. The child doesn't have a residence independent of Ms. Preston. And we know that the child doesn't have a residence with Mr. Preston because he's not a resident of the state of Kentucky. He's a bona fide resident of Montgomery County, Texas. And he can't establish the child's residence.

CR 1503 (at pp. 236-37). For his part, Preston argued that spousal support is not "subject to arbitration because it's reserved to [Preston's] sole discretion," CR 1501 (at p. 228), and that Dyer is ineligible for such support because she has not been named sole or joint managing conservator with the exclusive right to determine Cole's primary residence. CR 1504-05 (at pp. 241-42).

IV. The Arbitrator's Award and the Divorce Decree

The Arbitrator issued his findings and award on August 24, 2010. CR 905-07 (Preston App., Tab 5). Regarding Dyer's entitlement to spousal support in light of the Kentucky custody determination, he found:

> The agreement was executed in the State of Texas. The terms "Joint or Sole Managing Conservatorship with the exclusive right to determine the residence of the child" are indigenous to Texas and the Texas Family Code. Based upon the arguments and authority presented by each side, Kentucky does not and has never used the same terminology. Therefore, if one were to apply a strict interpretation of those terms, it becomes impossible for either parent to be named as such. In any event, it does not create an ambiguity.
>
> While it is true that the Kentucky order does not (and could not) award either parent "Joint or Sole Managing Conservatorship with the exclusive right to determine the residence of the child" it is undisputed that the child has primarily resided in Kentucky since 2006, and continues to reside in that state. Based upon the prior rulings of both Texas and Kentucky, the later [sic] would be considered to be the child's home state. Further, pursuant to the possession order (*Status of Parent Coordinating Referral*) the primary bulk of Mr. Preston's possession will occur in the state of Kentucky. Thus although different terminology is used by both states, any future custody determination would likely take place in Kentucky, not Texas.

CR 905-06. The Arbitrator acknowledged that Preston had deemed the proceeding to be "contentious" and therefore held that spousal support should be awarded as set forth in the first option of Alternative Eight: $11,500 per month, until spousal and child support payments together reach $2,160,000, and an additional $100,000 per year for five years. CR 906-07. He also determined that Preston should pay $3,500 per month in child support as well as other expenses relating to Cole's education and activities. CR. 906.

After the Arbitrator rendered his award, Preston e-mailed him on September 9, 2010 claiming for the first time that his appointment had expired after the hearing in May but before he issued the award in August, and that the award was therefore invalid. CR 1547 (Dyer App., Tab 8). Preston then moved the district court to vacate the award. CR 754-62, 889-902. That court heard argument, denied the motion, and entered a Final Decree of Divorce on January 31, 2011. CR 1802, 1883-1951 (Preston App., Tab 1). The decree recognizes that "all issues pertaining to and/or interpretation of child support, medical support, [and] post-divorce spousal support... were stayed by [the district] Court and referred to binding arbitration," and confirms and enters the arbitral award as the court's own order. CR 1886-87. The decree is a final judgment. CR 1907.

SUMMARY OF THE ARGUMENT

The Arbitrator did not exceed his power by awarding spousal support to Dyer. The Agreement's broad arbitration clause and Preston's many submissions in the litigation stating his wish to arbitrate all disputes with Dyer placed the spousal support issue squarely before the Arbitrator. The Arbitrator then simply construed the Agreement and found facts relating to whether spousal support is due. This sort of routine decision-making was not somehow outside the scope of the Arbitrator's authority. *See* Point II, *infra.*

Nor did the Arbitrator lack jurisdiction to issue the award when he did. Preston complains that the Arbitrator missed two deadlines governing when he was required to give his award, but Preston waived this complaint. A party cannot

lay low, hope the award favors him, and when it doesn't, claim for the first time that the Arbitrator lacked jurisdiction to decide the case. Yet that is what Preston tries here. In any event, the parties agreed to conduct the arbitration according to and abide by the Arbitrator's own schedule, so the deadlines Preston invokes are inapplicable. *See* Point III, *infra.*

Preston also urges that the court erred in including the child support award in its final divorce decree, but this complaint is unripe as Preston has not yet been subject to any contempt sanction. Moreover, the Agreement and order referring the case to arbitration provide that the award should be embodied in the divorce decree, which also accords with Texas law. *See* Point IV, *infra.*

Finally, Preston takes issue with the district court's award of attorneys' fees to Dyer's trial counsel. Two Texas statutes and the AAA rules authorize the fee award, however, which should consequently be affirmed. *See* Point V, *infra.*

ARGUMENT

I. Standard of Review

"[A] party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). This arbitration occurred under the Texas Arbitration Act, CR 1113, which permits only "extraordinarily narrow" judicial review. *Skidmore Energy, Inc. v. Maxus (U.S.) Exploration Co.*, 345 S.W.3d 672, 677 (Tex. App. – Dallas 2011, rev. denied). An award issued pursuant to the TAA must stand unless there is a statutory basis for

vacating it. *See Centex/Vestal v. Friendship West Baptist Church*, 314 S.W.3d 677, 684 (Tex. App. – Dallas 2010, rev. denied) (citing TEX. CIV. PRAC. & REM. CODE § 171.087). Such grounds "reflect severe departures from an otherwise proper arbitration process and are of a completely different character than ordinary legal error." *Id.* "[E]ven a mistake of fact or law by the arbitrator in the application of substantive law is not a proper ground for vacating an award." *Id.* at 683.

II. The Arbitrator Did Not Exceed His Power By Awarding Spousal Support

A. The Agreement and the Parties' Submissions Placed Dyer's Spousal Support Claim Before the Arbitrator

Preston initially maintains that the Arbitrator exceeded his authority by granting spousal support to Dyer under Alternative Eight of the Agreement. *See* Preston Brf. at 11-14; TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(3)(A) (Vernon 1997). As the Agreement and the parties' pleadings properly put the question of spousal support to the Arbitrator, however, this claim is groundless.

An arbitrator exceeds his power when he decides a matter not properly before him. *See Centex/Vestal*, 314 S.W.3d at 684; *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 829-30 (Tex. App. – Dallas 2009). The scope of the arbitrator's authority is bounded by the arbitration clause and the parties' submissions. *See Centex/Vestal*, 314 S.W.3d at 685; *Thomas v. Prudential Sec., Inc.*, 921 S.W.2d 847, 849 (Tex. App. – Austin 1996). To determine if an arbitrator exceeded his power, courts ask simply "whether the

arbitrator had the authority, based on the arbitration clause and the parties' submissions, to reach a certain issue, not whether the arbitrator correctly decided the issue." *Good Times Stores, Inc. v. Macias*, __ S.W.3d __, 2011 WL 2224358 at * 3 (Tex. App. – El Paso, June 8, 2011); *see also LeFoumba v. Legend Classic Homes, Ltd.*, 2009 WL 3109875 at * 3 (Tex. App. – Houston [14th Dist.] 2009) (not designated for publication); *Ancor Holdings*, 294 S.W.3d at 829. "When determining whether an arbitrator has exceeded his power, any doubts concerning the scope of what is arbitrable should be resolved in favor of arbitration." *Centex/Vestal*, 314 S.W.3d at 684.

In this case, then, the question is whether the Agreement's arbitration clause and the parties' pleadings put the issue of spousal support to the Arbitrator. Undoubtedly they did. The arbitration clause provides for arbitration of "all disputes, controversies, and questions as to rights and obligations relating to th[e] agreement." CR 1113. This sort of clause has been described as "broad" and indicative of the parties' desire to be "inclusive rather than exclusive" when it comes to what should be arbitrated. *Skidmore Energy*, 345 S.W.3d at 687; *Centex/Vestal*, 314 S.W.3d at 685. Obviously, Dyer's claim for the spousal support set forth in the Agreement qualifies as a dispute or question as to the parties' rights and obligations relating to the Agreement.

The parties also committed the spousal support issue to arbitration through their submissions to the trial court and the Arbitrator. This is how Preston described what should be arbitrated in his trial court filings:

• **Preston's original petition:**	"the issues between the parties" CR 7.
• **Preston's Amended Verified Plea to Stay Further Proceedings and to Compel Arbitration:**	"all disputes in the divorce proceeding... all maters in dispute" CR 154.
• **Preston's Amended Notice of Hearing:**	"the issues between them" CR 182.
• **Agreed Order Staying Further Proceedings and Referral to Arbitration:**	"all claims, disputes, controversies, and questions as to the rights and/or obligations of Petitioner and Respondent, which have been raised or could be raised, relating to the above proceeding and/or to the [Agreement]" CR 681.

There can be no doubt that Dyer's claim for spousal support falls within these expansive descriptions of what Preston asked to arbitrate. It is undeniably one of the issues between the parties, a matter in dispute between them, and a claim or question relating to their rights and obligations which they raised and which relates to the proceeding and/or Agreement.

Moreover, the injunction Preston sought and the temporary restraining order he obtained confirm that spousal support was among the subjects Preston wanted arbitrated. Preston's petition requested an order enjoining Dyer from litigating "spousal support... until the arbitrator's decision has been rendered." CR 7. The temporary restraining order granted this request. CR 24. This indicates that Preston expected spousal support to be handled through arbitration

along with all other issues Dyer was enjoined from litigating.

Once the case was referred to arbitration, Preston's counsel wrote the Arbitrator to discuss the course of proceedings, and after outlining how they would adjudicate custody and property disputes, wrote: "Assuming custody and property are resolved as described above, we will be down to child support and to a determination of whatever 'Support Living Expenses' rights Stephanie has under the pre-nup." CR 1443. Thus, in addition to his all-encompassing descriptions to the district court of what he aimed to resolve through arbitration, Preston specifically told the Arbitrator that their adjudication would include spousal support under the Agreement. The district court also thought spousal support had been referred to arbitration, as its divorce decree makes clear. CR 1886 ("post-divorce spousal support... [was] referred to binding arbitration").

"Arbitrators do not exceed their authority when the matter addressed is one which the parties agreed to arbitrate," nor may a party "submit an issue to the arbitration panel and then, when an unfavorable result occurs, claim the arbitrators exceeded their authority in deciding the issue." *Centex/Vestal*, 314 S.W.3d at 686; *accord Skidmore Energy*, 345 S.W.3d at 689. Preston's assent to the Agreement and his filings in this litigation now bind him to accept the Arbitrator's decision.

True, once Preston achieved his goal of referring his disputes with Dyer to arbitration and after he told the Arbitrator the proceeding would include the spousal support issue, he changed tack and began to argue that the Agreement allowed him alone to elect whether to pay support to Dyer, and that the matter was

therefore not one for arbitration. CR 966-67. But whether Dyer's claim for spousal support should have been arbitrated was committed to the Arbitrator no less than the underlying, substantive question of what spousal support award was due. The Agreement's sweeping arbitration clause, CR 1113, and its provision that "all issues concerning interpretation and enforceability of this agreement shall be submitted to arbitration," CR 1116, evince the parties' intent to have the arbitrator decide which issues are subject to arbitration. *See Katz v. Feinberg*, 290 F.3d 95, 97 (2d Cir. 2002); *MPJ v. Aero Sky, LLC*, 673 F. Supp. 2d 475, 493 n. 88 (W.D. Tex. 2009). So does the parties' incorporation of the AAA Commercial Arbitration Rules in their Agreement, CR 1115, since Commercial Rule 7(a) provides that arbitrators will determine the scope of their own jurisdiction. CR 1784 (R-7(a)); *see Schlumberger Tech. Cop. v. Baker Hughes, Inc.*, __ S.W.3d __, 2011 WL 4925996 at ** 9-11 (Tex. App. – Houston [1st Dist] 2011). Moreover, whether spousal support can be decided in arbitration, as Dyer maintained, or by Preston alone, as Preston argued, was an issue or matter in dispute between the parties and a question relating to their rights and obligations in the case and under the Agreement, and thus was placed before the Arbitrator by Preston's many submissions. *See supra* at 12-14.

As important, Preston's claim once in arbitration that spousal support is not arbitrable cannot vitiate his earlier, repeatedly stated consent to arbitrate the issue. Otherwise, he could conveniently deny Dyer the ability to litigate her claim in *any* forum. Preston succeeded in temporarily restraining Preston from litigating

spousal support "until the arbitrator's decision has been rendered," CR 24, and then in staying litigation while all issues were referred to arbitration. CR 681-82. Once ensconced in his chosen forum, however, he began asserting that the Arbitrator could not adjudicate the spousal support claim after all. Preston cannot unilaterally deprive Dyer of both a judicial and an arbitral decision-maker and thereby entirely foreclose her right to a hearing of her claim. His consistent urging that all issues must be arbitrated should estop him from later arguing that, actually, spousal support cannot be. *See In re C.Z.B.*, 151 S.W.3d 627, 633 (Tex. App. – San Antonio 2004) (discussing judicial estoppel). This Court should reject Preston's bait and switch and find that the Arbitrator did nothing more than decide an issue properly submitted to him by the parties' contract and pleadings.

B. The Arbitrator's Spousal Support Decision Was a Conventional Determination of Fact and Law and Therefore Did Not Exceed His Authority

Preston proposes two ways in which the Arbitrator supposedly exceeded his power by awarding spousal support, but neither does the trick. First, he claims: "The Agreement reserved to Mr. Preston the sole discretion to determine the alternative under which Mrs. Dyer-Preston would receive spousal support, and further provided that such decision would occur only after the marriage was terminated." Preston Brf. at 9. This ignores that Preston *did* elect "the alternative under which Mrs. Dyer-Preston would receive spousal support" – the first option under the only alternative applicable to a marriage lasting over seven years, Alternative Eight. CR 1104-05. When Preston informed the Arbitrator that he

viewed the proceeding as contentious, he made his election. CR 971 ("As stated at the May 26, 2010 Arbitration, Mr. Preston does in fact believe that the termination proceeding is contentious"); *see also* CR 1501 (at p. 228) (agreeing Alternative Eight is the governing one if spousal support is arbitrable). The Arbitrator honored Preston's choice and found the proceeding to have been contentious. CR 906-07. Had he actually disregarded Preston's contentiousness election, he would have been bound to award Dyer much more in spousal support under Alternative Eight's second option. CR 1104-05. Preston can hardly complain about a decision that favors him.

As for Preston's suggestion that he did not have to elect an alternative until after the marriage terminated, he never argued this to the Arbitrator but first raised it to the court. CR 1563. It is therefore waived. *See, e.g., Meyer v. Americo Life, Inc.,* 315 S.W.3d 72, 74-76 (Tex. App. – Dallas 2009, pet. filed) (arguments not made to arbitrators waived on appeal). In any case, the suggestion is hard to fathom. Preston seems to believe Dyer had to await a finalized decree terminating the marriage before seeing whether Preston would choose to grant spousal support. By law, divorce decrees include spousal property and maintenance awards, however. *See* TEX. FAM. CODE ANN. §§ 7.001, 8.051 (Vernon 2006) (Dyer App., Tab 9). Once Preston sued to dissolve the marriage, spousal support had to be determined during this proceeding, culminating in the decree containing the award. *See id.* Nor does Alternative Eight require termination to precede an award of support. The provision states that Preston will *pay* child and spousal