FACTS AND PROCEDURAL HISTORY

Dora White and her former law firm, Chervil & White, represented Florence Greene in protracted proceedings to increase the amount of child support Greene received from her ex-husband. When the parties disputed the attorney's fees White claimed, White served Greene on November 2, ____, with a Notice of Client's Rights to Arbitration.

The arbitration was set to begin on February 1, ____. Greene filed several requests to continue that date based on medical problems she was suffering, and on her need to take medication she claimed impaired her ability to present her case at the hearing. Included with the requests for a continuance was a letter from Greene's physician, which stated that his best estimate of when Greene would no longer need the medication would be four to six months. Additionally, Greene requested a continuance because she claimed that she had been unable to find counsel to represent her at the arbitration hearing.

On January 25, ____, the presiding arbitrator served all parties with her written decision denying Greene's motion for a continuance, first noting that Greene had known about the pending hearing for more than six months, which was adequate time in which to locate counsel. The arbitrator also found that, taking all relevant factors

into account (including the fact that Greene did not claim she was physically unable to attend the hearing), no grounds existed for a continuance. The arbitrator found that, even under medication, Greene had proved herself "able to compose and transmit cogent and appropriate letters and marshal evidence in support of her application." January 25, ____ Order Denying Motion for Continuance, p. 3. Finally, the arbitrator observed that, under the rules of procedure, Greene could obtain the assistance of "another person" at the hearing, and that nothing in the rules required that this person be an attorney.

The arbitration proceeded as scheduled. The arbitrators filed and served their Findings and Award on March 1, ____. White and Chervil & White obtained an award of $103,500.

On May 5, ____, Greene petitioned to vacate the arbitration award. As grounds, she asserted that the arbitrators had unfairly refused to grant her a continuance under Code of Civil Procedure[1] § 1286.2(e). Greene did not serve the petition on White until August 12, ____.

White moved to dismiss the petition to vacate, primarily on the grounds that Greene had not timely filed and served the petition within 100 days as required by § 1288. Additionally, White asserted that Greene had failed to include the required notice of the hearing date on the petition, and that Chervil & White was not a proper party to the proceeding because the law firm had dissolved several years earlier after Mr. Chervil's death.

Greene opposed the motion on the grounds that White had misinterpreted the case law and the requirement that service under § 1288 also had to occur within the 100 days. She said that California Rules of Court, Rule 1615(d) would allow her to

[1] All statutory references are to this code unless otherwise stated.

move to vacate the award up to six months after the hearing on one of the grounds set forth in § 473 (mistake, inadvertence, or excusable neglect). Greene contended that she had inadvertently failed to serve the petition in a timely manner based on her continuing medical problems. Greene also asserted that the court had the power to excuse her from the 100-day filing deadline under California Rules of Court, Rule 209(c).

The trial court dismissed the petition to vacate. In her tentative ruling granting White's motion, the judge found that § 1288 specifically states that both filing and service of a petition to vacate must be made within the 100-day time limit, and that dismissal of a petition to vacate is appropriate if it was not timely filed. As to Greene's argument that her medical condition prevented her from effecting timely service, the court observed that the 100-day requirement of § 1288 was more like the mandatory service-of-summons provision of § 583.210 than it was like California Rules of Court, Rule 3.110(b), which allows the court some discretion in granting extensions beyond its 60-day deadline. The court also noted that a party must request an extension before the time for service expires, and Greene had not done this. The court denied White's request for fees because she had not requested them in her notice of motion, and Business and Professions Code § 6023(c) only provides for an award of fees to a prevailing party if they were incurred in obtaining confirmation, correction, or vacation of the award, but does not encompass a motion to dismiss.

ISSUE

Does Greene have grounds to appeal the court's order dismissing her petition to vacate the arbitration award?

SUMMARY

No. The language of § 1288 explicitly states that filing *and service* of a petition to vacate an arbitration award must be made within 100 days from service of the notice of the award. California Rules of Court, Rule 1615(d) applies only to judicial arbitrations, not private arbitrations that take place under the parties' agreement, which was the case here. Finally, California Rules of Court, Rule 209(c) does not apply here. It permits the court to extend the time in which the parties must complete discovery and go to trial under the courts' delay-reduction program. It does not confer discretion on a judge to excuse a party from failure to comply with a mandatory filing deadline imposed by statute.

DISCUSSION

1. The standard of review on appeal of Greene's motion is "abuse of discretion," which greatly diminishes any chance of obtaining reversal of the trial court's order on appeal.

It seems likely that most cases reversed on appeal are those that are reviewed under a de novo standard, such as granting a motion for summary judgment. It is generally very difficult to obtain reversal of a trial court's order if the appellant must prove that the court abused its discretion.

2. Section 1288 sets a mandatory deadline for the filing and service of a motion to vacate an arbitration award, and the trial court had no discretion to waive it.

Section 1288 provides, in pertinent part: "A petition to vacate an award . . . shall *be served and filed* not later than 100 days after the date of the service of a signed copy of the award on the petitioner." (Emphasis added.) Additionally, § 1286.4(a) states that the court may not vacate an arbitration award unless "a petition . . . requesting that the award be vacated has been duly served and filed."

In *Klubnikin v. California Fair Plan Assn* (1978) 84 Cal.App.32d 393 (the case the trial court cited in its tentative ruling), the court of appeal confirmed an order granting a motion for summary judgment in a breach of contract action within 100 days after service of the arbitration award, based on the award's res judicata effect. The plaintiff did not file or serve a motion to vacate the arbitration award, and served the complaint more than 100 days following notice of the award. The appellate court concluded that, even if it liberally construed the complaint for breach of contract as a petition to vacate or correct the arbitration award, § 1288 mandated that the petition also be served within the 100-day period. Thus the "petition" was untimely. *Id.* at 398.

Greene filed her petition within the 100 days, but failed to serve it on White until after that deadline expired. Under the statutes and the cases interpreting it, the trial court had no discretion to deny White's motion to dismiss the petition.

3. Greene could not rely on California Rules of Court, Rule 1615 because it applies only to judicial arbitrations.

The Legislature enacted the Judicial Arbitration Act (Code Civ. Proc. § 1141.10 et seq.) in 1978 as a means of coping with the increasing cost and

complexity of litigation in civil disputes. In the preamble to the statute, the Legislature

> finds and declares that arbitration has proven to be an efficient and equitable method for resolving small claims, and that courts should encourage or require the use of arbitration for such actions whenever possible.
>
> § 1141.10(a).

The act mandates submission to arbitration of certain classes of at-issue civil actions where the amount in controversy is determined to be not in excess of a specified amount (§ 1141.11), and permits submission to arbitration on the parties' stipulation regardless of the amount in controversy (§ 1141.1). But the act provides that "[any] party may elect to have a de novo trial, by court or jury, both as to law and facts," and that an arbitration award is final if a request for a de novo trial is not "filed within 30 days after the date the arbitrator files the award with the court." § 1141.20. If there is no request for a de novo trial and the award is not vacated (§ 1141.22), the amount of the award is entered in the judgment book. § 1141.23.

Opportunity for de novo trial is what principally distinguishes court-annexed arbitration under the Judicial Arbitration Act from private arbitration conducted by the parties' agreement and subject to the arbitration statute (§ 1280 et seq.). The Judicial Arbitration Act provides:

> The provisions of this chapter shall not be construed in derogation of the provisions of Title 9 (commencing with Section 1280) of Part 3, and, to that extent, the provisions of this chapter and that title are mutually exclusive and independent of each other.
>
> § 1141.30.

There are other important differences as well. Private arbitration occurs only under agreement, and it is the agreement that determines the details of the process. § 1282

et seq. The parties are themselves responsible for paying the arbitrator and associated costs. Except in personal injury cases there is no provision for discovery unless the agreement itself so provides. § 1283.1. While the statute provides mechanisms for judicial enforcement of the agreement (§ 1281.2) and confirmation of the award (§ 1285 et seq.), both mechanisms are extraneous to the process and, ordinarily, to the parties' contemplation. Judicial arbitration, by contrast, is an adjunct to litigation. It is mandatory in certain cases, and it occurs only when an action has been filed. See California Rules of Court, Rule 1600. The general costs of arbitration are borne by the public, not by the parties, except that a party who requests a trial de novo and does not succeed in obtaining a judgment more favorable than the award must pay. § 1141.21. Rules adopted by the Judicial Council provide for full discovery (Cal. Rules of Court, Rule 1612) as well as other aspects of the proceeding (Rules 1613, 1614).

Ordinarily cases brought under the Mandatory Fee Arbitration Act (MFAA) under Business & Professions Code § 6200 et seq. are governed by the rules of judicial arbitration. Nevertheless, the supreme court has held that a petitioner cannot rely on California Rules of Court, Rule 1615 and § 473(b) to obtain relief from the 30-day deadline in which a petitioner can seek a trial de novo after receipt of notice of an MFAA arbitration award. *Maynard v. Brand* (2005) 36 Cal.4th 364.

Greene and White were engaged in private—rather than judicial—arbitration. No independent action was filed in the superior court. The papers indicate that Greene signed an agreement to submit the case to arbitration after the dispute arose. Petition to Vacate, ¶ 8(a). As a result, Greene could not rely on Rule 1615, which applies only to judicial arbitrations, to seek relief from the 100-day deadline of § 1288, which applies only to private arbitrations. Why White and the trial court did not state this in their papers is not clear.

A separate issue exists as to whether Greene could move under Code of Civil Procedure § 473(b) to obtain relief from the deadline of § 1288. But as *Maynard* states, § 473(b) does not afford a party relief from a mandatory, statutory deadline, such as the filing of a request for a new trial or the filing of a notice of appeal. *Maynard*, 8 Cal.4th at 372-373. The deadline set by § 1288 appears to be such a mandatory deadline. Thus, even if Greene filed a proper motion for relief, accompanied by a declaration as to how her failure to serve her petition was untimely because of inadvertence or excusable neglect, a court could not grant her relief from the petition's dismissal under § 473(b).

4. Greene could not rely on California Rules of Court, Rule 209(c) because it was repealed in 2004, and it applied only to the trial court delay-reduction program deadlines.

Rule 209(c) was not in effect when Greene filed her petition to vacate. And in that chapter of the Rules of Court, the judge's discretion to grant extensions of "program" deadlines refers to the court's delay-reduction program, which mandates that a case go to trial within two years following the filing of the initial complaint.

5. Even if Greene had timely filed her petition to vacate the award, it is unlikely that the court would vacate it on the grounds that Greene was unfairly denied a continuance.

Trial courts afford arbitrators' decisions great deference. A trial court can only vacate an arbitration award on one of the statutory grounds listed in § 1286.2. Even if the award contains obvious errors of law and fact appearing on its face, the court has no power to review or correct them. See *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9-12 (explaining history of judicial deference to arbitrators' awards).

Greene's petition to vacate was based on § 1286.2(e), which allows for vacation of an arbitration award where the petitioner was unfairly denied the right to a continuance. In only one instance did a court vacate an arbitration award based on the petitioner's failure to obtain a continuance. In *Humes v. Margil Ventures* (1985) 174 Cal.App.3d 486, a petitioner sought confirmation of an arbitration award. The respondent then sought its vacation on the grounds that he was unfairly denied a continuance, which he had sought because, incarcerated at the time of the proceeding, he could not attend. The arbitrator never addressed the respondent's request, and the arbitration took place in the respondent's absence. The court of appeal vacated the award because it found that denial of the continuance deprived the respondent of his due-process rights. As part of its reasoning, the court noted that a party's incarceration is a disability recognized by statute as tolling the statute of limitations and time for response in any court action. *Id.* at 496-498.

The arbitrator's decision to deny Greene's request for a continuance indicated that Greene had not presented sufficient evidence to demonstrate good cause to continue the hearing. She did not claim that she was physically unable to attend. The arbitrator found that her ability to compose cogent letters requesting the continuance and to marshal evidence in support indicated that she could put forth the essential facts in dispute before the arbitration panel. It also specifically ordered the panel to allow Greene to invite another person, who did not have to be an attorney, to assist her in presenting her evidence. Considering the strong deference granted to an arbitrator's findings of fact, and the dearth of cases where courts vacated arbitration awards based on failures to grant continuances, it is highly unlikely that Greene's petition would have been successful if heard on the merits.

CONCLUSION

It appears that Greene could not prevail on appeal. The 100-day deadline for service and filing of a motion to vacate under § 1288 is mandatory. Thus, even if Greene had filed, or were to file, a motion for relief from dismissal of her petition for failure to serve it within the 100-day deadline, § 473(b) would not relieve her from that dismissal. Finally, the California Rules of Court that Greene cited have no relevance to this case.