CITATION: Lopatowski v. Lopatowski, 2018 ONSC 824
COURT FILE NO.: 36938/14
DATE: 2018-02-02

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
MAGDALENA LOPATOWSKI	)	
Applicant	)	Marek Tufman, for the Applicant
– and –	)	
CEZARY LOPATOWSKI	)	Steven Benmor, for the Respondent
Respondent	)	
	)	
	)	**HEARD:** January 31, 2018

REASONS FOR JUDGMENT

GRAY J.

[1] There are motions by each party. The respondent moves for a contempt order, alleging that the applicant has failed to comply with orders made by Justices Fitzpatrick and Gibson. The applicant moves for an order striking out a paragraph of the order of Fitzpatrick J. that is said to be the subject of contempt, and a paragraph of the order of Gibson J., also said to be the subject of contempt. In the alternative, the applicant requests an order declaring that those paragraphs are not enforceable.

Background

[2] This matter has been ongoing since 2014.

[3] On July 22, 2015, a case conference was held by Trimble J. An interim order for custody and access was issued on consent.

[4] A settlement conference was held on December 29, 2015. The involvement of the OCL was requested.

[5] A trial management conference was held on March 22, 2016. It was adjourned by Coats J. until April 29, 2016. On that date, she ordered the matter to go trial on August 22, 2016, and she set out a detailed trial management order.

[6] On August 5, 2016, the parties and their counsel appeared for a final trial management conference before Fitzpatrick J. He noted, in his endorsement, "To their considerable credit, the parties with their counsel have settled all issues on a final basis." Final Minutes of Settlement were filed, and an Order was issued in accordance with the Minutes.

[7] Paragraph 45 of the Minutes of Settlement provides as follows:

> 45 (a) Within 30 days, the Applicant will select one of Risa Innis, Shely Polak or Jaret Norton to serve as the parties' Parenting Coordinator pursuant to section 59.7 of the *Family Law Act* for a period of two years. The services to be provided to the parties will include parenting education, coaching, communication assistance, facilitation of decision-making and, in case of a disagreement that cannot be resolved in this manner, by secondary arbitration.
>
> (b) Within 60 days, the parties will each complete an intake appointment with the selected Parenting Coordinator.
>
> (c) The cost of the initial retainer of the Parenting Coordinator will be equally shared by the parties.
>
> (d) The cost of Parenting Coordinator will be shared equally by the parties.

[8] Paragraph 46 of the consent order of Fitzpatrick J. provides as follows:

> 46. (a) Within 30 days, the Applicant will select one of Risa Ennis, Shely Polak or Jared Norton to serve as the parties' Parenting Coordinator pursuant to section 59.7 of the *Family Law Act* for a period of two years. The services to be provided to the parties will include parenting education, coaching, communication assistance, facilitation of decision-making and, in case of a disagreement that cannot be resolved in this manner, by secondary arbitration.
>
> (b) Within 60 days, the parties will each complete an intake appointment with the selected Parenting Coordinator.
>
> (c) The cost of the initial retainer of the Parenting Coordinator will be equally shared by the parties.

(d) The cost of Parenting Coordinator will be shared equally by the parties.

[9] The applicant selected Risa Ennis as the parenting coordinator. It turned out that she does not provide secondary arbitration services. The applicant refused to appoint one of the other named people. A motion was brought before Gibson J. on June 8, 2017. His endorsement, in its entirety, reads as follows:

> Pursuant to a Consent agreement between the Parties, on 5 August 2016 Fitzpatrick J. made an Order which provided at its para. 46(a) for the Applicant to choose one of three persons to serve as the Parties' Parenting Coordinator for a period of 2 years. The services to be provided by the parenting coordinator were to include parenting education, coaching, communication assistance, facilitation of decision-making and in the case of a disagreement that cannot be resolved in this manner, by secondary arbitration.
>
> The Applicant selected Risa Ennis.
>
> It now emerges that Ms. Ennis does not provide secondary arbitration services.
>
> The Respondent moves for an order appointing a different person to be the parenting coordinator. The Applicant objects to this, saying that she cannot afford it.
>
> The selection of a person who cannot fulfill one of the functions agreed between the parties (secondary arbitration) frustrates the original intent of the Parties, as reflected in Fitzpatrick J.'s order. The Applicant agreed initially to consider Shely Polak or Jared Norton as well.
>
> In order to preserve the original agreement between the Parties, the Court Orders that:
>
> 1. If she is still willing, Shely Polak will act as the Parenting Coordinator; and
> 2. The Parties shall sign the Parenting Coordinator Agreement forthwith, and each pay half the initial retainer, as agreed at para. 46(c) of the 5 August 2016 Order.
>
> Both counsel vehemently submitted that this motion should not have been necessary, and seeks to lay blame on the other party.
>
> I agree that this motion should not have been necessary. It appears to have been caused by the intransigence of both parties.
>
> The Respondent seeks costs of $12,014.68 on the motion. This is excessive.
>
> Having regard to the factors enumerated in FLR 24, the Applicant shall pay costs to the Respondent fixed at $500.

[10] The formal order of Gibson J. dated June 8, 2017 reads as follows:

> 1. Shely Polak will act as the Parenting Coordinator for the parties, if she is still willing.
>
> 2. The parties shall sign the Parenting Coordinator Agreement forthwith and each pay half of the initial retainer, as agreed at paragraph 46(c) of the Order made by Justice Fitzpatrick dated August 5, 2016.
>
> 3. The Applicant shall pay costs to the Respondent fixed at $500.00
>
> 4. This Order bears post-judgment interest at the rate of 2% per annum effective from the date of this Order. Where there is a default in payment, the payment in default shall bear interest only from the date of the default.

[11] It is noteworthy that prior to or during the proceedings before Gibson J., there was no suggestion that Fitzpatrick J. lacked jurisdiction to make the order he made, nor was there any suggestion that Gibson J. did not have jurisdiction to make an order to complete the process agreed to by the parties, and that led to the consent order of Fitzpatrick J. The only dispute was as to the identity of the Parenting Coordinator, and putting into place a process to finalize the appointment of the Parenting Coordinator.

[12] Several months after the Order of Gibson J. was issued, Mr. Tufman, counsel for the applicant, wrote to Mr. Benmor, counsel for the respondent, in which he raised, apparently for the first time, an argument that the relevant provisions of the orders of Fitzpatrick J. and Gibson J. are invalid. He suggested that the parties had failed to enter into an agreement to arbitrate in a valid form, and specifically as required by Ontario Regulation 135/07, made under the *Arbitration Act*. Further, he suggested that the parties had not properly agreed on an arbitration, as the Parenting Coordinator's initial agreement had been redrafted and there were a number of blanks to be filled in. He advised that he would move for an order setting aside the relevant provisions of the two orders, on the basis that the court lacked jurisdiction to make them, and that in any event the orders are not enforceable.

[13] Ultimately, the respondent brought his contempt motion, and the applicant brought her motion to set aside or declare unenforceable the challenged provisions of the orders.

[14] In order to complete the factual matrix, it should be noted that the respondent also alleges that the applicant is in violation of paragraph 50 of the order of Fitzpatrick J., which reads as follows:

> 50. For as long as child support is paid, the Payor (and Recipient, if applicable) must provide updated income disclosure to the other party each year, within 30 days of the anniversary of this Order, in accordance with section 24.1 of the *Child Support Guidelines.*

[15] The respondent asserts that, pursuant to this paragraph, the applicant is required to provide a copy of her income tax return, in addition to any other material provided. He asserts that while the applicant has provided a copy of her T4 and her Notice of Assessment, she has not provided a copy of her full income tax return.

Submissions

[16] Mr. Tufman, counsel for the applicant, submits that the challenged paragraphs of the Orders of Fitzpatrick J. and Gibson J. were made without jurisdiction, and must be set aside. In the alternative, he submits that they are unenforceable, and the court should declare that they are unenforceable.

[17] Mr. Tufman submits that the court has no jurisdiction to delegate its power to make orders affecting the welfare of children to a third party, including an arbitrator. This is so, Mr. Tufman submits, even where the parties have consented to such an order.

[18] In particular, Mr. Tufman relies on the decision of Kurz J., sitting as a judge of the Ontario Court of Justice, in *Michelon v. Ryder*, 2016 ONCJ 327. In that case, Kurz J. refused to include in an order of the court a paragraph requiring arbitration, even though the parties had consented to such a term. In essence, he held that it would require express statutory authorization to allow the court to include a term requiring arbitration of disputes, even on consent. Even though the definition of the term "secondary arbitration" in s.59.7(2) of the *Family Law Act* refers to a family arbitration that is conducted in accordance with "a separation agreement, a court order or a family arbitration award", that does not constitute an express statutory authorization to include arbitration in a court order.

[19] Mr. Tufman also relies on the decision of Nelson J. in *Horowitz v. Nightingale*, 2017 ONSC 2168.

[20] In the alternative, Mr. Tufman submits that the agreement to arbitrate is nothing more than an "agreement to agree", and is thus unenforceable. It is clear, Mr. Tufman submits, that at the time of Justice Fitzpatrick's order, and indeed at the time of Justice Gibson's order, there was no actual arbitration agreement to which the parties had agreed. Indeed, subsequently the proposed parenting coordinator provided two separate drafts of the agreement, and it is clear that there are many terms with which the applicant is not in agreement.

[21] In addition, Mr. Tufman points out that there are statutory requirements that must be observed before a family arbitration is considered to be valid and enforceable. In addition to being signed by the parties, certificates of independent legal advice must be furnished, and the arbitrator must certify that he or she has canvassed with the parties whether they have been properly screened for power imbalances and domestic violence. None of the statutory formalities have been observed.

[22] Mr. Tufman submits that the impasse between the parties results from a legitimate legal dispute over the validity and enforceability of the relevant paragraphs of the orders. He submits that it would be inappropriate to deal with the contempt issue unless and until the court has dealt with his argument that the relevant parts of the orders are invalid or unenforceable.

[23] As far as the income tax return issue is concerned, Mr. Tufman submits that the applicant has complied with her obligations under paragraph 50 of the order of Fitzpatrick J., and there is no basis for finding the applicant in contempt of that paragraph.

[24] Mr. Benmor, counsel for the respondent, submits that the applicant is in contempt of the relevant paragraphs of the Orders of Fitzpatrick J. and Gibson J. He requests remedies for the contempt.

[25] Mr. Benmor submits that the orders must be complied with unless and until they are set aside, even if it could be said that they are beyond the court's jurisdiction.

[26] Mr. Benmor submits that Mr. Tufman's motion is misconceived. He submits that this court has no jurisdiction to set aside the orders of Fitzpatrick J. or Gibson J., or any parts of

them, or to declare them unenforceable. The applicant's remedy, if she has one, is to appeal the orders, which she has not done.

[27] Mr. Benmor submits that an order may be set aside or changed by the originating court only pursuant to *Family Law Rule* 25(19), which provides:

> 25. (19) The court may, on motion, change an order that,
>
> (a) was obtained by fraud;
>
> (b) contains a mistake;
>
> (c) needs to be changed to deal with a matter that was before the court but that it did not decide;
>
> (d) was made without notice; or
>
> (e) was made with notice, if an affected party was not present when the order was made because the notice was inadequate or the party was unable, for a reason satisfactory to the court, to be present.

[28] While the Court of Appeal in *Gray v. Gray*, 2017 ONCA 100, held that this Rule authorizes the court to "set aside" an order, as well as to change one, that can be done only if the case is governed by one or more of clauses (a) to (e). In this case, none of those clauses apply.

[29] There is also nothing in *Family Law Rule* 25(19) that would authorize the court to declare that one of its orders is unenforceable. There is no other source of authority to do so. Once again, the applicant's remedy, if she has one, is by way of appeal.

[30] In any event, Mr. Benmor submits that the relevant paragraphs of the challenged orders were made on consent, and they are valid and enforceable.

[31] Mr. Benmor respectfully submits that the decision of Kurz J., if it can be taken to mean that the court does not have the power to include an arbitration provision in one of its orders on consent, should not be followed. Mr. Benmor submits that while it is clear that the court does not have jurisdiction to order arbitration where the parties do not consent, there is nothing in the legislation that would prohibit a court from incorporating into an order the consent of the parties to arbitrate. He submits that, in fact, courts throughout the Province of Ontario have been doing so for many years.

[32] Mr. Benmor submits that the parties have agreed to an arbitral process, and the mechanics of getting to that process are not essential terms that must be agreed to before the fundamental agreement of the parties can be enforced. In this case, the parties were represented by competent counsel when they negotiated the agreement, and they must be taken to have understood what was required in order to formalize the process. Furthermore, they understood that there was a binding agreement, at least up until the proceedings before Gibson J. were concluded. It was not until several months later that the applicant took the position that her agreement was unenforceable.

[33] A blank to be filled in in the draft parenting coordinator agreement is to select the grounds on which an award can be appealed. On behalf of his client, Mr. Benmor stipulates that the applicant may select whichever appeal ground she chooses. Thus, that is not an impediment.

[34] As far as the income tax issue is concerned, Mr. Benmor submits that it is clear from the *Child Support Guidelines* that both parties are required to furnish copies of their income tax returns in addition to any other documents. The respondent has furnished his income tax return, and it is incumbent on the applicant to do so as well.

Analysis

[35] In my view, the applicant is in the wrong court. Any challenge to the orders of Fitzpatrick J. and Gibson J. must be made to the proper appellate court, presumably the Court of Appeal. This court's jurisdiction to set aside or ignore one of its own orders is very limited, and is set out in *Family Law Rule* 25(19). It is clear, in my view, that that Rule does not apply here.

[36] Accordingly, to the extent that the applicant wishes to challenge the relevant paragraphs of the orders of Fitzpatrick J. and Gibson J., her remedy is by way of appeal and not by motion in this court to set aside or declare unenforceable the relevant paragraphs of the orders.

[37] Notwithstanding my conclusion in that respect, I disagree with the applicant's submissions. In my view, the court had jurisdiction to make the challenged orders, and they are enforceable.

[38] I accept that the court does not have jurisdiction, in the absence of consent, to confer decision-making power on an arbitrator or another third party. The court must not, in the absence of consent, delegate its decision-making power.

[39] However, where the parties consent I see no impediment to the court incorporating a requirement that the parties arbitrate disputes. In my own experience, the courts make such orders on consent all the time.

[40] The definition of "secondary arbitration" in s.59.7(2) of the *Family Law Act* is as follows:

> (2) In this section,
>
> "secondary arbitration" means a family arbitration that is conducted in accordance with a separation agreement, a court order or a family arbitration award that provides for the arbitration of possible future disputes relating to the ongoing management or implementation of the agreement, order or award.
>
> [Emphasis added]

[41] The reference to "court order" in this definition can only be a reference to an order made on consent. That must be so since it is accepted that a court order that is not made on consent cannot contain a requirement to arbitrate. While the definition does not expressly say that the court has the power, on consent, to order that disputes be arbitrated, the definition cannot be meaningfully understood unless it impliedly recognizes that the court has the power to make such an order on consent.

[42] To the extent that Kurz J. came to a different conclusion in *Michelon, supra*, I respectfully disagree.

[43] The order of Fitzpatrick J. was made on consent. The parties were represented by experienced counsel when it was negotiated. Clearly, in my view, Fitzpatrick J. had the necessary jurisdiction to make the challenged order.

[44] The order of Gibson J. was made because the parties had a dispute as to the identity of the Parenting Coordinator, and the process for completing the mechanical requirements for mediation and arbitration. Since Gibson J.'s order flowed directly from the consent order of

Fitzpatrick J., it is clear, in my view, that Gibson J. had the necessary jurisdiction to make the order.

[45] I do not agree that either order is unenforceable.

[46] In my view, the challenged paragraph of the order of Fitzpatrick J. does not simply represent an unenforceable agreement to agree. It is specifically stated to be made pursuant to s.59.7 of the *Family Law Act*, and it provides for secondary arbitration. It provides that the parties will complete an intake appointment with the selected Parenting Coordinator, and that the costs of the Parenting Coordinator will be shared equally.

[47] In other contexts, it is clear that an enforceable agreement can be entered into where the parties agree to certain basic, fundamental, terms, and leave other incidental terms to be discussed and agreed later. In such circumstances, it has been held that such an agreement is enforceable.

[48] A good example is *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.). The judgment of the court was delivered by Morden J.A., as he then was.

[49] In that case, the parties discussed the establishment of a restaurant on the top floor of a building to be constructed. A document, in the form of a letter, was signed, in which the parties set out the basic terms of the agreement. There were a number of uncertainties that had not been discussed and agreed to, including a description of the premises to be demised; the commencement of the term; and other material terms of the contract.

[50] Ultimately, the court concluded that the original letter was an enforceable contract.

[51] One of the factors that Morden J.A. took into account, at p. 261, was the fact that subsequent to the execution of the letter agreement, the parties had conducted themselves in a way which showed that it was more probable than not that they regarded their relationship as being of a binding nature rather than one of two parties still engaged in negotiations.

[52] As far as the uncertainties were concerned, Morden J.A. noted, at p. 262, that the document "is crudely expressed and contains some very loose language." However, he went on

to say "Nonetheless, accepting that the parties intended to create a binding relationship and were represented by experienced businessmen who had full authority to represent their respective companies, a court should not be too astute to hold that there is not that degree of certainty in any of its essential terms which is the requirement of a binding contract."

[53] In the case before me, the parties certainly acted, at least until the proceedings before Gibson J. were concluded, as if they had a binding agreement to arbitrate. Furthermore, similar to the position articulated by Morden J.A., the court should not be too astute to hold that there is not that degree of certainty in any of the essential terms of their agreement.

[54] Fundamentally, I think the basic agreement made by the parties was that parenting disputes would be dealt with by a parenting coordinator, and if necessary, arbitrated. Those were the essential terms that the parties agreed to. The mechanical terms of setting out the details of the process were not essential, in my view. At the time the matter came before Gibson J., as he noted, "The selection of a person who cannot fulfill one of the functions agreed between the parties (secondary arbitration) frustrates the original intent of the parties as reflected in Fitzpatrick J.'s order." There was no suggestion that the terms of a parenting coordinator agreement, whatever they may be, would be seen as an impediment. It must be recalled that both parties were represented by experienced counsel who would have an understanding of the terms of parenting coordinator agreements, which are widely used in Ontario.

[55] In my view, there is nothing in the draft parenting coordinator agreements presented by the parenting coordinator that would be inconsistent with the basic understanding, that the parties had agreed to, that the parenting coordinator was to mediate disputes and, if necessary, arbitrate them. It would be understood, particularly by experienced counsel, that broad authority would need to be conferred in order to effectively mediate. They would also understand that if arbitration proved to be necessary, the proceedings would be governed by the *Arbitration Act*, which ensures a high degree of natural justice. Neither would the statutory terms, including the provision of independent legal advice and inquiry by the arbitrator as to the power imbalances in play, be an impediment. Once again, the parties were represented by counsel who would understand these requirements and they obviously did not cause enough concern to prevent the agreement resulting in the order of Fitzpatrick J. from being entered into.

[56] I am assisted in this analysis by a consideration of the unanimous judgment of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. In that case, the Court recognized a general organizing principle of good faith contractual performance, and particularly that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations: see the reasons of Cromwell J. at paras. 33, 60, 62, 63 and 93.

[57] The Court made it clear that these principles apply to all types of contractual relationships. I see no reason why they should not apply to family law contractual relationships, and indeed in some ways they perhaps should be applied even more strongly to family law contractual relationships.

[58] In this case, the parties had entered into a clear agreement to the use of a parenting coordinator with broad powers to assist them in parenting disputes, which was to include arbitral authority if necessary. The principle of good faith and honest contractual performance would require that the parties take the steps necessary to make that agreement operative. In a case such as this, the parties, represented by experienced counsel, would know that certain formalities would be required, including statutory formalities. At the outset, when they made their agreement, if either party was concerned about whether something in a potential parenting coordinator agreement might be an impediment, one might have expected experienced counsel to raise it, or at least see a draft parenting coordinator agreement before executing the Minutes of Settlement. Similarly, if either party thought any of the statutory formalities were in issue, one might have expected counsel to raise it.

[59] Not only were none of these issues raised at the time the Minutes of Settlement were issued, they were not raised at the time of the motion before Gibson J. As noted by Gibson J., the only objection raised by the applicant to the appointment of a parenting coordinator was that she could not afford it.

[60] It was not until several months later that the applicant raised the issue of the validity of the relevant paragraphs in the orders, and their enforceability. The apparent difficulties regarding the provisions of the draft parenting coordinator agreement were only raised very

recently. The actions of the applicant, in my view, are more consistent with a desire to escape from what she now regards as a bad deal than with any legitimate concern about the terms of the parenting coordinator agreement. Her actions, in my view, are inconsistent with the principle of good faith and honest contractual performance as recognized in *Bhasin*. She was ordered by Gibson J. to execute the parenting coordinator agreement, and she must do so. She may, as stipulated by Mr. Benmor, select the ground on which an award can be appealed.

[61] For the foregoing reasons, I do not think the challenged paragraphs of the orders of Fitzpatrick J. and Gibson J. are invalid or unenforceable.

[62] As far as the income tax issue is concerned, I agree with Mr. Benmor that the applicant is required to furnish copies of her income tax returns. She has not done so.

[63] At this point, I will not make a formal order of contempt. Rather, I will give the parties 30 days, after which I will, if necessary, convene a further hearing at 9:00 a.m. on any day I am sitting in Milton, by arrangement through the trial coordinator. I will also reserve on the question of costs until at least 30 days have elapsed, and I will invite written submissions on costs if the parties cannot agree.

Gray J.

Released: February 2, 2018

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