COURT OF APPEAL FOR ONTARIO

CITATION: Petersoo v. Petersoo, 2019 ONCA 624
DATE: 20190723
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Tulloch, Benotto and Huscroft JJ.A.

BETWEEN

Karinna Margaret Gerda Petersoo

Applicant (Appellant)

and

Tonu Elmar Petersoo

Respondent (Respondent)

Kristen Normandin and Joanna Hunt-Jones, for the appellant

Michael Stangarone and Stephen Kirby, for the respondent

Heard: May 23, 2019

On appeal from the order of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated November 1, 2018, with reasons reported at 2018 ONSC 6519, allowing an appeal from a decision of Arbitrator Gregory Cooper, dated August 21, 2017.

Benotto J.A.:

[1] The parties retained an arbitrator to conduct the parenting plan review provided for in their separation agreement. Following an eight-day hearing, the arbitrator awarded the mother custody and allowed her to move the children from Toronto to Guelph to attend a school adapted to their special needs. The mother

moved and enrolled the children in the school. The father then appealed the arbitrator's decision.

[2] Although the father raised several grounds of appeal, the appeal judge overturned the arbitral award on the basis that there was a fundamental procedural unfairness to the process causing a denial of natural justice. It arose, she found, because the father did not receive adequate notice of the mother's intent to move. The appeal judge set aside the award and directed the parties to attend another arbitration before a different arbitrator.[1]

[3] For the reasons that follow, I would allow the appeal and re-instate the arbitrator's award.

FACTS

[4] The parties were married in 2003 and had three children: K. born November 2007, and twins U. and J. born December 17, 2009. The parents separated in 2011.

[5] Not long after the separation, the parties retained senior family law lawyer Gregory Cooper to mediate their disputes as to property, support and parenting. The issues were resolved and incorporated into the terms of a separation

[1] Although financial issues were included in the award and on the appeal, only custody is an issue before this court.

agreement on December 16, 2013. They agreed to joint custody of the children with a comprehensive parenting plan that provided for the following:

- The children would reside primarily with the mother;
- The children would reside with the father alternate weekends, Tuesdays overnight and alternate Thursdays from after school until 7:30 pm.
- The mother would continue to be the main contact person with respect to the children's educators and health care providers.

[6] The separation agreement provided that the parenting schedule would be reviewed at the request of either party on or after September 1, 2015. In this regard, the agreement stated, at para. 3.22:

> The review will be conducted by way of mediation/arbitration with Gregory Cooper, or if Mr. Cooper is not available, another mutually agreed to mediator/arbitrator.

[7] There was also a "Dispute Resolution" provision in para. 5.3 and 5.4:

> The arbitration will be conducted in accordance with the *Arbitration Act,* and will constitute a secondary arbitration under the *Arbitration Act* and the *Family Law Act.*
>
> [The parties] waive section 35 of the *Arbitration Act.*

[8] The children did not do well under the parenting plan. All three children were having difficulties. K. was having serious difficulties academically. In 2014, the mother sought the advice of Dr. Handley-Derry, a developmental pediatrician.

[9] In 2015, the mother asked Mr. Cooper to terminate the father's overnight access due to concerns about alcohol and anger management. Mr. Cooper did not do so, but required the parties to attend an assessment before Dr. Raymond Morris pursuant to s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

[10] The children's situation did not improve. According to the mother, the children were in crisis academically and emotionally. K., who by 2016 was in grade four, was reading at a grade one level and was falling further behind. The boys were also below grade level.

[11] The mother initiated the custody review procedure provided for in the separation agreement.

[12] Meanwhile, Dr. Handley-Derry continued to see the children. He recommended that they be enrolled in a school that offers a "Direct Instruction" system. This system operates in conjunction to regular classroom programmes with remedial attention for special needs children. Shortly before the review was to begin, the mother began researching schools. Unable to find an affordable and suitable institution in Toronto, she expanded her search. She was impressed with St. Jude's/Scholars' Hall in Kitchener which offers the Direct Instruction system at affordable tuition.

[13] The father did not agree that the children were having difficulties at school. He wanted them to stay at their current school and he wanted more time with

them, in accordance with the assessment report of Dr. Morris which recommended that the children not spend more than three days without seeing their father.

The arbitration

[14] In May 2017, the parties attended before Mr. Cooper for a pre-arbitration meeting. He fixed the date for the hearing at June 26, 2017.

[15] On June 16, 2017 the father brought a motion before Mr. Cooper seeking a six to eight-week adjournment. He relied on a non-specific medical issue and the need for more time to assemble financial information. The adjournment was opposed by the mother, who argued that the children were in crisis. The arbitrator moved the start date for the hearing from June 26 to July 7, 2017 but made it peremptory on the father.

[16] On July 4, 2017 the mother served an offer to settle including a term that she be entitled to move to Guelph so the children could attend St. Jude's.

[17] On July 6, 2017 Opening Statements were exchanged. The mother's statement indicated that she would be "seeking an order allowing her to move to Guelph so that the children can attend" St. Jude's.

[18] The arbitration began on July 7, 2017 and continued for eight hearing days concluding on July 24, 2017. The arbitrator heard from the parents, from Dr. Handley-Derry and from Dr. Morris. At no point during the hearing did the father

seek an adjournment in response to the mother having raised the issue of the move to Guelph.

[19] A review of the parenting plan was front and centre in the hearing. The most significant issue was the educational plan for the children.

[20] Dr. Handley-Derry recommended that the children move schools. Dr. Morris recommended that the mother have final decision-making authority with respect to health and education. However, Dr. Morris's report of February 7, 2017 predated the mother's request to move the children to Guelph and he did not offer an opinion on this issue.

[21] The arbitrator's award was released on August 21, 2017. He agreed that the children were in crisis. They were acting out, hitting each other, lashing out at their mother, exhibiting symptoms of illness with no apparent physical bases and regressing in terms of bladder and bowel control. He concluded that the existing joint custodial arrangement had "not served the children well" and that their best interests would be served by being in the custody of the mother, who had primarily managed their lives to date.

[22] The arbitrator then addressed the mother's proposal to move the children to Guelph to attend St. Jude's. At no point did the father or his counsel object to the mobility issue being addressed by the arbitrator.

[23] The arbitrator correctly set out the law on mobility and concluded that the children should move to Guelph and attend St. Jude's because it was most appropriate to meet their complex needs. The arbitrator recognized that this was contrary to one of the recommendations of Dr. Morris that the children should not be away from either parent for more than three days, but found as follows at para. 123:

> However, when I examine Dr. Morris' report carefully, I am not able to find the rationale for this position, nor did I hear such rationale in Dr. Morris' oral evidence…It was my impression that the frequent transitions between the parties' houses has been detrimental rather than beneficial to the children, partly due to the differing parenting styles and regimens in each of the homes. I am buttressed in this view by the comment of Dr. Handley-Derry…that "The moving back and forth between the two homes was a very stressful period for the children, due to the disruption in [their] sleep and routines".

[24] The arbitrator found that the high level of conflict between the parents was impacting the children. He then set out a parenting plan on the basis of the move to Guelph.

Events following the award

(1) The mother and children moved

[25] Following the award, the mother and children moved to Guelph and the children began attending St. Jude's. No motion to stay the award was brought by the father.

(2) The father appealed

[26] The father served a notice of appeal of the arbitrator's award on September 20, 2017, after the children began attending St. Jude's. This was the last day of the appeal period.

(3) The costs award was released

[27] On November 1, 2017 the arbitrator released his costs award. He awarded the mother $75,000 in costs pursuant to r. 24(11) representing costs of the financial issues. With respect to costs of the parenting issue, he awarded no costs. He explained this at para. 21:

> …I do not consider that it was unreasonable for [the father] to oppose the plan put forward by [the mother]. There are several reasons for this:
>
> a) The parties had operated for many years under a mediated separation agreement which provided [the father] with considerably more parenting time than that proposed by [the mother] at the hearing;
>
> b) The mobility issue, which arose as a result of [the mother's] wishing to enroll the children in a private school in Kitchener, came to [the father's] attention only very shortly prior to the commencement of the hearing, and thus, arguably, [he] had insufficient time to fully prepare for and respond to this aspect of [the mother's] case;
>
> c) Dr. Morris…recommended that the children not be apart from either parent for a period in excess of three days. In the face of this recommendation, I do not consider that it was

> unreasonable for [the father] to take the position that the children should not be moved…

(4) The appeal was heard

[28] The appeal was heard in Superior Court on October 22, 2018. By this time, the children had been living in Guelph for 14 months and were in their second year at St. Jude's.

DECISION OF THE APPEAL JUDGE

[29] Although many issues were raised by the father on appeal, the appeal judge relied entirely on a procedural issue to set aside the arbitrator's award with respect to parenting issues.

[30] She concluded that the arbitration process was "fundamentally unfair" to the father because of the late notice of the mobility issue. She found that the arbitrator did not comply with s. 19(2) of the *Arbitration Act*, *1991*, S.O. 1991, c. 17 (the "*Arbitration Act*"), which requires that each party: "shall be given an opportunity to present a case and to respond to the other parties' cases". Despite the fact that the father – who was represented throughout – did not object to the issue being decided or seek an adjournment, the appeal judge found at para. 32 that:

> …it was incumbent on the arbitrator to enquire about the issue to ensure proper notice has been given.

[31] On this basis she found a denial of procedural fairness and set aside the award as it related to parenting issues. She ordered a new arbitration before a different arbitrator. Pending that arbitration, the appeal judge set aside the entirety of the arbitrator's parenting schedule – including several provisions that had been made on consent – and made significant changes to the parenting arrangements on an interim basis.

POSITION OF THE PARTIES

[32] The mother submits that the appeal judge erred by relying solely on the alleged procedural rights of the father without regard to the best interests of the children. The appeal judge should not have entertained a submission not made before the arbitrator. It was not incumbent on the arbitrator to pursue procedural rights not raised by a represented party at first instance.

[33] The father submits that a balanced analysis of the best interests of the children cannot take place where there has been – as here – a denial of procedural fairness. The father was prevented from addressing the mobility issue because of the short notice. The appeal judge therefore correctly concluded that a new hearing before a different arbitrator was required.

ISSUES

[34] The sole issue on this appeal is clear: did the appeal judge err in law by finding that the arbitrator violated principles of procedural fairness?

ANALYSIS

[35] Mediation/arbitration is an important method by which family law litigants resolve their disputes. Indeed, the courts encourage parties to attempt to resolve issues cooperatively and to determine the resolution method most appropriate to their family. The mediation/arbitration process can be more informal, efficient, faster and less adversarial than judicial proceedings. These benefits are important with respect to parenting issues, which require a consideration of the best interests of children. The decision of an arbitrator, particularly in child related matters, is therefore entitled to significant deference by the courts: see *Patton-Casse v. Casse*, 2012 ONCA 709, 298 O.A.C. 111, at paras. 9, 11.

[36] The essence of arbitration is that the parties decide on the best procedure for their family. Although the family law of Ontario must be applied, the procedures on an arbitration are not meant to mirror those of the court. I do not agree with the appeal judge's criticism of the process which did not include pleadings and a record of the pre-arbitration meeting.

[37] Here the parties decided that an appeal would only be based on a question of law. As this court stated in *Alectra Utilities Commission v. Solar Power Network Inc.,* 2019 ONCA 254, at para. 20:

> The starting point in exercising the court's role under the *Arbitration Act, 1991* is the recognition that appeals from private arbitration decisions are neither required nor routine.

[38] The issue on this appeal is whether the appeal judge erred on a point of law. She found that the arbitrator violated s. 19 of the *Arbitration Act* because:

1. It was "incumbent" on him to enquire about the notice as to mobility and to "ensure proper notice" had been given (para. 32); and
2. The "lack of notice of the mobility issue caused a fundamental procedural unfairness" (para. 34).

[39] The *Arbitration Act* provides the following under the general heading "Conduct of Arbitration":

> **Equality and fairness**
>
> 19 (1) In an arbitration, the parties shall be treated equally and fairly.
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases. 1991, c. 17, s. 19 (2).

[40] The appeal judge erred in law by finding a violation of s. 19. I say this for four reasons:

1. the proceedings were fair;
2. the father acquiesced in the notice with respect to mobility;
3. the appeal judge ignored the best interests of the children; and
4. the appeal judge's interpretation of s. 19 of the *Arbitration Act* establishes a new duty for arbitrators that would fundamentally change the arbitration process and undermine arbitral independence and impartiality.

The proceedings were fair

[41] There is no doubt that the issue of mobility came up relatively late in the proceedings. However, the father, who was represented throughout, knew of the issue prior to the start of the hearing and neither requested an adjournment nor objected to the issue being addressed.

[42] For eight days while evidence was being presented, he was not impeded from presenting his case, nor from cross-examining the mother or the experts. At no point did he request a further assessment with respect to St. Jude's to challenge the evidence that the school would benefit the children. Instead, the father simply gave evidence that the children were fine and should stay at their Toronto school.

[43] Having received the evidence of both parties on the mobility issue, the arbitrator preferred the mother's evidence and found in her favour, as he was entitled to do so: see *Arbitration Act,* s. 21. The proceedings were not rendered unfair simply because the arbitrator found in favour of the mother on this issue.

The father acquiesced in the notice

[44] The father acquiesced in the late notice. Instead of raising the issue and seeking an adjournment, he proceeded with the hearing, submitting that the children should stay at their school and only raising an objection when the result was not to his liking.

[45] In *Popack v. Lipszyc,* 2016 ONCA 135, 129 O.R. (3d) 321, this court dealt with a challenge to an arbitration decision where the arbitral panel met with a witness *ex parte* without notice to the parties. On appeal, the appellant, Mr. Popack, who had not objected to such a meeting when the issue was raised during the hearing, argued that the award should be set aside because of this procedural breach. In dismissing the appeal and upholding the arbitral award, this court said, at para. 39:

> Mr. Popack sought to gain an advantage in the arbitration proceedings when he learned of the *ex parte* meeting…[He] positioned himself so that he could decide to raise the issue formally…if he was not satisfied with the award given by the panel. To reward that tactic by setting aside the award would eviscerate the finality principle that drives judicial review of arbitral awards and would cause "a real practical injustice".

[46] Similarly, here, the father was not entitled to stay silent, participate in the proceedings without objection, wait to see what the ruling was and then claim procedural unfairness when the decision was against him.

[47] Further, the father's conduct after the hearing confirms his acquiescence in the process. He did not seek a stay of the mobility order but raised the issue for the first time on appeal.

[48] As a general rule, an appellate court will not permit an issue to be raised for the first time on appeal. This rule is grounded, in part, on society's interests in finality and the expectation that matters will be dealt with at first instance: see *R.*

v. Reid, 2016 ONCA 524, 132 O.R. (3d) 26, at paras. 39-40, leave to appeal refused [2016] S.C.C.A. No. 432. This principle is particularly important when the lives of children are impacted by the proceedings.

Best interests of the children

[49] The record leaves no doubt that the children were in crisis. The evidence was overwhelming that their behavioural, emotional and scholastic life was in danger. Although the father did not accept the crisis, he long knew that this was the issue on the parenting review. The mother found St. Jude's to ameliorate the crisis. To require the parties to defer a proposed remedy – however late-breaking – because of procedural issues ignores the urgency of the situation and the best interests of the children.

[50] The appeal judge relied exclusively on the short notice given to the father to set aside the award without regard to the children's best interests. The procedural rights of a parent – which were not pursued at the time of their purported breach, despite ample opportunity to do so – cannot be invoked long after the hearing has been completed in order to override the welfare of children in crisis.

Duty of arbitrator

[51] The appeal judge's interpretation of s. 19 of the *Arbitration Act* places a new and unreasonable burden on an arbitrator in family law proceedings. When

parties are represented, it does not fall to the arbitrator to move to the role of advocate. Such a move would undermine the required independence and impartiality of an arbitrator.

[52] There is no evidence that the arbitrator did not treat the parties equally and fairly. There is no evidence that the father did not have an opportunity to present and respond to the case. As I have already explained, he was represented by counsel and did not object to the mobility issue being determined. The situation was urgent, and the arbitrator had a duty to consider the children's welfare as paramount. Recall that the arbitrator had been involved with the family for many years.

[53] The appeal judge placed an obligation on the arbitrator to depart from his role as independent adjudicator and move to the role of advocate. This would compromise his independence and potentially breach his duty of impartiality. Section 19 does not require the arbitrator to descend into the arena and become an advocate or advance a party's case.

THE INTERIM PARENTING PLAN

[54] In light of my determination to re-instate the arbitrator's award, it is not necessary for me to consider the interim parenting plan set out by the appeal judge.

CONCLUSION

[55] The appeal judge erred in determining that the principles of procedural fairness as articulated in s. 19 of the *Arbitration Act* were violated.

[56] I would allow the appeal and re-instate the arbitral award.

[57] I would award the appellant her costs of the appeal in the amount of $23,000 inclusive of HST, disbursements and the application for leave to appeal. I would reverse the costs awarded in the court below so that they are payable to the her by the father.

Released: July 23, 2019
"MLB"

"M.L. Benotto J.A."
"I agree M. Tulloch J.A."
"I agree Grant Huscroft J.A."