

CITATION: *Ali v. Obas*, 2021 ONSC 3412
COURT FILE NO.: FC-19-200
DATE: 2021/05/10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nicolas Farouk Ali, Applicant

AND

Annine Marjorie Obas, Respondent

BEFORE: Justice Mark Shelston

COUNSEL: Marie-Hélène Godbout, for the Applicant

Julie Gravelle, for the Respondent

HEARD: April 27, 2021

ENDORSEMENT

Overview

[1] The central issues for these motions are whether the court should enforce or set aside two interim awards made by a parenting coordinator and whether the parenting coordination process should terminate or continue. The next step in this case will depend on the court's ruling on these issues.

[2] The parties are the parents of a three-year-old girl. They are involved in high conflict litigation regarding decision-making and parenting time. By consent order of Roger J. dated January 16, 2020, the parties agreed to various temporary orders including a parenting schedule, the appointment of a parenting coordinator, child support and disclosure.

[3] On December 15, 2020 and January 27, 2021, the parenting coordinator issued two awards addressing the Christmas parenting schedule, a parenting schedule for January, February and March 2021 and the appointment of a custody assessor. Both parties have filed motion seeking various claims for relief set out herein.

Claim for Relief

[4] The applicant seeks the following:

- (1) An order finding the respondent in non-compliance with paragraphs 10, 12 and 13 of the temporary order.
- (2) An order confirming the validity of and enforcing the two interim awards of the parenting coordinator dated December 15, 2020 and January 27, 2021.
- (3) An order compelling the respondent to duly execute a mediation/arbitration agreement and to comply with the temporary order.
- (4) In the alternative, an order for this court correct/re-write/clarify paragraph 12 of the temporary order to give effect to the clear process to be adhered to by the parties, forthwith, in the child's best interests.
- (5) In the alternative, an order that the applicant be granted immediate increased parenting time with the child as follows:
 - (i) Week #1
 - Every alternate Wednesday from 3 pm until Thursday morning at 9 am.
 - Every alternate Friday from 3 pm until Sunday at 7 pm.
 - (ii) Week #2
 - Every alternate Monday from 3 pm until 7 pm. Every alternate Wednesday from 3 pm until Friday morning at 9 am.
- (6) Costs.

[5] The respondent seeks the following relief:

- (1) An order terminating the parenting coordination service contract.
- (2) An order setting aside the interim awards of the parenting coordinator dated December 15, 2020 and January 27, 2021.

- (3) An order that the parties proceed to a settlement conference and in the interim, that the applicant have parenting time with the child as follows:
- Every second weekend from Friday at 3 pm to Sunday at 7 pm.
 - Following the child being in the care of the respondent for the weekend, Mondays from 3 pm to 7 pm.
- (4) Costs.

Background

[6] The parties were involved in a relationship on and off for approximately three years but never lived together. The child was born on May 3, 2018. On January 16, 2020, at a motion for temporary relief before Justice Roger, the parties consented to a temporary order which included *inter alia* the following relief:

- a) Granted access to the applicant as follows:
 - (i) Every Wednesday evening from 3 pm to 7 pm.
 - (ii) Every alternate Monday evening from 3 pm to 7 pm.
 - (iii) Every alternate Saturday from 10 am to 4 pm.
 - (iv) Every alternate Sunday from 10 am to 4 pm.

- b) Overnight access was to commence in one month on the condition that the applicant was registered in a parenting course and attending with the intention to complete it. The overnight visits would be as follows:
 - (i) Every alternate Wednesday evening from 3 pm to 8:30 am on Thursday.
 - (ii) Every alternate Monday evening from 3 pm to 7 pm.
 - (iii) Every alternate Saturday from 10 am to 4 pm.
 - (iv) Every alternate Sunday from 10 AM to 4 PM.

- c) Three months from January 16, 2020, the schedule was to expand to include alternate Saturday overnights.

- d) The parties were to retain a parenting coordinator, Julie Guindon, within 30 days. She was to address all parenting issues if and when they arise, mediate if required any disputes with this order or any other parenting issue, and to assist the parties in preparing a comprehensive parenting plan. If the matter is resolved collaboratively, the next step shall be a settlement conference. Neither party may unilaterally put an end to the contract with the parenting coordinator.

- e) No further motions in this matter on parenting issues without leave of a judge through procedural court. This order although it is interim, is meant to address all parenting issues until a further order on consent or a trial.

[7] In addition, the order required the applicant to make specific disclosure within 30 days and on an interim without prejudice basis, the applicant was to pay child support in the amount of \$1068 per month commencing January 1, 2020 based on an imputed income to the applicant of \$120,000.

[8] By March 24, 2020, both parties had signed a Parenting Coordination Services contract (“PCA”) which identified the contract as a formal submission to arbitration under the *Arbitration Act, 1991*.

[9] Paragraph 16 of the PCA defines the role of the parenting coordinator to include but is not limited to thirty four possible issues including assisting the parents with the implementation of their Parenting Plan/Separation Agreement/Minutes of Settlement/Court Order(s)/Arbitration Award(s), monitoring the children, assisting the parents with communication, settle conflicts in the children’s scheduling, settle or determine disputes about proposed temporary changes to the regular parenting schedule to accommodate holidays, settle or determine disputes about children’s health, and settle or determine disputes between the parents about any other parenting role, responsibility, issue or decision, not specified, as delegated by the courts or by mutual parental consent.

[10] Paragraph 17 provides the parenting coordinator with authority to:

- a) In her discretion, schedule meetings with the child(ren) and/or parents individually or together.
- b) Make decisions about the location, frequency and duration of the meetings.
- c) Facilitate discussions between the parents through mediation conducted by face-to-face, telephone or electronic (Skype/video conference) meetings.
- d) Coach the parents with a view to:
 - (i) Improving their communication;
 - (ii) Reducing the conflict between them; and
 - (iii) Helping them develop their own strategies to work effectively as co-parents.
- e) Assess the dynamic within the family, the needs of each family member and educate the parents about the child(ren)’s needs.

- f) Require the parents to sign consent forms authorizing the release of information to the parenting coordinator from one or more of the following:
 - (i) The child(ren)'s teacher(s), principal, vice-principal or applicable school board relating to the child(ren)'s attendance at school, performance at school or education needs;
 - (ii) The child(ren)'s health care provider;
 - (iii) The child(ren)'s caregiver(s) or babysitter(s);
 - (iv) The child(ren)'s counsellor(s) or therapist(s);
 - (v) A hospital through which a child has been assessed or treated;
 - (vi) A child protection agency;
 - (vii) A police force; or
 - (viii) Any other third party recordholder.
- g) Require either parent or the child(ren) to attend counselling or therapy with a named counsellor or therapist.
- h) Require a parent to attend for substance abuse testing and make decisions about:
 - (i) The nature of any required testing;
 - (ii) The frequency of any required testing;
 - (iii) The location of any required testing;
 - (iv) The names of individuals with whom test results may be shared; and
 - (v) Which parent(s) will pay for the cost of any required testing.
- i) Refer the parents and/or the child(ren) to mental health and legal professionals or to community resources, in her discretion.
- j) Consult with third parties, including other parenting coordinators, counsellors, mental health professionals and independent legal counsel; and
- k) In the event that the parties cannot reach agreement, arbitrate disputes.

[11] Paragraph 18 prohibits the parenting coordinator from making any awards on three specific areas being:

- 18. The parenting coordinator shall not make either a temporary or a final arbitration award which:
 - a. Changes legal custody of the child(ren).
 - b. Changes the children's residence beyond that the geographic boundaries set out in the applicable parenting plan, separation agreement, minutes of settlement, court order or arbitration award.
 - c. Permanently or significantly changes the children's regular residential schedule, unless the change is contemplated by the term of the applicable parenting plan, separation agreement, minutes of settlement, court order or arbitration award.

[12] Paragraph 19 allows the parties to submit any one of the prohibited subject matters in Paragraph 18 to arbitration if the parties sign a mediation/arbitration agreement. The paragraph states as follows:

19. Despite paragraph 18 above, the parents are free to sign (sic) and independent Mediation/Arbitration contract formally submitting one or more of the issues identified in paragraph 18 above for determination by Julie Guindon in her capacity as a mediator/arbitrator, however, the issue shall not be decided by her in her capacity as a parenting coordinator unless under the terms of this parenting coordination contract.

[13] Paragraph 56 sets out the procedure where the parties are at an impasse in the parenting coordination process and need to move from mediation to arbitration. Specifically, this paragraph states as follows:

56. If the parents are unable to resolve one or more disputes between them relating to any of the issues described in paragraph 17 above through the mediation component of the parenting coordination process or if the mediation process is terminated (by the parents jointly or by the parenting coordinator), the parenting coordinator will formally advise the parents in writing that all outstanding disputes will be addressed through arbitration conducted under the terms of this contract.

[14] Paragraph 60 addresses the issue of objecting to the parenting coordinators jurisdiction as follows:

60. In the event that one parent objects to the parenting coordinator determining an issue in dispute on the basis that it falls outside of the parenting coordinators mandate, the parenting coordinator shall determine whether she has the authority to proceed with the arbitration, in accordance with section 17 of the arbitration act, 1991 before proceeding with the arbitration hearing.

[15] As part of the arbitration process, paragraph 67 of the PCA gives the parenting coordinator discretion to decide whether expert evidence is required before specific issues are arbitrated. Paragraph 67 states as follows:

67. The parenting coordinator may, in her absolute discretion, decide whether expert evidence is required before specific issues are arbitrated. The parenting corners shall provide the parents with necessary directions to retain a particular expert and may postpone an arbitration hearing until all

necessary expert evidence is received. Both parents will have an opportunity to review expert evidence in advance of an arbitration hearing.

[16] Paragraphs 86 to 91 set out the provisions regarding the enforcement of the arbitration award, the application to set aside the arbitration award and finally the appeal of the arbitration award. Paragraph 91 sets out the terms for the termination of the parenting coordination services contract as follows:

91. This parenting coordination contract expires on the earliest of the following dates:
 - a) The date on which the parents provide the parenting coordinator with a written notice of their mutual intention to terminate the parenting coordination services contract.
 - b) The date on which the parenting coordinator provides the parties with written notice of her resignation.
 - c) The date on which a court of competent jurisdiction issues an Order which terminates the parenting coordination contract.

[17] Paragraph 92 and 93 address the issue that neither party may unilaterally withdraw from parenting coordination as follows:

92. Neither party may unilaterally terminate this parenting coordination service contract.
93. Either parent may unilaterally withdraw from the parenting coordination process during the term of this contract.

April 17, 2020 to December 14, 2020

[18] The parties attended six sessions with the parenting coordinator, each lasting approximately five hours. The parties met on April 17, June 1, July 27, October 27 and December 11, 2020.

[19] During this process, the parenting coordinator requested that the parties provide submissions in the context of each parenting time between the applicant and the respondent and when important milestones or parenting issues were to be reported by way of a summary to the parenting coordinator.

[20] On July 29, 2020, the parenting coordinator requested that both parties provide their proposal for a regular parenting schedule. The applicant provided a comprehensive parenting plan

on August 31, 2020. The respondent never provided such a plan to the parenting coordinator, despite numerous requests. She refused to provide any proposal until the applicant complied with the disclosure order of Justice Roger. The applicant replied that he had provided the disclosure. The disclosure issue was not addressed to the respondent's satisfaction, but the parties continued to meet with the parenting coordinator.

[21] On December 11, 2020, the parties met with the parenting coordinator in a mediation session, discussing the Christmas holiday schedule, as well as a plan for regular access. The applicant provided his proposal as requested on December 11, 2020 and the respondent was to provide her proposal by December 14, 2020.

[22] On December 11, 2020, the parenting coordinator emailed Ms. Bourgeois, a proposed custody assessor, which included the following statements:

The parents and counsel attended a PC meeting today(mediation). Marie-Hélène represents the father and Julie Gravelle represents the mother. I believe you recall that your involvement was requested previously but for some reason it did not move ahead. In any event, everyone is agreeing to involve you with a mandate to propose a regular parenting times schedule and special occasions/holidays schedule (although this seems to be easier to get resolved). In so doing, I assume that you will want to meet with the parents and conduct observation visits in both residences, taking into account the protocol in place for Covid-19. As well you may contact some collaterals, if you feel necessary to do so.

Once a proposal/or your recommendations are ready, I would suggest that we hold a "disclosure" meeting with all parties involved and work on a plan(whether short-mid-or/and long term) this meeting would be held virtually by Zoom. It is hoped that we could have this meeting in March 2021.

[23] On December 14, 2020, counsel for the respondent requested that a meeting take place with Ms. Bourgeois before the respondent sent her position on the interim schedule, as the respondent wanted to understand her timeline and her proposal for visits and observations with the family. She wanted to understand her recommendations on visits and what she proposed on an interim without prejudice basis. Counsel for the respondent raised an issue with respect to an error in the January 16, 2020 order when she stated as follows:

The Order as it stands has a schedule, and parenting coordination with respect to resolving any issues arising from it. Mr. Ali has just reached paragraph 10 in terms of time as far as the Order goes. Paragraph 12 I note has a typo, it should read if the parties do NOT reach an amicable resolution, then the next step is a settlement conference. There is no binding process in the Order. You can argue otherwise at court but I have my notes and otherwise, the Order makes no sense at all. That being said, my client and I agree that a med-arb process is in Amelia's best interest

[24] Further, counsel for the respondent submitted her client's proposal for Christmas access and concluded her email with the following:

In terms of the interim WP proposal, I will send it after speaking with Ms. Bourgeois, who I understand is available tomorrow.

December 15, 2020 to January 27, 2021

[25] On December 15, 2020, a Zoom conference was held with counsel, the parenting coordinator and Ms. Bourgeois. The respondent did not provide her client's position on an interim without prejudice parenting schedule. Later that day, the parenting coordinator sent an email to both counsel and Ms. Bourgeois that stated as follows:

Good afternoon everyone,

Further to our discussion this morning, I a(sic) providing you with the med-arb contract to be reviewed and if everything is satisfactory, it is ready to be executed by the parties by today.

Further to our discussion this morning, I will proceed with an award regarding Christmas based on the proposed schedule as well as a regular schedule for January.

Please advise if my understanding is in accordance with our meeting with Ms. Bourgeois this morning.

Thank you

Julie Guindon

[26] The mediation/arbitration agreement proposed that the issues of custody, access, child support and costs be submitted to arbitration. After reviewing the agreement with her counsel, the respondent insisted that the applicant had to comply with the disclosure obligations of the order of

Justice Roger. Counsel for the respondent took the position that all disclosure had been provided. The mediation/arbitration agreement was never signed.

[27] On December 15, 2020, the parenting coordinator released her award for the Christmas holiday schedule and a regular access schedule on an interim and without prejudice basis for the months of January, February and March 2021. In her award, the parenting coordinator stated as follows:

5. It was agreed that if the parties were unable to resolve these two issues, I was to provide an award by Tuesday, December 15, 2020. No additional submissions were required to be made by the parties for the award. As agreed between the parties, I am to rely on the proposals of each parent.
6. Marjorie provided her Christmas holiday plan on December 14, 2020, but no proposal for regular parenting plan. During the day, Marjorie's counsel requested that both counsel and the parenting coordinator speak to Chantel Bourgeois to understand her timelines for interim visits and observations with the family as well as any recommendation in terms of an interim parenting plan.
7. A virtual meeting was scheduled with Ms. Bourgeois on December 15 at 8 am. to discuss among other things are mandate to assist the parents in this process.
8. Although I did not receive a proposed plan for Marjorie regarding the regular schedule for Amelia's time with her father, I understand her position to be that the existing schedule should remain in place because an adjustment was made as recently as two weeks ago. She relies on the fact that the parents need to be sensitive to the child's pace and as such adding time is too soon and is not giving an opportunity for Amelia to familiarize herself with the new adjustments.

[28] On December 18, 2020, the respondent emailed the parenting coordinator raising a number of questions about her award. The parenting coordinator replied by indicating that she did not have to justify her award and that the respondent should speak to her counsel. The same day the parenting coordinator called the respondent indicating that she was unable to change the award, that she must remain neutral and that she indicated that the respondent should ask questions to her counsel.

[29] On December 22, 2020, the applicant emailed the parenting coordinator seeking clarification of the interim award and proposing changes to the interim award. The parenting coordinator did not respond to this email until January 5, 2021.

[30] On December 23, 2020, the respondent's counsel emailed the applicant's counsel addressing a series of issues including the purported new schedule provided by the applicant. Specifically, counsel for the respondent stated the following in the last paragraph of their email:

We will need to address this process in the NY to clarify outstanding action items from the Order of Justice Roger and when this is done, we can move on to a new varied WP temporary Order. My client will respect this process and interim WP schedule when it's clear that Mr. Ali will comply with court orders. If and when that happens, we will move on, but this is formal NOTICE that we will not agree to implement the new schedule until the issues set out above are all addressed. Please advise Mr. Ali. He should have plenty of time over the holidays to get his affairs in order, comply with disclosure, and engage in this process in good faith.

[31] On January 4, 2021, the applicant again emailed the parenting coordinator which included the following paragraph:

The current schedule for January and February 2021 needs to be amended as it has over a week separation between father and child. You will agree this is detrimental for the child's developmental and attachment needs. I kindly ask that you keep in your vision and focus Amelia as we move forward.

[32] On January 5, 2021, the parenting coordinator, having returned from the Christmas holiday season, sent an email to all parties and counsel advising as follows:

- a. She acknowledged receipt of the applicant's email to her dated December 22, 2020.
- b. She stated that she made a factual error in rendering her December 15, 2020 award in that she understood that the applicant saw his daughter every week. After reading the applicant's email, she realized that her award resulted in the child and the applicant being without contact for a week if not a week and a half.
- c. She was prepared to amend her December 15, 2020 award as follows:

Para. 10 b and d would read "Every Wednesday from 3:00pm until Thursday 8:30 am".

[33] On January 21, 2021, counsel for the applicant wrote to the parenting coordinator requesting an award be made regarding the appointment of Ms. Bourgeois, progression of next steps regarding the parenting calendar and a process to be established regarding child support adjustments moving forward. The same day, counsel for the respondent sent an email indicating that she objects to the request made by the applicant but could not respond that week.

[34] On January 27, 2021, counsel for the respondent emailed the parenting coordinator advising that the respondent had a number of issues with the process, she no longer was finding it meaningful or productive, that she was scheduling a settlement conference with the court and effective that date, her client was ending the process.

January 27, 2021 Award

[35] The parenting coordinator acknowledged the respondent notice that she was withdrawing from the PCA. The same day, the parenting coordinator released her award where she ordered the parties to retain the services of Ms. Chantal Bourgeois and sign her retainer agreement forthwith and amended the parenting schedule as follows:

- a) Para. 10 b. and d. will read “Every Wednesday from 3 pm until Thursday 8:30 am”.
- b) The remaining schedule as set out in paragraph 10 shall remain the same.

[36] Further, the parenting coordinator made the following statements in her award regarding her role in the parenting coordination process:

[12] In this case, the parenting issues are to be dealt with through a parenting coordination. The role of the parenting coordinator described therein is to address all parenting issues and assist the parties in the preparation of a comprehensive parenting plan, which includes establishing a regular schedule regarding the child’s time with her parents.

[14] In my view, the parenting coordination contract should prevail to allow the parties to come up with a parenting plan dealing with all parenting issues. In the event that the parties are unable to agree, the parenting coordinator should be able to make an award as arbitrator to ensure that the preparation of the parenting plan proceeds in a timely fashion.

[16] In addition, paragraph 12 of the order states that “if the matter is resolved collaboratively, the next step shall be a settlement conference”. I am reading

those words to mean that the parties are to collaborate, engage and commit to the process to resolve all parenting issues as well as a parenting plan.

[17] Furthermore, the order sets out a minimal schedule for parenting time between the father and the child. It appears that there was no comprehensive parenting plan already in place at the time the order was made. Hence this would explain the willingness of the parties to participate in the preparation of a parenting plan.

[19] The parenting issues are but one issue for the parties to resolve. There are other issues such as child support which entails the determination of the parties' incomes, financial disclosure as well as retroactive child support that also need to be addressed. I assume that the court process will be used and the parties will proceed by way of settlement conference and trial, if necessary unless agreed otherwise.

[20] In light of the above, I see no basis for the parenting coordination contract to be terminated or for a party to withdraw from this process.

[37] In her January 27, 2021, the parenting coordinator indicated that she made the December 15, 2020 award on Christmas access because the parties disagreed, and an award was needed to clarify any confusion or dispute on this issue. She further explained that the reason that she increased the father's parenting time at paragraph 25 of her award as follows:

[25] Since the parties were contemplating the involvement of Ms. Bourgeois, the award was also putting in place a gradual schedule increasing Nicholas's parenting time with the child. The purpose of adding time was based on Ms. Bourgeois view that in order for her to be able to reasonably and fairly assess the father's ability to care for the child, it would be best to have in place an adequate amount of parenting time.

[38] On February 2, 2021, the respondent filed a notice of appeal to the Superior Court of Justice. Counsel wrote to the trial coordinator to seek judicial intervention by way of an urgent case conference. On March 16, 2021 the parties appeared before Justice Doyle who conducted the case conference, granted leave to the parties to bring the motions and assumed case management of this matter.

January 28, 2021 to Date

[39] Currently, the respondent has reverted to providing parenting time by the applicant to his child in accordance with the consent order of Justice Roger.

Issues

[40] The issues to be resolved are as follows:

- a) Should the two awards dated December 15, 2020 and January 27, 2021 be enforced or set aside?
- b) Should the parenting coordination process continue or be terminated?
- c) If the parenting coordination process is terminated and the two awards are set aside, what should be the applicant’s parenting time with the child and what is the next step in this case?

Legal and Jurisprudential Framework

[41] Section 1 of the *Arbitration Act* defines specific terms that are germane in this matter:

- a) “Arbitration agreement” means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them.
- b) “Family arbitration” means an arbitration that,
 - (i) Deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under part IV of the *Family Law Act*, and
 - (ii) Is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.
- c) “Family arbitration agreement” and “family arbitration award” have meanings that correspond to the meaning of “family arbitration”.

[42] In *Jirova v Benincasa* 2018 ONSC 534, Audet J, describes the use of parenting coordination as a dispute resolution model as follows:

[10] Parenting Coordination is one of the most recent dispute resolution models to enter the Ontario family law realm, although it has been known and used for many years in other jurisdictions[1]. Parenting Coordination is used exclusively to deal with parenting issues and is only possible once a final parenting agreement or court order is in place. To confirm the PC’s authority to work with the parents outside of the adversarial process, to obtain information and to make recommendations and decisions as authorized by a parenting agreement, the parents’ consent to defer to parenting coordination is normally incorporated into a formal court order. One of the main functions of the PC is to help parents implement the parenting terms of their final agreement/court order.

[11] This resolution model includes two components: the non-decision-making component and the decision-making component. During the non-decision making component of the process (the mediation phase), the PC *assesses* the family dynamics to obtain a better understanding of the parenting issues and challenges, *educates* the parties about child development matters and the impact of parenting conflict on the children, *coaches* them regarding communication skills and parenting strategies, and *mediates* disputes as they arise.

[12] During the decision-making portion of the process (the arbitration phase), which is triggered when resolution through mediation is not possible, the PC makes a binding decision on the issue in dispute after having provided both parents with an opportunity to be heard. During both phases of the process, the PC is generally given expanded investigative powers to assist in his or her mandate to mediate or adjudicate on the issue, such as the ability to speak with professionals involved with the family as well as the ability to interview the children, when he or she deems it necessary and in the children's best interest to do so. Parenting Coordination is a way for parents to settle parenting disputes with cost-efficiency, procedural flexibility and expeditiousness.

[43] In *Petersoo v Petersoo* 2019 ONCA 624, the Court of Appeal opined on the issue of mediation/arbitration processes in family law as follows:

[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.

[44] In *Sehota v Sehota* 2012 ONSC 848, the court made the following comments at para. 24 and 28 that are instructive with the issue of parenting coordinators:

24. The services of parenting coordinators have become an important part of the family law system. The court values the work of such professionals for the vast potential it holds for easing many of the difficulties litigants face. In particular,

the court usually sees the children being benefited by the help of a parenting coordinator because that person can help the parents to put their children's interests first, to understand how conflict hurts children and to cooperate in spite of their past sorrows and hurts.

28. A further component of the guidelines is that the order for parenting coordination should be after a final order that sets out the parenting plan. This case illustrates why this is preferable. It is not the job of the parenting coordinator to decide what the plan should be but to work within the smaller issues of an overall established plan. The parenting coordinator is not to develop the plan, but to help the parties implement a final plan from a final order or agreement.

Applicant's Position

[45] The applicant argues that paragraph 12 of the order of Justice Roger dated January 16, 2020 mandated the parenting coordinator to address parenting issues, to mediate disputes and to assist the parties in preparing a comprehensive parenting plan. Further, paragraph 13 of the order provides that no further motions on parenting issues were to be permitted without leave of the judge and that the order was meant to address all parenting issues until a further order on consent or a trial.

[46] The applicant submits that the respondent simply does not agree with the two decisions made by the parenting coordinator and consequently has acted unilaterally to seek to terminate the PCA and to set aside the two awards.

[47] The applicant argues that the respondent has ignored the awards and has not increased the parenting time with the applicant and the child, in breach of the PCA. The applicant seeks an order that the respondent is in non-compliance with the order of Justice Roger.

[48] The applicant seeks an order that the court enforce both awards as court orders. In the alternative, the applicant requests that the court correct/re-write/clarify the order of Justice Roger dated January 16, 2020. Finally, if the awards are set aside and the PCA is terminated, the applicant seeks a variation of the parenting time set out on Justice Roger's order.

Respondent's Position

[49] The respondent argues that the court cannot delegate its authority to make decisions regarding custody and access. The respondent submits that by ordering the parties to retain a parenting coordinator, the court was delegating its authority to decide custody and access issues.

[50] The respondent argues that prior to making an award, the parenting coordinator was required to give notice under the terms of the parenting coordination contract for a matter set out in paragraph 17 of the PCA.

[51] However, if the parenting coordinator sought to address the matter set out in paragraph 18 of the PCA, the parties were required to enter into a mediation/arbitration agreement. The respondent argues that without that mediation/arbitration agreement, the parenting coordinator was without jurisdiction to make any award.

[52] In addition, with respect to the January 27, 2021 award, the respondent argues that she was not afforded an opportunity to make submissions with respect to the appointment of Ms. Bourgeois.

[53] The respondent argues that there is a reasonable apprehension of bias against the parenting coordinator, who advised the respondent on December 18, 2020 that she could not vary the terms of the December 15, 2020 award but varied them on January 27, 2021 in response to a request by the applicant dated January 4, 2021. The respondent argues that this unilateral action creates a reasonable apprehension of bias on behalf of the parenting coordinator.

[54] Finally, if the awards are set aside and the PCA terminated, the parties should proceed to a settlement conference and that in the interim, she proposes a schedule for the applicant's parenting time with the child.

Analysis

Should the December 15, 2020 and January 27, 2021 awards be enforced or set aside

[55] On January 16, 2020 Justice Roger made a court order, on consent, addressing three issues being parenting/access, disclosure and child support. This order was made on a temporary basis and provided a parenting schedule that covered three different periods of time as follows:

- a) The initial period of January 16, 2020.
- b) The parenting schedule was to increase one month later by extending every Wednesday evening parenting time from 7 pm to 8:30 am on Thursdays on the condition that the applicant registered for parenting course and attended with the intention to come complete it.
- c) The parenting schedule was to increase three months from January 16, 2020 expand to include alternate Saturdays overnights.

[56] In addition, at paragraph 12 of the order, Justice Roger, with the consent of the parties, ordered a parenting coordinator to be retained with the following terms:

- a) She shall address all parenting issues if and when they arise, mediate if required any disputes with this order or any other parenting issue
- b) Assist the parties in preparing a comprehensive parenting plan.

[57] Paragraph 12 goes on to state that if the matter was resolved collaboratively, the next step would be a settlement conference and that neither party could put an end to the parenting coordinator contract. Further the order was intended to be interim and that paragraph 13 provided that “no further motions in this matter on parenting issues without leave of a judge through procedural court” (the leave being a separate issue to be dealt with through procedural court).

[58] The applicant requests, as part of his claim for relief in his notice of motion, that the court correct/re-write/clarify parts of the order of Justice Roger. I dismiss that relief. In my view, the terms of the order are quite clear in that the applicant was provided with a graduated increase in parenting time, a parenting coordinator was appointed to assist the parties with the existing order and to prepare a comprehensive parenting plan and that there would be no motions brought unless leave had been obtained from the court.

[59] I agree with the respondent that the court cannot delegate its authority to make decisions regarding parenting time and decision-making as the jurisdiction to make such orders rests solely with the court. It cannot be delegated to a third party such as a psychologist, a social worker or a parenting coordinator. In my view, Justice Roger did not delegate any of his authority.

[60] I agree with the *dicta* in *Sehota v Sehota* and *Jirova v Benincasa*, that a parenting coordination process should only be used for implementing, interpreting and applying a final order. Unfortunately, the parties engaged the parenting coordinator at a stage where the final order had not been issued. The parties were at a temporary order stage. The purpose of a parenting coordinator is to assist the parties in the implementation, interpretation and application of the terms of a final order.

[61] The applicant argues that combination of the terms of the order and the PCA granted the parenting coordinator the jurisdiction to create a parenting schedule including increasing parenting time. This view is shared by the parenting coordinator where she stated the following in her January 27, 2021 award, at paragraph 14, 17 and 19:

[14] In my view, the parenting coordination contract should continue to prevail to allow the parties to come up with a parenting plan dealing with all parenting issues. In the event that the parties are unable to agree, the parenting coordinator should be able to make an Award as an Arbitrator to ensure that the preparation of the parenting plan proceeds in a timely fashion.

[17] Furthermore, the order sets out a minimum schedule for parenting time between the father in the child. It appears that there was no comprehensive parenting plan already in place at the time the order was made. Hence this would explain the willingness of the parties to participate in the preparation of a parenting plan.

[19] The parenting issues are but one question for the parties to resolve. There are other issues such as child support which entails the determination of the parties' incomes, financial disclosure as well as retroactive child support that also need to be addressed. I assume that the court process will be used and the parties will proceed

by way of Settlement Conference and trial, if necessary and unless agreed otherwise.

[62] I find that the parenting coordinator's jurisdiction as set out in the PCA was to arbitrate disputes set out in paragraph 17. In my view, if the parties wished to expand the jurisdiction of the parenting coordinator to assume the role as arbitrator beyond the disputes set out in paragraph 17, the parties were required to enter into a mediation/arbitration agreement. They never did.

[63] Neither party contested the jurisdiction of the parenting coordinator to address the Christmas holiday schedule parenting time. The January 16, 2020 order did not provide for any Christmas time, but the parties willingly participated in the mediation by providing the parenting coordinator with their proposals. The parenting coordinator justifies her jurisdiction in the January 27, 2021 award, where she indicates that she made the Christmas schedule award to clarify a dispute between the parties. I agree that the parenting coordinator had jurisdiction to deal with Christmas because it was modifying the regular parenting schedule to accommodate holidays. Neither party is challenging the Christmas schedule award and the parties followed it.

[64] On the issue of extending the applicant's parenting time with his child in the December 15, 2021 and January 27, 2021 award, I find that the parenting coordinator exceeded her jurisdiction as follows:

- a) The effect of the award was to increase the applicant's parenting time with his child, from four overnights in a twenty-eight day period gradually increasing to ten overnights by March 2021.
- b) The PCA specifically prohibits the parenting coordinator from making any significant changes in the residential parenting schedule. Increasing the overnights by the two awards was a significant change in the residential parenting schedule and beyond the jurisdiction of the parenting coordinator.
- c) Despite emailing the parties on December 14, 2020 that she would only address the Christmas holiday schedule and January 2021, the award went beyond that scope and included February and March 2021.

- d) The parenting coordinator stated that she increased the applicant's parenting time at the request of the custody assessor, to allow the applicant to have more time with the child before the assessment started. There is no evidence the parties were aware of this exchange between assessor and parenting coordinator or that the respondent consented to any changes.
- e) I accept that the parenting coordinator was aware of the applicant's position on expanding his parenting time and that the respondent was opposed to any increase. I do not find that the failure of the respondent to provide her position on December 15, 2021 prevented her position from being considered by the parenting coordinator.

[65] Further, on December 15, 2020, the parenting coordinator sent a mediation/arbitration agreement to both parties requesting that it be signed the same day. In that document, the issues to be submitted expanded the jurisdiction of the parenting coordinator to include custody, access, child support and costs. In my view, this is a significant change in the mandate given to the parenting coordinator. While the parties are at liberty to enter into a mediation/arbitration agreement, the court cannot compel parties to opt out of the court process. The applicant has requested in his materials that the court order the parties to sign a mediation/arbitration agreement. On the facts of this case, the court has no jurisdiction to compel the parties to sign a mediation/arbitration agreement.

[66] With respect to a reasonable apprehension of bias, the respondent alleges that the parenting coordinator's decision to amend the December 15, 2020 order in her January 27, 2021 order caused a reasonable person to believe that the parenting coordinator was biased against the respondent. During submissions, I indicated that that issue of a reasonable apprehension of bias must be presented to the parenting coordinator as per paragraph 60 of the PCA as an initial step. As it was not done, I will not consider this claim for relief.

[67] The respondent submits that she was denied natural justice when the parenting coordinator made the January 27, 2021 award as there was no formal hearing convened or submissions requested to address the modification of the parenting time in the December 15, 2020 award and the appointment of a custody assessor. The parties did discuss the appointment of a custody

assessor prior to December 15, 2020 and then had a Zoom meeting with the lawyers, the parenting coordinator and the assessor on December 15, 2020. The custody assessment retainer agreement was provided to the parties which was signed by the applicant before Christmas but not by the respondent.

[68] I agree that the parenting coordinator had the jurisdiction under paragraph 17 to have the parties retain an expert, such as a custody assessor. However, after the release of the December 15, 2020 award, the next written next communication from the parenting coordinator was on January 5, 2021 where she indicated that she intended to amend the December 15, 2020 order based on a factual misunderstanding, resulting in the father potentially not seeing the child for a period of between 1 week to 1 ½ weeks. Nowhere in that email did the parenting coordinator advise that she intended to make an order that the parties retain the custody assessor. From the record, there is no communication between the parties or the parenting coordinator from January 5, 2021 to January 21, 2020, when the applicant's counsel wrote the parenting coordinator requesting an order to amend her first award and to appoint the custody assessor.

[69] The same day, the respondent's counsel sent a very short email advising that she could not respond in depth but that she objected to the request made by the applicant. On January 27, 2021, the respondent's counsel sent an email indicating the respondent's intention to terminate the PCA. At this point in time, neither party had made any submissions about the appointment of a custody assessor. The respondent had refused to sign the custody assessment agreement and had decided to withdraw from the PCA. After receiving the email notifying of the respondent's decision to terminate the parenting coordination process, the parenting coordinator then released her award the same day. I find that the parenting order denied the respondent the right to make submissions regarding the custody assessor.

[70] I conclude that the December 15, 2020 and January 27, 2021 awards of the parenting coordinator are hereby set aside.

Should the parenting coordination process continue or be terminated?

[71] The respondent requests the termination of the PCA submitting that the parenting coordinator has exceeded her jurisdiction, that there is a reasonable apprehension of bias and that

she wishes to return to the court process. The applicant submits that the respondent cannot unilaterally terminate the PCA and wishes that the parenting coordination process continue.

[72] I find that the respondent did not have the right to withdraw both pursuant to the PCA and pursuant to the order of Justice Roger. The respondent submitted that if she could not withdraw from the PCA, the court had the jurisdiction to terminate the process.

[73] The PCA provides that the parenting coordination process can be terminated by court order. In making a decision to terminate the parenting coordination process, I have taken into consideration the time spent by the parties to date, the allegations of interference by the respondent with respect to the applicant's request to seek increase parenting time with his child, the respondent's insistence on disclosure by the applicant and the current state of this litigation.

[74] The appointment of the parenting coordinator was made on January 16, 2020. The applicant signed the PCA in February 2020 and the respondent in March 2020. The first mediation session was in April 2020 and as of May 2021, almost 17 months has elapsed.

[75] While I agree that an alternative dispute resolution process should be encouraged by the court, especially in family law cases, the courts retain a supervisory role to ensure that the process is both fair and beneficial to the parties and the child. The applicant alleges that the respondent has intentionally delayed this process. For example, despite the applicant signing the PCA in February, it was not until March 24, 2020 that the respondent signed the PCA and the first mediation session was on April 17, 2020, three months after the consent court order. The applicant submits that the respondent unilaterally suspended his parenting time while the respondent's position is that the applicant did a very gradual parenting time with his child.

[76] The parties do not appear to be closer to a settlement than they were in January 2020. The most important issue for the court is the best interests of this child. Despite the best of intentions on January 16, 2020, this process has not worked.

[77] I agree that the respondent was acted in noncompliance with the order of Justice Roger by unilaterally terminating the parenting coordination process, both the order of Justice Roger and the PCA specifically prevent a party from unilaterally terminating the process. However, the order of

Justice Roger at paragraph 13 provided a mechanism to return to court. This is consistent with the court being the final arbitrator of parenting disputes.

[78] With the greatest respect to the parenting coordinator, I am concerned about statements made by the parenting coordinator as to her role in creating a parenting schedule. In paragraph 14 and 25 of her January 27, 2021 Award, the parenting coordinator made the following comments:

[14] ... In the event that the parties are unable to agree, the parenting coordinator should be able to make an Award as Arbitrator to ensure that the preparation of the parenting plan proceeds in a timely fashion.

[25] ...The purpose of adding time was based on Ms. Bourgeois view that in order for her to be able to reasonably and fairly assess the father's ability to care for the child, it would be best to have in place an adequate amount of parenting time.

[79] I disagree with those statements. The parenting coordinator's role is not to create a parenting schedule but rather it is to work with the existing schedule and to assist the parties in putting together a comprehensive parenting schedule.

[80] I cannot see how compelling the parties to return to the parenting coordination process at this time will be beneficial to the parties and child. I have serious doubts that the process will be of assistance. My overriding concern is the best interest of the child including a determination of a parenting schedule and the decision-making issue.

[81] I find that while appointing a parenting coordinator may have been considered a viable method to advance a settlement in this case in January 2020, it has achieved the opposite result. I conclude that the parenting coordination process must end. I order that the parenting coordination service contract is terminated.

New parenting schedule and appointment of an assessor

[82] Both parties submitted that if the parenting coordination process ended, both parties sought a new parenting schedule set out in their notices of motion.

[83] The respondent proposes that, on an interim basis, that the parenting schedule be based on the order of Justice Roger but that when the applicant has the child on weekends, the parenting

time would be from Friday until Sunday. The applicant proposes that one week he would have the child every Wednesday from 3pm until Thursday at 9 am and every second weekend from Friday to Sunday and in the second week, Monday from 3 pm until 7pm and every alternate Wednesday from 3 pm until Friday at 9 am.

[84] Neither party has provided the court with a detailed affidavit to support the conclusions sought with respect to the parenting time and the appointment of an assessor. This is not surprising as significant effort was placed on addressing the parenting coordinator awards and the issue of terminating the parenting coordination process. However, on the evidence before me, I cannot properly decide these issues.

[85] I order the applicant to serve and file on or before May 18, 2021, a notice of motion addressing the temporary parenting schedule including a summer holiday schedule and the appointment of a parenting assessor with a detailed affidavit no longer than 15 pages with exhibits restricted to an additional 15 pages. I order the respondent to serve and file on or before May 25, 2021, a detailed affidavit no longer than 15 pages with exhibits restricted to an additional 15 pages. I grant the applicant the right to file a reply affidavit no longer than five pages with exhibits restricted to an additional five pages, by May 30, 2021.


[86] I will render a decision on a temporary parenting schedule and the appointment of a parenting assessor based on the written material. If counsel request a hearing to make submissions on these issues during the week of June 1, 2021, such request must be made in writing by May 26, 2021 through the Trial Coordinator's office. If no request is made by that time, there shall be no hearing and I will proceed on the written material.

Next Steps

[87] On March 16, 2021, Justice Doyle assumed the role as case management judge in this matter. However, I am placing this matter on the next available trial sittings being November 2021. This matter shall proceed on a priority basis and shall be preemptory to both parties.

Costs

[88] I will defer the issue of costs until after I address the parenting schedule and the appointment of an assessor.



Mr. Justice Mark Shelston

Date: May 10, 2021

CITATION: *Ali v. Obas*, 2021 ONSC 3412
COURT FILE NO.: FC-19-200
DATE: 2021/04/10

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Nicolas Farouk Ali, Applicant

AND

Annine Marjorie Obas, Respondent

COUNSEL: Marie-Hélène Godbout, for the Applicant

Julie Gravelle, for the Respondent

ENDORSEMENT

Justice Mark Shelston

Released: May 10, 2021