CITATION: Jirova v. Benincasa, 2018 ONSC 534
COURT FILE NO.: FC-17-1223
DATE: 20180124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
NADIA JIROVA	)	Self-represented
Applicant/Respondent in Appeal	)	
– and –	)	
ADAM VINCENZO BENINCASA	)	John E. Summers, for the Respondent/Appellant
Respondent/Appellant	)	
	)	**HEARD:** January 9, 2018

REASONS FOR DECISION

AUDET J.

[1] This is an appeal by the appellant, Mr. Benincasa (« the appellant"), from an arbitration award made by Ms. Janet Claridge, as the parties' Parenting Coordinator, on May 15, 2017. The sole issue before her was the determination of the school that the parties' child, Alexander (4), would attend in September 2017.

[2] The appellant argues that the arbitration was not conducted in a fair and impartial manner or in a way that would be consistent with the principles of natural justice, in contravention with s. 19 of the *Arbitration Act*, 1991, S.O. 1991, c. 17. The appellant further submits that the Parenting Coordinator failed to apply the proper legal test under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

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[3] For the reasons that follow, the appellant's appeal is dismissed and the arbitration award is confirmed.

Background

[4] The parties are the parents of Alexander who was born on August 28, 2013. They resolved all matters arising from their separation by way of a consent court order signed by Justice Blishen on July 9, 2015. Pursuant to that consent order, the parties agreed to resolve any disputes arising from their parenting agreement through a parenting coordination process. Subsequently, the parties did enter into a Parenting Coordination Agreement with Ms. Janet Claridge.

[5] As indicated in her resume, Ms. Claridge (hereinafter "the PC") is an experienced family consultant, mediator, OCL clinician and children's therapist. She has a Master's degree in Social Work and over thirty years of experience working with separating families and their children.

[6] Before the parties could even begin any meaningful work with Ms. Claridge, the appellant requested that the issue of the school that the parties' son would attend as a junior kindergartener, come September 2017, be arbitrated by her. The arbitration hearing took place on April 6, 2017 and the PC's written decision was released to the parties on May 15, 2017. She decided that the child would attend Elmdale Public School, the mother's preferred choice. The appellant father brought this appeal of the PC's arbitration award shortly after.

The Appellant's Position

[7] The appellant argues that the arbitration process was not conducted in accordance with the requirements of equality, fairness and the principles of natural justice enshrined in s. 19 of the *Arbitration Act*. His position is based on the following:

- The PC signed a declaration that the parties were screened when they were not;

- The PC denied the appellant's request for a brief adjournment to allow him to consider and respond to additional evidence submitted by the respondent mother the day prior to the arbitration hearing;

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- The PC allowed the respondent's partner to participate in the arbitration hearing and, in fact, to interfere in the hearing including by providing answers on behalf of the respondent;

- The PC allowed the respondent and her partner to take a break in the middle of the respondent's cross-examination to consult with each other with respect to the respondent's evidence;

- The PC refused to consider and review the custody and access assessment that had been previously prepared by Dr. Frances Smythe in the context of the parties' court proceeding;

- The PC allowed the respondent to present blatant hearsay evidence and to present documents at the hearing that had never been produced before;

- The PC acted as an advocate on behalf of the respondent and failed to remain neutral and impartial;

- The PC allowed the respondent to provide further contradictory evidence after the arbitration hearing was completed.

[8] The appellant further argues that the PC failed to apply the appropriate legal test, namely, the best interests of the child, pursuant to the *Children's Law Reform Act*.

The Legal Framework

[9] The relevant sections of the *Ontario Arbitration Act* are the following:

> **3** The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following:
>
> 1. In the case of an arbitration agreement other than a family arbitration agreement,
> i. subsection 5 (4) ("Scott v. Avery" clauses),
> ii. section 19 (equality and fairness),
> iii. section 39 (extension of time limits),
> iv. section 46 (setting aside award),
> v. section 48 (declaration of invalidity of arbitration),
> vi. section 50 (enforcement of award).
>
> 2. In the case of a family arbitration agreement,
> i. the provisions listed in subparagraphs 1 i to vi,

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ii. subsection 4 (2) (no deemed waiver of right to object),
iii. section 31 (application of law and equity),
iv. subsections 32 (3) and (4) (substantive law of Ontario or other Canadian jurisdiction), and
v. section 45 (appeals).

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.

20 (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act.

21 Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications.

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Parenting Coordination in the Context of Family Disputes

[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.

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[1] Such as the United States and the Province of British Columbia.

[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.

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The Parenting Coordination Agreement

[13] The statement of principles set out in the Agreement for Parenting Coordination Services and Arbitration (hereinafter "the PC Agreement") entered into by the parties in this case is revealing of the expectations of the parties in choosing this particular process:

1. We acknowledge that our child(ren) will benefit from a meaningful relationship with both parents, that parental conflict will impact negatively on our child(ren)'s adjustment, and that every effort should be made to keep the children out of parents' disputes.

2. We wish to retain the services of Janet Claridge as Parenting Coordinator to assist us in implementing, maintaining and monitoring the terms of our Minutes of Settlement/Court Order/Separation Agreement, dated July 9, 2015.

3. We acknowledge that we are aware of Ms. Claridge's professional background, as family mediator and custody/access assessor, as an expert in family matters regarding best interest of children.

4. We agree to voluntarily enter into this agreement because we wish to:
    a. de-escalate parental conflict
    b. prioritize the child(ren)'s best interest
    c. promote the child(ren)'s optimum adjustment
    d. resolve issues/disputes in a timely and cost-efficient manner
    e. benefit from the direction of a qualified professional

[14] Because a Parenting Coordination process has an arbitration component, s. 59.6 of the *Family Law Act* requires that the parties obtain independent legal advice prior to signing such an

agreement for any resulting award to be enforceable. The parties both obtained independent legal advice prior to signing the PC Agreement.

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[15] The PC Agreement appointed Ms. Claridge as arbitrator pursuant to the *Arbitration Act*. Therefore, all of the procedural and evidentiary rules contained in the *Arbitration Act* apply to the arbitration hearing conducted by her. As set out above, paragraph 3 of the *Act* allows the parties to vary or exclude any provision of the *Act* except those specifically provided for in that paragraph.

[16] In the spirit of the parties' expectation for a process that would allow them to resolve issues and disputes in a timely and cost-efficient manner, with the assistance of an expert in the field, the PC Agreement did in fact contain several variations and exclusions which allowed the PC to depart from the provisions of the *Act* with regards to rules of procedure and evidence, including the following (I have highlighted some of the most important parts):

> 21. Subject to par. 20 [confidentiality of the screening process], the PC process is non-confidential and the PC may provide information and/or report to us, our lawyers and the Court. Upon request of either of us, the Parenting Coordinator shall issue a report to counsel and the Court. The parent requesting the report shall pay fees for any such report. The report may be submitted as evidence in legal proceedings between us, and either of us may call Ms. Claridge to give evidence in Court.
>
> 36. The PC shall advise us in writing that we are now engaged in arbitration. The PC may communicate with us prior to commencing the arbitration to discuss procedural matters. *Arbitration may be conducted in a hearing and/or by way of written submissions*. We understand that *arbitration may proceed on written submissions only* and for this purpose, we specifically waive our rights under section 26(1) of the *Arbitration Act, 1991* with respect to request for a hearing.
>
> 39. *All communication during the arbitration phase will be 3-way, be it by conference call, email, fax and/or in meetings*. All communications to the arbitrator shall occur in the presence of the other parent and/or be copied to the other parent. The same shall occur for all communications from the arbitrator to the parties.
>
> 40. Should the parents wish to involve their lawyers in an arbitration, it may be by way of a conference call, written submissions and/or hearing, depending on the circumstances. If the parents choose not to involve their lawyers, they are waiving the right to do so.

> 41. In her decision-making role as an arbitrator, *the PC may rely on any information received, including the PC's written records during attempts to resolve the issues through the non-decision making process*. Notwithstanding, for arbitration purposes, we must provide our full submissions, either verbal or in writing, and not assume that any prior or information provided will be taken into account in the decision-making process.
>
> 42. Subject to provisions in paragraphs 27 and 28, prior to rendering a decision, and in time for us to respond, the PC shall provide for us a summary of any information received from third parties, if any.
>
> 43. *To the extent that information relied upon by the PC in her decision is information which the PC has received from the children and/or the children's therapist, we may not be private to that information, and disclosure of same to us by the PC shall be with the consent of the children or at the PC's discretion*. Each of us, by signing this Agreement, acknowledges that he/she has been advised that such may not satisfy the requirements of the *Arbitration Act* but that each agrees that such is in the children's best interests. Each waives his or her right, at any time in the future, to rely on this discretionary disclosure by the PC to set aside the PCs decision on any issue and releases his/her right to make such argument.
>
> 44. From time to time, given the exigencies of the situation and time constraints, it may be necessary to have a summary disposition of a parental issue in order to accommodate the parents and the best interests of the children and avoid further escalation of the conflict. In such a circumstance, clause 39 of this Agreement shall be satisfied. Accordingly, *where circumstances require, the PC has the authority to make a summary disposition of an issue upon hearing briefly from both parties in a meeting, conference call, or by three-way email correspondence*, as the PC deems appropriate.
>
> 47. *The parties do not wish to have a reporter present* at the arbitration of any issue and waive the rights to have a transcript of the proceedings. If, however, in the absolute discretion of the arbitrator, the arbitrator requires to have a reporter present, then the arbitrator may direct the parties to share the costs of the reporter in such a manner as the arbitrator deems appropriate in all the circumstances.

[17] Since by virtue of section 41 of the agreement the PC may rely on information received during the mediation portion of the process, it is important to set out how such information may be obtained during mediation:

> 25. During this non-decision making phase prior to arbitration, the PC may communicate with one parent without the other parent being present. The PC

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> may communicate with our lawyers jointly and/or separately, unless otherwise determined at the start of this process.
>
> 26. The PC shall be entitled to pursue matters submitted to her by meeting with the parents jointly and/or individually, reviewing written materials and considering any other information that she determines is relevant to the matter. The PC may consult with professionals, family members and others who have information regarding the parents and/or child(ren), such as therapists, custody assessors, schoolteachers, daycare providers, health care and other professionals, if the PC believes the information may be relevant.

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Breach of Equality, Fairness and Procedural Fairness (s. 19 of the *Act*)

[18] It is against this backdrop that the appellant's contention that the PC breached the requirements of equality, fairness and procedural fairness set out in s. 19 of the *Arbitration Act* must be assessed. Those requirements are so important that the *Act* has given them a special status, and confirmed that parties cannot contract out of them. Regardless of the nature of the arbitration process chosen by the parties, an arbitrator is required to treat the parties equally and fairly, including procedurally. As stated by Justice Templeton in *Hercus v. Hercus*, 2001 CarswellOnt 452, [2001] O.J. No. 534, at para. 75:

> **75** It is settled law that the right to a fair hearing is an independent and unqualified right. Arbitrators must listen fairly to both sides, give parties a fair opportunity to contradict or correct prejudicial statements, not receive evidence from one party behind the back of the other and ensure that the parties know the case they have to meet. An unbiased appearance is, in itself, an essential component of procedural fairness.

[19] At paras. 98 and 99, she further expands on the meaning of the words "fair" and "equal" as follows:

> According to the Oxford Dictionary, "fair" means "just", "unbiaised", "equitable", "without finess", "above-board" and "equal conditions for all."
>
> The concept of treating a party "equally" infers an "even balance" and "uniform approach."

[20] Before reviewing each of the appellant's allegations in support of his position that he was denied equality and fairness during the arbitration process, it is important to provide a summary of what occured before the arbitration hearing took place.

The Arbitration

[21] As was her prerogative pursuant to the clear terms of the PC Agreement, the PC did not require that a reporter be present during the arbitration hearing. Consequently, there is no transcript available to confirm what took place during the hearing. For that reason, both parties filed affidavits in the context of this appeal setting out their own perspectives of what transpired before, during and after the hearing. At the request of the respondent, and as permitted by s. 21 of the PC Agreement, the PC also provided a report to the court summarizing her involvement with these parties. Neither party objected to the other's evidence being filed as part of this appeal.

[22] Based on the evidence before me, I find that the following occurred during the course of the decision-making component of the Parenting Coordination process.

[23] Once it was clear that the parties would not resolve the issue of their son's schooling through the non-decision making component of the PC process, the appellant on December 14, 2016, requested that the matter proceed to arbitration. On the same day, the PC wrote to both counsel and indicated that while she realized that the child was anxious to get things settled, she felt the parties were not ready to enter into the arbitration phase of the process as she did not know what all the options were and the impact of these options on the child. She encouraged the parties to continue with the mediation process.

[24] On January 6, 2017, counsel for the appellant wrote to the PC to advise her that, to the extent arbitration proceeded on the issue of the schooling, he would require an actual hearing as he felt *viva voce* evidence, including the opportunity for cross examination, was necessary given the nature of the evidence and the credibility issues raised by the dispute.

[25] When it became obvious that the dispute would not be resolved through mediation, an initial Notice of Arbitration was sent to the parties by the PC on February 14, 2017. It confirmed

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that the arbitration would proceed on the basis of written materials only. The appellant's lawyer then reiterated his request that the parties be afforded an opportunity to provide *viva voce* evidence and to cross-examine. On February 27, 2017, the PC sent a revised Notice of Arbitration providing the parties with an opportunity to cross-examine each other in the context of a hearing that would be conducted at the PC's office after written submissions were exchanged. Basically, the PC incorporated into this second Notice of Arbitration the exact process suggested by the appellant's counsel.

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[26] By that point, the parties' counsel had confirmed that they would be present to assist their clients during the arbitration hearing. Due to scheduling issues, a third Notice of Arbitration ("New Notice of Arbitration") was sent to the parties on March 1, 2017. The same process as provided in the second notice (and as suggested by counsel for the appellant) was reiterated in this last notice, but the date of the hearing was changed. The important sections of this last notice dealing with procedure are the following:

> 4.1 The arbitration will proceed on the basis of written evidence to be submitted by email.
>
> 5.1 You must provide a statement of your position on the issue to be determined. You also have the option to make a reply to each other's statement.
>
> 5.2 In your statement, you should indicate in a numbered, point form:
>
> 1. Your position on the issue;
> 2. Reasons for your position; and
> 3. Your proposed option(s) for a solution.
> 4. Any documentation that you may wish to rely on in support of your position must be attached with your statement.
>
> 6.1 You must provide your statement to me by email, including any attachments, by 5 PM, Friday, March 10, 2017. I will promptly forward your respective statement to the other parent.
>
> 6.2 You will be provided an opportunity to cross-examine and submit replies on Thursday, April 6, 2017 from 10 AM to 12 PM at Janet Claridge's office.
>
> 8. You should seek legal advice if you have any questions of legal nature concerning this arbitration and/or if you wish to rely on your lawyer's assistance in making your

submissions.

[27] Neither party objected to the procedure set out in this last Notice of Arbitration. As the respondent's counsel was unavailable to attend on April 6, she confirmed her choice to appear at the hearing without her lawyer to ensure that the matter was not delayed any further.

[28] On February 28, 2017, the respondent sent an email to the PC asking if it would be possible for her to bring her new partner to the arbitration hearing. She stated "he is part of Alexander's life and will be there to provide moral support to me as well as to answer questions about our new house." That email was forwarded by the PC to the appellant's counsel and on the same day, he responded "whether her partner attends or not is up to you, but if he does attend he is not to participate in any way." On March 1, the PC wrote to the respondent (copied to the appellant) "I also understand that you would like Kian to attend, for moral support and to answer any questions regarding the house. I have no problem with Kian attending in this capacity. However, unless questions are directed at him, his role is supportive only. If you wish to consult with him or Karla, we can take a short break allowing you to do that." The appellant voiced no objection to this email from the PC.

[29] The appellant sent his written (sworn) statement dated March 9, 2017 to the PC on or about that day. The respondent provided her own written (unsworn) statement dated March 10, 2017 to the PC on or about that day. Although the notice of arbitration did not provide for sworn evidence to be exchanged (only written statements), on March 20 counsel for the appellant sent an email to the PC asking that the respondent's written statement be provided in a sworn format. On April 3, the respondent provided a sworn affidavit to the PC which basically attached as an exhibit the written statement she had already provided a month before. In addition, she provided a second affidavit for the purpose of responding to some of the allegations made by the appellant in his own affidavit.

[30] For reasons unknown to me, the respondent's two affidavits were only forwarded to the appellant at noon on April 5. As the appellant's counsel was involved in other matters all day, he only became aware of the respondent's responding affidavit later that night. On or about 7 PM, he wrote an email to the PC asking that the arbitration hearing be adjourned so that he would

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have an opportunity to prepare a reply affidavit for his client. Within the hour, the PC answered: "you can respond to her reply at the meeting tomorrow."

[31] Upon arriving at the arbitration hearing on April 6, 2017, the appellant provided the PC and the respondent with a seven page-long reply affidavit sworn that same day (from the perspective of our court process, this would have been a "reply to a reply affidavit"). It is to be noted that the Notice of Arbitration specifically contemplated that one of the purposes of the arbitration hearing would be to provide reply evidence. There was no need to prepare written materials in reply, but there was also nothing wrong *per se* with the appellant providing a reply affidavit that day. It is important to note, however, that the respondent had not had a chance to read it before the arbitration hearing began.

[32] At the arbitration hearing, the respondent also showed up with additional documents that she wanted to present to the PC; original architectural plans for her new home to be built in the catchment of the Elmdale Public School (her choice of school), legal documentation related to the purchase of the lot of her home, and a cohabitation agreement between her and her partner pertaining to their respective rights with regards to the house to be built. It is important at this juncture to mention that it was the appellant's position that the mother's proposed school should not be chosen because it was not clear whether her house would be completed before or within the first few months of the 2017-2018 school year, which in his view would make it impossible for the child to be registered there. He was also questioned whether or not, in the case of a breakup between her and her new partner, the respondent would be able to remain in that home. Since there were uncertainties about the child's ability to attend or remain in that school in the long-term, he argued that his proposed school should prevail.

[33] I will discuss in more details the events that transpired during the arbitration hearing itself later in these reasons, while considering each of the appellant's complaints with regards to the fairness of the process. Suffice it to say, for the moment, that the appellant's counsel had an opportunity to cross-examine the respondent on both of her affidavits, and that the respondent had an equal opportunity.

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[34] While it is the appellant's evidence that he and his counsel voiced their many objections and frustrations with the manner in which the arbitration was conducted by the PC during the hearing, there is absolutely no evidence before me that would suggest that the appellant filed a grievance (as permitted by the PC Agreement) until after she released her arbitration award. In fact, in an email dated May 12, 2017, the appellant wrote to the PC asking her when he could expect a decision with regards to Alexander's schooling.

[35] In an eleven page long Arbitration Award, the PC ruled in favor of the school endorsed by the mother, the Elmdale Public School. On May 25, 2017, counsel for the appellant wrote to the PC and asked her to rescind her Arbitration Award based on what he considered to be new information obtained by him about the child's ability to attend Elmdale Public School if the respondent did not reside in the catchment come September 2017. The new evidence consisted of an email from the Ottawa Carleton District School Board confirming that Alexander would not be allowed to attend Elmdale Public School if the respondent did not reside there at the beginning of the school year. The appellant was of the view that, had the PC known this, she would not have ruled as she did. He made it clear that, should she refuse to rescind her decision, he would appeal her award.

[36] The PC forwarded that email to the respondent and her lawyer for consideration and comments. The respondent's response was forwarded to the PC and the appellant. In a letter dated June 2, 2017, the PC indicated that based on information provided by the respondent, she was satisfied that the School Board's decision as confirmed in an email that was submitted as part of the respondent's evidence in the context of the arbitration, remained the same and that the child could be enrolled at Elmdale Public School in September 2017. As a result, she refused to rescind her award.

[37] The child was, in fact, enrolled at Elmdale Public School in September 2017 and he continued to attend that school on the day of the appeal hearing.

Issues of Credibility

[38] I shall deal with each of the appellant's complaints with regards to the arbitration process, one by one. But prior to doing this, it is important to make a few comments with regards to the

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evidence presented by each party in the context of this appeal concerning the events that transpired during the arbitration process.

[39] Unsurprisingly, the evidence presented by both parties is contradictory. It is often difficult to assess credibility based on written evidence. However, in this case, I have attached less credibility to the appellant's evidence than to the respondent's evidence for the following reasons. As will be described in more details below, I found many discrepancies in the appellant's evidence. In addition, I find that many of the statements he made about the events that took place before and during the arbitration hearing were either exaggerated or grossly inaccurate.

[40] For instance, at paragraph 14 of his June 28, 2017 affidavit, he states: "just prior to the arbitration, [the respondent] provided a written document as her evidence. My lawyer had to ask that this document be provided by way of an affidavit", suggesting that by allowing an unsworn document from the respondent, the PC was not holding her to the same (or proper) standard of proof. As I have stated above, there was no requirement for sworn evidence to be provided for the purpose of the arbitration, only written statements.

[41] At paragraph 20 of his December 11, 2017 affidavit, the appellant, referring to the PC's December 14, 2016 email (in which she opined that arbitration was premature) states: "Ms. Claridge then responded to my lawyer's email that same evening indicating in the first line that she has already made her decision regarding how the schooling would be determined." I fail to see how Ms. Claridge's email can possibly be interpreted this way.

[42] At paragraph 24 of his December 11, 2017 affidavit in which he discusses the respondent's request for her partner to attend the arbitration hearing, and the PC's response to same, the appellant states: "Ms. Claridge stated that [the respondent's partner] was allowed to participate in the arbitration and that [the respondent] was free to take breaks as needed to consult with her counsel and [her partner]." This is a gross distortion of the PC's response which was reproduced earlier in this decision.

[43] There are many other such examples in the appellant's affidavits filed in the context of this appeal.

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Screening

[44] The appellant alleges that, contrary to the Declaration signed by the PC on September 15, 2016, and attached as a schedule to the PC Agreement, at the time he signed the PC Agreement he had not been screened by her for power imbalance and domestic violence.

[45] Sections 2 and 3 of the *Family Arbitration Regulations*, O. Reg. 134/07, require family arbitrators to attach to their arbitration agreements the following declaration:

> I, (name of arbitrator), confirm the following matters:
>
> I. I will treat the parties equally and fairly in the arbitration, as subsection 19(1) of the *Arbitration Act*, 1991 requires.
> II. I have received the appropriate training approved by the Attorney General.
> III. The parties were separately screened for power imbalances and domestic violence and I have considered the results of the screening and will do so throughout the arbitration, if I conduct one.

[46] The PC Agreement in this case contained this Declaration, duly signed by the PC on September 15, 2016. The evidence in this case makes it clear that, despite the appellant's allegations to the contrary, the PC did meet the parties separately on September 20, 2016 for the purpose of conducting an intake and screening meeting. Further, paragraph 20 of the PC Agreement clearly stated:

> The Parenting Coordinator **will** meet separated with each of us for the purpose of, among other things, fulfill the requirements of the *Family Statute Law Amendment Act*, 2006 regarding screening the parties for the suitability of the process, including but not limited to, violence and power imbalances.

[47] The PC Agreement clearly indicates that it can be terminated if the PC resigns. There is no doubt that the PC could resign in the event that the information obtained during the intake and screening process was such that she felt the process was not suited for the parties on the basis, among other things, that domestic violence and/or power imbalances are present.

[48] While I acknowledge that the PC's Declaration in this case was signed before the screening actually took place, the PC Agreement clearly contemplated that this was to occur after the Agreement was signed, which it did. *The Family Law Act and Regulations* require that screening occur prior to the arbitration. This was done in this case.

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[49] Therefore, I would dismiss this ground of appeal.

Denied Request for an Adjournment

[50] The appellant submits that he was denied procedural fairness when the PC refused his counsel's request for an adjournment the day before the arbitration hearing, given the late receipt of the respondent's reply affidavit. Even within the very strict procedural rules of our Court, it is doubtful whether or not the appellant would have been entitled to an adjournment to file a reply to the respondent's reply affidavit. In the context of this arbitration process, I fail to see how the appellant might have been denied procedural fairness when he was afforded the opportunity to provide a reply by way of oral evidence during the hearing itself.

[51] In *Lockman v. Rancourt*, 2017 ONSC 2274, 93 R.F.L. (7th) 272, Justice Engelking reviewed some of the caselaw pertaining to an arbitrator's discretion to grant or deny an adjournment request and how a denial might affect the fairness of the process. She stated:

> **24** Pursuant to Perell J. in *Ariston Realty Corp. v. Elcarim Inc.*, 2007 CarswellOnt 2371 (Ont. S.C.J.), at para. 34, decision makers exercising their judicial discretion to grant or refuse an adjournment are to weigh many relevant factors, including the overall objective of a determination of the matter on its substantive merits; the principles of natural justice; that justice not only be done, but appear to be done; the particular circumstances of the request for an adjournment and the reasons and justification for the request; the practical effect or consequences of an adjournment on both substantive and procedural justice; the competing interests of the parties in advancing or delaying the progress of the litigation; the prejudice not compensable in costs, if any, suffered by a party by the granting or the refusing of the adjournment; whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused; the need of the administration of justice to orderly process civil proceedings; and, the need of the administration of justice to effectively enforce court orders.

[52] Given the procedure that the parties had expressly agreed to follow, as detailed in the Amended Notice of Arbitration, and given that he was provided with ample opportunity to provide a reply to the respondent's responding affidavit in the context of the hearing itself, there was no denial of procedural fairness on this ground.

The Respondent partner's participation\interference in the hearing

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[53] It is the appellant's evidence that during the respondent's cross-examination by his lawyer, her partner participated, gave documents and even attempted to ask questions. He states that he was allowed to whisper in her ears, give answers for her or provide answers of his own. Despite his lawyer's objections, he alleges that the PC allowed him to participate. He further adds that on one occasion, when the respondent was having difficulty answering questions, the PC authorized the respondent and her partner to go to a different room "to discuss their evidence before providing any further answers."

[54] The respondent's evidence is quite different. She states that the only questions answered by her partner were those with respect to the timelines for obtaining a building or demolition permit with regards to their home to be built, because she did not have that personal knowledge. She explains that when the appellant's questions started to relate to allegations made by the appellant in his reply affidavit, which she had not had an opportunity to read before the hearing, the PC allowed her and her partner to take a break to review the reply affidavit before answering any questions related to its content. She states that the purpose of the break was not to consult with her partner about her evidence, but rather to have an opportunity to read this lengthy reply affidavit before being asked questions on allegations it contained.

[55] I find the respondent's evidence on this point credible. Furthermore, in her email dated February 28, 2017, the PC had stated that the respondent's partner would be allowed to attend for moral support and to answer any questions regarding the house if the questions were directed at him. Since the respondent did not have answers to some of the questions related to the construction of the house, and her partner did, I see no reason why the PC could not have allowed him to provide his input. As stated earlier, the essence of the parenting coordination process is to allow the PC to make time-efficient decisions based upon all relevant information that the PC can obtain from the parties and other sources, including by reaching out to those sources on her own free will. I see nothing improper in the PC allowing the respondent's partner to answer questions and to fill-in the gaps on this issue.

[56] I also find that there was nothing wrong with allowing the respondent, who was not assisted by her counsel, short breaks for the purpose of reviewing the appellant's reply affidavit

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before being asked questions on its content, and for the purpose of consulting with her partner. It would have been inappropriate to insist that the respondent answer questions on evidence she had not had an opportunity to review. Further, the PC had made it clear in her February 28, 2017 email that she would provide the respondent with an opportunity to consult with her partner, as her support person, and there had been no objection from the appellant at the time it was said.

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[57] I would not allow the appeal on this ground of appeal.

The PC's refusal to consider the custody and access assessment

[58] The appellant alleges that during the course of his initial intake meeting with the PC, he tried to discuss the custody and access assessment that was previously completed by Dr. Frances Smythe during the course of the parties' family litigation. He expressed concerns about the respondent which, he states, were clearly validated in Dr. Smythe's assessment. The appellant says that he informed the PC of his wish for Dr. Smythe to be involved in the mediation and "inevitable" arbitration that he knew would ensue. He states that the PC's response was that she "would not read the assessment, would not allow him to refer to it, would not be contacting any of the parties that were listed in that assessment, and would not allow him to involve any of them, as per her discretion in the PC Agreement." This, he alleges, was unfair to him and demonstrated bias on the part of the PC.

[59] The appellant's assertions are difficult to reconcile with the PC's report, filed as part of the Appeal Record, in which the PC indicates that in September 2016, she received and reviewed Dr. Frances Smyth's assessment. I am of the view that it was entirely within the PC's authority to decide that this assessment, which dealt with parenting capacity and the child's best interests in the context of a custody and access determination, was irrelevant to the issue of where this child should attend school.

[60] Further, there is no evidence before me that would suggest that the appellant attempted at any point in time after that initial intake meeting to get the PC to reconsider her position on Dr. Smythe's assessment. During the appeal hearing before me, counsel for the appellant admitted that the assessment was not provided by the appellant as part of his written submissions to the PC, nor did he attempt to have it entered into evidence during the arbitration hearing. There is

also no evidence that the appellant ever brought the issue back for reconsideration after the initial intake meeting.

[61] I fail to see how the PC could be faulted for not having considered a document that was not even produced or discussed in the context of the arbitration. I also have no reason to believe that the PC did not, in fact, consider Dr. Smythe's assessment (or part thereof) since she was not limited in her decision-making process to relying solely on information obtained during the course of the arbitration itself.

[62] I would not allow the appeal on this ground.

The presentation of blatant hearsay evidence as well as new evidence

[63] The appellant contends that the PC allowed the respondent to give "blatant hearsay evidence" during the arbitration hearing. Further, the appellant states that throughout the respondent's cross-examination of him, the appellant's counsel had to constantly object to the respondent's questions on the basis that they were irrelevant or based on hearsay evidence.

[64] Except for his bare allegations to that effect, the appellant only provided one example of an "inappropriate" question being asked by the respondent during his cross-examination. In paragraph 30 of his December 11, 2017 affidavit, he states: "An example of such a question was when [the respondent] asked me if I had contacted the architect regarding the building of her partner's new home." He further states that, despite his counsel's objection to the question, the PC asked that he respond.

[65] Frankly, I see nothing inappropriate in that question given that the appellant was questioning the veracity of the information submitted by her from her architect. It was the respondent's evidence that during her cross-examination of the appellant, his counsel objected to almost every question, arguing that they were either not relevant or inappropriate, thus significantly circumscribing her ability to question the appellant on his allegations.

[66] While the appellant complains about the PC having allowed "significant hearsay evidence" from the respondent, there is absolutely no mention in his appeal materials of the specific hearsay evidence that he took objection to, and how the admission of that evidence

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might have denied him fair and equal treatment from the PC, or procedural fairness. A reading of the affidavits filed by the parties in the context of the arbitration reveals that both of them relied on unsworn statements and documents from third parties, none of whom attended the arbitration hearing to provide first-hand testimony.

[67] I find the following observation made by Justice de Sousa in *Kainz v. Potter*, (2006), 33 R.F.L. (6th) 62 in the context of a family arbitration conducted by a non-lawyer (Dr. Leonoff) to be of particular relevance in the context of this case:

> **61** The parties chose Dr. Leonoff as their arbitrator, not for his legal training or expertise. He is not a lawyer nor is he legally trained. Dr. Leonoff is a psychologist and his expertise is in psychology and psychoanalysis. He has acted as the parties' assessor dealing with the development and needs of their children and their parental capacity. He is not expected to know nor to conduct his hearings as if he knows the minute and intricate details of trial proceedings, the Rules of Civil Procedure and the rules of evidence. He is not held up to that standard nor should he be. Nonetheless, the minimum standard expected of him is that he conduct his arbitration hearing in a manner that is fair and equal to both parties and that allows both parties to present their case and respond to the case of the other party.

[68] Based on the evidence before me, I find that the PC did exactly that.

[69] The appellant also claims that the admission of additional documents from the respondent at the arbitration hearing which he had not seen before resulted in a denial of procedural fairness to him. Those additional documents consisted of architectural plans, a letter provided by the respondent's architect, and a cohabitation agreement confirming the respondent's housing and ownership arrangements with her new partner with regards to the house to be built. As already stated, the process agreed upon by both parties clearly allowed them to present reply evidence in the context of the arbitration hearing. As stated by the court in *Kroupis-Yanovski v. Yanovski*, 2012 ONSC 5312, 112 O.R. (3d) 268:

> **74** In particular, individuals are entitled to choose the arbitration option to resolve their family law disputes outside of the court process. People choose the arbitration route, at least in part, because the process can be less costly, more efficient and speedier than court proceedings. If the arbitration process had to mirror the court process these advantages might well be lost or minimized.

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> **75** It is evident from the statutory provisions that the arbitration process need not be the same as a court process. Section 26(1) of the *Arbitrations Act* enables an arbitrator to determine the procedure to be followed and provides that the arbitration may be on the basis of documents or the arbitrator may hold hearings for the presentation of evidence and oral argument.
>
> **76** There are, however, minimum requirements that apply to the arbitration process: (i) the parties must be treated equally and fairly; (ii) each party must have an opportunity to present a case and respond to the case of the other party; and (iii) the arbitration must be conducted in accordance with the law of Ontario and Canada and no other law.

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[70] The process contemplated by the parties contained no requirement that every single document, particularly those submitted in reply, be exchanged between the parties ahead of time. Further, the appellant had ample opportunity to ask questions to the respondent about the content of those documents, and to present his position in light of the additional evidence. In that regard, he was not denied procedural fairness.

Acting as an advocate on behalf of the respondent

[71] The appellant argues that the PC acted as an advocate for the respondent by asking questions on her behalf, and on one occasion by answering a question for her. The respondent responds that the PC during the arbitration hearing asked both the appellant and herself several questions, sought clarifications and allowed both parties the ability to speak and to participate.

[72] As she was clearly authorized by the clear language of the PC Agreement, the PC took a much more proactive role in the fact-finding portion of the arbitration process than what would be expected of a judge in a traditional court process. As an example, in order to assess the child's best interests with regards to the choice of his school, she communicated directly with the child's speech pathologist, as well as with officials from both schools suggested by the parties. I do not see how the PC's proactive role in the arbitration hearing may have resulted in a denial of justice for the appellant, in light of the nature of the process that he engaged in. Further, the appellant's very limited (if not entirely non-existent) evidence on the issue of the PC's alleged bias falls short of establishing actual bias on her part.

[73] For those reasons, this ground of appeal is denied.

Providing further contradictory evidence after the arbitration hearing

[74] About two weeks after the arbitration hearing was concluded, and while the PC was writing her decision, the respondent's partner sent two emails to the PC providing her with further information with regards to the application for demolition and building permits for their new home which contradicted the respondent's evidence given during the hearing (her evidence was that those permits had already been obtained whereas the emails confirmed that they had not, but would be in the near future).

[75] Upon receiving these two emails, which occurred approximately two weeks before the PC released her written arbitration award, the PC forwarded them to the appellant and his counsel for comment. Counsel for the appellant responded by way of email that he found that evidence to be inappropriate in the context of the arbitration, and took that opportunity to voice his views on the evidence itself, explaining why it confirmed that the respondent's evidence on this issue given during the hearing was untrue, and therefore, her testimony simply not credible.

[76] Firstly, the PC had no control over the respondent or her partner's sending her further evidence after the hearing. The only thing she could be expected to do, which she did, was to make the appellant aware of this additional evidence, and to give him a chance to provide his views and comments on it.

[77] Secondly, whether or not the PC actually relied on this additional evidence is unclear. In the end, she concluded, based on the evidence before her, that the timeline for the completion of the home was unclear. Despite her conclusion in that regard, she determined that it was still in Alexander's best interests to be registered in Elmdale Public School, and she made provisions for an alternative solution should he only be allowed to register come September 2018. Whether or not the PC relied on the additional evidence to arrive at her decision (which evidence was not favorable to the respondent in any event, and therefore could have only assisted the appellant's position if considered), I am of the view that she was free to do so if she felt that it was relevant to the issue at hand. So long as she gave the appellant an opportunity to be heard and to provide his position on that evidence, no denial of procedural fairness occurred.

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[78] I note in passing that while the appellant complains about the PC receiving additional evidence from the respondent post-hearing, he completely fails to recognize that he did exactly the same thing (email from the School Board purporting to confirm that the child could not attend Elmdale in September 2017), and his additional evidence was treated in the exact same way by the PC.

Conclusion

[79] I get the clear impression that the appellant and his counsel, during the arbitration portion of the PC process, insisted on a very strict adherence to the rules of procedure and evidence that one would expect in a court proceeding. Unfortunately for the appellant, that is not the dispute resolution process that he agreed to engage in. The role of this Court, in the context of this appeal, was to ensure that he was treated equally and fairly, and that he had an opportunity to present his case and to respond to the respondent's case within the procedural framework clearly set out in the PC Agreement. I find that he did.

Application of the Legal Test set out in the *Children's Law Reform Act*

[80] The appellant submits that the PC failed to apply the appropriate legal test in her determination of the child's school choice, namely, the "best interests" test set out in s. 24 of the *Children's Law Reform Act*. The crux of his argument is that the PC did not expressly acknowledge the application of the *Children's Law Reform Act*, did not list all of the relevant factors set out in s. 24, nor did she provide a detailed analysis as to how the evidence adduced by the parties fitted into each of these factors.

[81] A similar argument was made by the appellant in *Kainz v. Potter* in the context of an appeal of an arbitration award. In dismissing this ground of appeal, Justice de Sousa stated:

> **42** It is not disputed that an appeal on questions of law is measured by the standard of correctness (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.)). Contrary to the arguments of the Ms. Kainz, Dr. Leonoff understood and applied correctly the legal principle of the best interests of the children in coming to the conclusion that he did even though he did not specifically mention the Children's Law Reform Act and its "best interests" of children provisions. It is clear from the reasons of his arbitration award that his discussion of parental capacity and

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> parental incapacity to care for children specifically spoke to the question of the best interests of the children of this couple.

[82] A review of the PC's arbitration award in this case makes it clear that the PC had a deep understanding of the "best interests" test and of the various factors relevant to that test. While she did not list each one of them and discuss each one in turn, her detailed analysis clearly demonstrates that she was very cognizant of the various factors and that she focused her attention on those relevant to the determination of which choice of school would meet in Alexander's best interests.

[83] I see no merit in this ground of appeal.

<u>Conclusion</u>

[84] Based on all of the above, this appeal is dismissed.

[85] The respondent is clearly the successful party in this appeal. If the parties cannot agree on costs, I will accept brief written submissions from the parties not exceeding three pages (exclusive of Bills of Costs and Offers to Settle). The respondent will have 15 days from the date of this decision to provide her submissions and the appellant will have 15 days thereafter to do the same. The respondent will be allowed a brief reply if deemed necessary, not exceeding one page, which shall be provided within 5 days from receipt of the appellant's submissions.

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Madam Justice Julie Audet

Released: January 24, 2018

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CITATION: Jirova v. Benincasa, 2018 ONSC 534
COURT FILE NO.: FC-17-1223
DATE: 20180124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

NADIA JIROVA

Applicant/Respondent in Appeal

– and –

ADAM VINCENZO BENINCASA

Respondent/Appellant

REASONS FOR DECISION

Audet J.

Released: January 24, 2018

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