

# ONTARIO COURT OF JUSTICE

CITATION: *Walton v. Walton*, 2022 ONCJ 394  
DATE: August 30, 2022  
COURT FILE No.: FO-21-00042108-0000

**B E T W E E N :**

**Michael Walton**  
*Applicant*

— AND —

**Aimee Rebecca Walton**  
*Respondent*

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Before Justice Roselyn Zisman  
Heard on August 16, 2022  
Reasons for Judgment released on August 30, 2022

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**Jaret Moldaver** ..... **counsel for the applicant**  
**Tilda Roll** ..... **counsel for the respondent**

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**Zisman, J.:**

## **Introduction**

[1] This is my decision with respect to two motions. The Applicant (father) seeks orders to incorporate the terms of the parties' separation agreement into a court order. He also seeks an order for police enforcement due to the Respondent's (mother) lack of compliance with the terms of the separation agreement specifically with the father's parenting time. The father also seeks orders to clarify or change terms of the separation agreement.

[2] The mother seeks an order for the appointment of a parent co-ordinator (PC) as required by the separation agreement.

[3] At the commencement of the motions, counsel advised that the parties had agreed to the appointment of Ricardo Theoduloz as a PC. Although not pleaded in her Notice of Motion, counsel essentially sought an order that would require the father to sign Mr. Theoduloz's PC Agreement as the father objected to various terms of that agreement.

## **Background and litigation history**

[4] The father and mother were married on November 15, 2009.

[5] They are the parents of B. born [...], 2012.

[6] They separated for about 1 year in 2013, reconciled and then separated for a final time on March 22, 2016. B. was 4 years old at that time and is now 10 years old.

[7] The father is self-employed in a family injection molding business and also works as a property manager. The mother is employed in the advertising business.

[8] The mother has remarried. She and her husband Shane Dubin have 2 children and Mr. Dubin has 2 children from a prior relationship that reside with him on alternate weeks.

[9] The father has a close and loving relationship with B.

[10] In 2010, the father was the subject of a brutal and random attack during a robbery. He was badly injured and subsequently became addicted to prescribed opioid pain medication.

[11] In 2012, he attended for an assessment at CAMH and then entered into a residential rehabilitation program.

[12] He relapsed in March 2016 and entered into residential treatment with the Farm and Yonah Budd program. The parties separated at this time.

[13] The father attended for random drug testing. The father has managed his addiction without relapse since March 2016 although the mother alleges that he abuses drugs and alcohol.

[14] The parties became involved in litigation shortly after their separation. In May 2017 they agreed to a section 30 assessment with Dr. Irwin Butkowsky. They also agreed to a temporary without prejudice order that the father have access to be supervised by their nanny or other agreed upon supervisor for his overnight visits and for continued random drug testing. They agreed that if there were no incidents supervision would terminate on September 30, 2017. Although there were no incidents, the father continued to have the nanny present for overnights visits to avoid conflict.

[15] The parties attended a disclosure meeting with Dr. Butkowsky in September 2018 and he delivered his recommendations at that time. The recommendations provided for the mother to have primary care of B. and that B. reside with the father on alternate weekends from Friday to Monday and on alternate Mondays and Thursdays overnight. It was recommended that the father continue to employ a nanny to assist him in providing care for the child at all times. There were further recommendations for the father to continue with his treatment regime and testing for use of alcohol and non-prescribed drugs.

[16] Despite the recommendations of Dr. Butkowsky that the father was permitted to

travel without the requirement of a nanny or any other restrictions, the father was required to bring a motion to travel with B. to travel to Florida in April 2019 as the mother insisted that the father be accompanied by a third party including when he is away from his parents' condominium.

[17] Justice Gilmore, who heard the motion, held that there was “no evidence of any issues that would necessitate a return to a supervised schedule of access.” Justice Gilmore further held that she “did not intend to create a situation which obfuscates the progress made by the father and creates an unnecessary false atmosphere for the child. The mother was ordered to pay costs of \$8,500. Although Justice Gilmore found that the mother was not completely unreasonable, she stated that “her hardline position reflected an unwillingness to recognize the reality of the applicant’s [father] personal progress and his commitment to parent B..”

[18] In May 2019, the parties attended for mediation with Alfred Mamo. The parties were able to negotiate a separation agreement that incorporated the majority of the recommendations of Dr. Butkowsky but with several changes.

[19] The separation agreement dated May 23, 2019 provided that the mother have final decision making authority regarding major decisions if after seeking the father’s input and opinions they do not agree. Such communications to take place through written communication only. The agreement provided that B. continue to reside with the father on alternate weekends from Friday to Monday, alternate Mondays and Thursday overnight and extended time during the holidays.

[20] The most relevant provisions related to the issues before the court on these motions relate to the appointment of a PC and the issue of a nanny being present.

[21] Those provisions are as follows:

4.2 a) ...the parties will engage a parent coordinator (PC) who will mediate/arbitrate any disputes between the parties with respect to interpretation and/or implementation of the terms of the Recommendations. The PC will also mediate/arbitrate any appeals by Michael regarding major decisions.....the parties will sign aa PC and/or Arbitration Agreement to give effect to the terms of this paragraph. They shall agree that only error of law may be appealed without leave.

4.2 b) ...Michael will employ a nanny to assist him in the overall care of B. and his household, but with no requirement of supervision. For clarity, the nanny will not need to be present at all times during Michael’s care, which will be left to the discretion of Michael, and the nanny will only travel with Michael and B. at the discretion of Michael.

[22] Dr. Butkowsky was the agreed upon PC. The mother alleges that the father never paid Dr. Butkowsky’s retainer and that he refused to attend. The father alleges that he refused to attend as the issue the mother wished to mediate was outside the mandate of the separation agreement. Neither party sought the court’s assistance to clarify this issue.

[23] The mother alleges that the father began to act erratically, no longer employed his nanny and that the relationship totally broke down by October 2020.<sup>1</sup>

[24] The mother refers to an alleged incident that occurred on October 31, 2020, when B. called her from the father's home hysterical because she could not wake up the father. When the mother attended, she found the father was disengaged with her and asleep. The mother alleges that B. reported there was often little or no food and she was anxious about being on time for her activities or school when in his care. The father offers a different version of this incident and alleges that he was simply taking a nap and denies there was ever an issue with him not having sufficient food in his home. The mother took no legal steps to change the father's parenting time.

[25] The mother alleges that the father's erratic and abusive behaviour resurfaced after the commencement of the pandemic in March 2020. The mother alleged that the father had discharged the nanny and that the father appeared to be using drugs and alcohol and was unstable.

[26] In the Fall of 2021, the father briefly stopped taking medication for his depression and anxiety and sent a series of rude and disrespectful text messages to the mother, her husband and B. The mother contacted the police and alleged the father was warned not to send such texts. The Jewish and Family Child Services (JFCS) was also contacted. The police did not lay any charges and the society after an investigation closed their file.

[27] According to the mother by October 2021 there was a complete breakdown in the parenting relationship such that the mother implemented changes to the parenting plan "to protect" B. She deposes that she felt she had the authority to do so in accordance with the separation agreement that provided she had sole decision-making authority.

[28] The mother by October 2021 restricted the father's agreed upon parenting time. In email correspondence dated November 16, 2021, by the mother's counsel, she denied that the mother unduly restricted the father's parenting time but that the restrictions were necessary due to the father's "erratic and threatening behaviour" to the mother, her spouse, third parties and B. The email alleges that the father has ongoing medical issues and although reassured that the father is again taking his medications, more information is required so that the mother can make an informed parenting decision.

[29] The email further states, "The separation agreement provides my client with sole decision-making authority. She made the decision [ie to restrict parenting time] to protect B." The mother agrees in her affidavit that she believed she had the authority to restrict the father's parenting time as she had sole decision-making authority.

[30] The email goes on to state that the court does not have any jurisdiction as the parties agreed to a PC to mediate/arbitrate disputes and that Dr. Butkowsky is the PC and that the father is refusing to attend.

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<sup>1</sup> This is referenced in the mother's affidavit sworn August 5, 2022 paragraphs 13-15 but the correspondence regarding the father and the text messages refer to October 2021. It was not clear if this was a typographic error and should refer to October 2021 or if this is the mother's position.

[31] The mother further deposes that she tried to engage the father to attend with Dr. Butkowsky or another PC and tried to negotiate a resolution through counsel as she wished to avoid court.

[32] Between November 2021 and February 2022 there are numerous correspondences between counsel for both parties with respect to various restrictions and significant reductions of the father's parenting time being imposed by the mother. The mother required the father to be supervised, not permitting him to drive B. on Tuesdays and Thursdays to and from her dance classes and not permitting her to be with him during anytime she has remote online learning alleging that these requests were made by B..

[33] The father agreed to these restrictions and reduction of his parenting time through counsel on a temporary without prejudice order basis.

[34] There were further heated messages in 2022 including March 2022 as the father became increasingly upset due to the mother's ongoing restrictions to his parenting time and interference with his relationship with B.

[35] Counsel for the father advised mother's counsel that he intended to proceed to the Superior Court of Justice (SCJ) with a motion to enforce the terms of the separation agreement due to his allegation that the mother was not complying with the terms.

[36] Counsel for the mother took the position that the matter should proceed in the Ontario Court of Justice (OCJ) and counsel would need to file the separation agreement as a court order and bring an application in that court. She further advised that it would be her position that the court did not have jurisdiction to adjudicate this issue in light of the requirement for a PC to mediate/arbitrate.

[37] Mother's counsel did not advise father's counsel that the mother on November 9, 2021 filed the separation agreement for enforcement of the support provisions in the OCJ.<sup>2</sup>

[38] The parties attended in the SCJ before Justice Shore on March 7, 2022 to obtain direction from the court regarding the proper jurisdiction to address the enforcement of the terms of the separation agreement and the mother's intention to start proceedings to change the separation agreement that she had already filed with the OCJ.

[39] As pointed out by Justice Shore this was not a straightforward issue. FLR 15 (2) provides that an agreement filed pursuant to s. 35 of the *Family Law Act* only permits a Motion to Change with respect to support issues. If a party wishes to change an agreement, not related to support, then an application must be commenced.

[40] Whether an application to change the separation agreement be heard in the SCJ or OCJ was not clear in the case law and Justice Shore then adjourned the matter for proper argument. The court further ordered that neither party commence proceedings in either the OCJ or SCJ until the issue of jurisdiction was determined.

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<sup>2</sup> The father in a text message in August 2021 threatened to stop paying child support but he has continued to pay child support without any interruption.

[41] In order to prevent any further delays father's counsel agreed to this court having jurisdiction. The father commenced an Application on April 28, 2022. An early case conference was agreed upon.

[42] The parties proceeded before me on a case conference on June 7, 2022. On a without prejudice basis an order was made for the father's parenting time to resume in accordance with the terms of the separation agreement but with a "third party present." The father's motion for enforcement of the separation agreement as well as the mother's motion for the appointment of a PC was scheduled for August 16, 2022. Both parties were to sign a consent for the release of the records of the JFCS and disclosure requests were to be exchanged by specified dates.

[43] On July 7, 2022 Counsel for the mother filed a 14B motion with the court requesting the court order the father to pay for a missed appointment with Dr. Iosif, a psychiatrist, that had been retained by the mother to conduct an Independent medical examination (IME) of the father and for an order that he reattend the appointment. She also requested an adjournment of the motion as the IME and other disclosure requested from the father would not be before the court. The 14B was dismissed with costs reserved. The father attended an appointment about a week later and paid for the missed appointment.

[44] Both motions proceeded as scheduled.

### **Medical evidence**

[45] The mother alleged that she had concerns about the father's mental health based on the father's text messages. The father subsequently apologized for the messages.

[46] The father proactively arranged for an independent psychiatric assessment in view of the allegations made by the mother and appreciating the concerns raised by his stopping to take his medications and in view of his inappropriate communications.

[47] Dr. Srinivasan met with the father on two occasions in January 2022. She reviewed the father's health records related to his rehabilitation and his text messages. She reviewed the records of CAMH, his family doctor and the 2016 psychological report of Dr. Newman.

[48] In Dr. Srinivasan's report dated January 26, 2022, she concludes:

Based on the psychiatric assessment and evaluation, Mr. Walton's current health Indicates that he suffers from mild symptoms of depression along with anxiety. However, these symptoms are under control that he is able to maintain his function at work in his self-employment business. He continues to remain abstinent of alcohol and opioid medication with continued recovery. His physical health status seems to be unremarkable as stated by his attending family physician.

His symptoms of sadness, irritability, anger and disappointment all seem to be related to reduced interaction time with his daughter that caused him to be unhappy and lacking enjoyment as well as making him feel lonely as indicated in the depression rating scales as well as clinical observation. His symptoms are minimal and he has shown improvement with the antidepressant medication, Cipralext, that he has restarted in November 2021. He

does not display any symptoms of mania or hypomania of bipolar disorder. Detailed cognitive testing also does not indicate any evidence of cognitive impairment. He continues to maintain abstinence from alcohol and opioid medication. Therefore, the relapse of symptoms that occurred due to abrupt discontinuation of the antidepressant medication seems to be currently under control with improvement in his insight. He is well aware of his behaviour and is remorseful of his text messages and wishes to improve the relationship with his ex-wife and continue his parental rights with his daughter. He is hoping to regain the full visiting rights as per their initial separation agreement in order to have a meaningful relationship with his daughter.

His relapse of symptoms is precipitated by ongoing stressors, personality conflicts between himself and his ex-wife and leading to stressful interpersonal interactions in addition to discontinuation of the medication.

He is still functioning well at work with minimally impaired concentration and anxiety. His anger seems to be due to fear of loss of control at this time with regards to his daughter's visiting hours with are directed by his ex-wife. Therefore, with proper anger management and cognitive behaviour therapy in conjunction with the recommended medical treatment, it is expected that he will continue to show improvement. His prognosis remains good as he has shown good compliance in the past with treatment suggestions and has continued to maintain recovery.

[49] Subsequent to this report being provided to the mother, the mother raised issues with respect to the lack of knowledge by Dr. Srinivasan regarding the father's past history of medications, the text and emails between the parties, involvement of the JFCS and other omissions.

[50] In a letter dated July 19, 2022 Dr. Srinivasan confirmed that she was aware, as set out in her report, of the medications prescribed to the father and had read the text messages. She also provided a copy of all her clinical notes and records along with additional documentation [that is, text messages]. She advised that she did not include the third party records of Dr. Usman (the father's family doctor) and the health records from CAMH or Mount Sinai as these records need to be requested directly from the third parties.

[51] Counsel for the father subsequently provided mother's counsel with a copy of the CAMH records. A request for the family doctor's file was sent in July but has still not been received. A request for the JFCS filed has also been requested but not yet received.

[52] In a further letter dated August 3, 2022 Dr. Srinivasan confirmed that she had received all of the text messages between the parties since December 2021 as the mother raised concerns whether these texts would impact her analysis of the father and/or her recommendations. Counsel for the father also indicated to Dr. Srinivasan that if she wished the father would reattend or if she required any further reports to advise.

[53] Dr. Srinivasan indicated that after a review of the texts, she understood the father was under stress regarding his father's surgery and worried about the outcome of the surgery. He was further upset due to the loss of expensive earrings he had given his daughter but she stated that these appeared to be isolated incidents.

[54] Dr. Srinivasan confirmed that she understood the father was attending for psychotherapy weekly to help him deal with emotional stressors. She continued to believe that the father was capable of having independent access to his daughter and did not need any supervision. As evidenced by his past history, she did not believe he posed a danger to others as there is no incident of any aggression or violent behaviour.

[55] The father also provided an affidavit from his counsellor Shlomo Radcliffe. Mr. Radcliffe is a Registered Psychotherapist and Certified Anger Management therapist. He confirms that as of March 2022, he has provided the father with counselling related to stress and anger management and interpersonal conflict management skills. Mr. Radcliffe uses Cognitive Behaviour Therapy and Acceptance and Commitment Therapy. The father has reported that he is using these skills to cope with difficult interpersonal challenges and in managing anger and addressing life challenges. The father confirmed that he is committed to continue counselling and that he attends weekly sessions.

[56] Counsel for the mother requested a copy of Mr. Radcliffe's notes and records. The father is not prepared to release these as he wishes to maintain confidentiality of his counselling sessions.

[57] The mother has taken the position that the report of Dr. Srinivasan is limited and flawed. She alleges that the father has been diagnosed with bipolar disorder despite the several reports that dispute this.

[58] Counsel for the mother requested that the father attend for another IME as arranged by a psychiatrist chosen by her. The father voluntarily agreed to attend for this assessment with Dr. Iosif and has now attended on July 14, 2022, at the one virtual appointment requested.

[59] On July 19, 2022 Dr. Iosif indicated to mother's counsel that she requires further historical reports before she can prepare her report. She also states that she only had a summary prepared by mother's counsel and the other psychiatric report [ that is, the report of Dr. Srinivasan ] that was "uninformative."

[60] There is no indication in the mother's affidavit that Dr. Iosif has now been sent the extensive disclosure that the father has already provided.

[61] Mother's counsel served a Request for Information and alleged that the father was not providing the disclosure requested. The list is misleading. For example, the father is requested to produce reports of Drs. Rampers, Cook and Sokolov but as these doctors work at CAMH, any reports or their notes are in the CAMH file. A request was made for the report of Dr. Newman dated July 1, 2016. That report was previously provided on July 14, 2016, but father's counsel provided it again. The father requested his OHIP record to respond to a request for a list of all his medications. That list was somehow already obtained by the mother. The father provided a Direction for the release of Dr. Butkowsky, JFCS and his family doctor's file.

[62] If mother's counsel was concerned with the release of any of the requested reports she should have brought a motion on notice to the third parties for the release of their files instead of simply requesting an adjournment to delay the father's motion.



[63] Further, a preliminary report from Dr. Iosif could have been provided that outlined any deficiencies in Dr. Srinivasan's or why these historical reports and other reports she sought were vital to any assessment of the father's mental health and any risk he poses to his daughter.

[64] I note that despite allegations that the father has not complied with the Requests for Information, the mother has not complied with most of the requests for information made of her.

### **Events subsequent to order of June 7, 2022**

[65] On June 7<sup>th</sup> pending the hearing of motions by the parties, I ordered that the father's parenting time resume in accordance with the terms of the separation agreement. However, I ordered that a third party be present and counsel to advise the name of the third party.

[66] Counsel advised that at present the third party would be his mother and if there was a change the mother would be notified.

[67] The mother since that order has continued to breach the terms by imposing restrictions that were not ordered and that violate the terms of the separation agreement.

[68] In a series of emails, the mother personally or through counsel began to insist that she be advised of who the third party would be on each visit as she did not trust the father. She insisted that she be told a plan for the father's time with B., that she be advised where the father will be at all times and who will be present and that she transport B. to and from B.'s dance classes that impacted on the father's parenting time.

[69] I note that the separation agreement that incorporated Dr. Butkowsky's parenting plan provided that the parent in whose care the child is during any activities be the parent that transports the child.

[70] The mother began to record calls between the father and B. and listen in on those calls. It was the position of the mother that she had the right to do so and would do so to ensure there was no "back and forth".

[71] There were also disputes about when the father was permitted to exercise his parenting time that appear to be in contravention with the terms of the separation agreement.

[72] After the hearing of the motions, counsel for the mother filed a 14B motion for the court to consider further evidence regarding the parties' communications after the motion was heard. I refused to consider this evidence as the text messages were simply further indications of the parents' inability to communicate appropriately.

[73] I ordered pending release of my decision that the father did not need to have a third party present. As it was clear that my order for a third party to be present was not necessary and was causing further conflict between the parties.

## Issues to be determined

1. Does the court have jurisdiction to appoint Ricardo Theoduloz as the PC pursuant to the separation agreement dated May 23, 2019?
2. If so, does the court have the jurisdiction to order the father to execute the PC agreement?
3. Does the court have the jurisdiction, in light of the separation agreement, to order the mother comply with the terms of the separation agreement?
4. Should the court make an order of police enforcement of the separation agreement?

## Analysis

### Appointment of PC and jurisdiction to order the father to execute PC agreement

[74] The case law is clear that a court has the jurisdiction to appoint a PC only if the parties consent. See *Bozin and Bozin* 2010 ONSC 1010, *Reid and Catalano* 2008 CanLII 9379 (SCJ); *Imineo v. Price* 2011 ONCJ 584, *Michelon v. Ryder* 2016 ONSC 327; *N.S. and R.M.* 2019 ONSC 4215.

[75] In this case the separation agreement provides that the parties agree to appoint a PC and specifically agreed that Dr. Butkowsky be appointed. The parties signed an agreement that appointed the PC for 24 months and that expired on June 30, 2021.

[76] It was not argued before me that therefore the father had no ongoing obligation to now reappoint Dr. Butkowsky or another PC.

[77] In fact, in the father's affidavit sworn August 4, 2022 he agreed that Mr. Theoduloz being appointed. This agreement was made prior to the mother's motion for the appointment of Mr. Theoduloz being served on the father on August 5<sup>th</sup>.

[78] On August 9<sup>th</sup>, the mother executed the PC agreement with Mr. Theoduloz without prior consultation or agreement of the father regarding the terms.

[79] In the father's reply affidavit sworn August 11<sup>th</sup>, the father deposes that the terms of the PC agreement provide for an expansion of the PC's powers as outlined in the separation agreement.

[80] During submissions, I inquired if mother's counsel was aware of any case law regarding the court's jurisdiction to order the father to sign a PC agreement as presented or make changes to a PC agreement without the father's consent.

[81] Counsel provided the court the decision of Justice Audet in *Jirovn v. Beuincasa* 2018 ONSC 534. In that case the parties agreed to resolve any disputes arising from their parenting agreement through a PC process. The father appealed the PC arbitral award due to a lack of a fair and impartial process.

[82] The decision is not helpful on the specific issue before me.

[83] However, the decision is helpful in outlining the role of a PC. A PC is used exclusively for parenting disputes once a final agreement or order is in place. There is a non-decision-making component (mediation phase) to assess the family dynamics, educate the parents and coach them regarding appropriate communication. If there is no resolution in the mediation phase, the decision-making portion of the process (the arbitration phase) is triggered and empowers the PC to made binding decisions. As the PC has an arbitration component, independent legal advice is necessary.

[84] There is no dispute that the utilization of a PC can be very helpful to parents to settle parenting disputes through a process that is cost efficient, provides procedural flexibility and is expedient. However, due to the arbitral powers of the PC the terms of a PC's authority must be clear and agreed upon by the parties.

[85] In some of the cases cited above the courts also draw a distinction between appointing a PC to assist the parties in reaching agreements and appointing a PC to arbitrate disputes. However, the caselaw is clear that a court cannot order a PC to make a decision regarding custody and access [ now decision-making responsibilities and parenting time] as this would be a delegation of authority.

[86] The Ontario Court of Appeal in the case of *M.(C.A.) v. M.(D)*, (2003) CanLII 18880 at para. 22, clearly stated that a court has “no authority” to delegate its power to determine custody or access to a third party. That position was again reaffirmed by the court in *D.D. v. H.D.*, [2015] O.J. No. 2959 (OCA) at para. 92-93. where the court stated that “...there is no statutory authority to delegate decision-making as to access to a third party.”

[87] In the case of *Bozin v. Bozin*, *supra*, Justice McKee at para. 5 states:

There are many advantages in moving parenting issues from the courts to a parenting coordinator. It is a decision increasingly being made by separated parents, and it is their decision alone. It is outside the jurisdiction of the court to delegate the court's authority to a parent coordinator, or to dispense with the consent of a parent to an Agreement for Mediation/Arbitration, or an Agreement for parenting Coordination Services and Arbitration in accordance with the Arbitration Act and the *Family Statute Law Amendment Act* [citations omitted].

[88] Later in the decision at paragraph 13 the court further added that, “The power of the parenting coordinator is rooted in the parties’ consent.”

[89] I adopt this position.

[90] In this case, the parties in their separation agreement agreed to appoint a PC “to mediate/arbitrate any disputes between the parties with respect to the implementation and/or interpretation of the terms of the recommendations [Dr. Butkowsky’s parenting plan]..The PC shall also mediate/arbitrate any Appeals by the Applicant regarding major decisions [subject to the mother having major decisions making responsibility]....The parties will sign a PC and/or Arbitration agreement to give effect to the terms of this paragraph, they will agree that only error of law may be appealed without leave.”

[91] I therefore find that the court has jurisdiction only to appoint a PC and only require the father to sign the PC agreement in the exact terms that were agreed upon in the separation agreement.

[92] Therefore, on consent Ricardo Theoduloz is appointed as a PC to mediate/arbitrate any disputes between the parties with respect to the implementation and/or interpretation of the terms of the recommendations [Dr. Butkowsky's parenting plan], to mediate/arbitrate any appeals by the father regarding major decisions and that only an error of law may be appealed without leave.

[93] Despite the fact that the mother's Notice of Motion only requested that a PC be appointed and that the motion was therefore not necessary, there were extensive discussions and submissions during submissions regarding the terms of the PC agreement that the father disputed. A copy of his requested changes was provided to the court.

[94] In order to provide some direction to counsel regarding the terms of the PC agreement, it is my view, in accordance with the submissions of counsel paragraphs 4.1.2 to 4.1.16 of the PC agreement should be omitted, as those provisions expand the authority agreed upon in the separation agreement. As the PC has authority to make binding decisions, the scope of his authority must be in accordance with the agreement of the parties. I also agree that a new 4.1.2 be added regarding the appeals by the father regarding major decisions as this provision is set out in the separation agreement.

[95] I agree given the high conflict in this case, that a provision be added as proposed by the father's counsel that clearly states that the PC does not have the authority to change legal custody that is, decision-making authority and no authority to change any and all matters that fall outside of the jurisdiction set out in the separation agreement. There are also some further provisions regarding costs and fees that are not consistent with the terms of the separation agreement and should be revised.

[96] The issue of whether the motion should have been necessary in view of the father's consent to the PC appointment is an issue that can be dealt with in cost submissions and subject to any offers to settle that were made.

**Jurisdiction of the Ontario Court of Justice regarding enforcement and compliance with the terms of the separation agreement**

[97] Despite the agreement for a PC to mediate/arbitrate the parenting terms of the agreement, I find that there is no impediment to the court having jurisdiction to order compliance and enforcement of those terms if the court finds that the mother breached the terms of the agreement.

[98] Pursuant to FLR 1 (8) the court is provided with a broad discretion to deal with a party's failure to obey a Court order and/or deal with a party's failure to obey the FLR by means of various and non-exhaustive enumerated remedies or mechanisms including making any order that the court considers necessary for a just determination.

[99] The majority of the court in Ontario Court of Appeal in the case of *Bouchard and Sgovio* 2021 ONCA 709, held that FLR 1(8) provides the means of enforcement so that a party's substantive rights can be realized. At paragraph 51, Justice Paciocco speaking for the majority stated, "The rule provides broad discretion to courts to make orders that it considers necessary to fully address a party's failure to comply, a flexibility that is of particular importance when the orders address the well-being of children."

[100] Further at paragraph 56 of that decision the benefit of utilizing FLR 1(8) to settle disputes is outlined as follows:

Appropriately when one parent wrongfully withholds a child from the other parent, in violation of a court order, r.1(8) provides quick access to a remedy, including for example make-up time with the child. The parent entitled to court ordered time with the child should not be compelled to bring a motion to change the existing order. the same holds true where parental alienation is frustrating a parenting order. When dealing with the best interests of a child, delay should be avoided as much as possible. Litigation about children is costly and procedural roadblocks should be avoided.

[101] Applying this principle to the facts of this case, it would be an absurd situation, if this court could not deal with the alleged non-compliance by the mother with the terms of the father's parenting time and simply defer the matter to the PC who does not have the authority to vary the order and has limited tools to require compliance and enforcement of the order.

[102] The parties despite agreeing to an order for the PC in 2019 have yet to use those services to resolve any disputes. Regardless of whether this is the fault of either parent, the court has the duty to make decisions that are in the best interests of the child. B. is clearly caught up in the conflict between her parents and the issue of the father's parenting time needs to be resolved without further delay.

[103] The father in his Notice of Motion requests an order that the separation agreement be made a court order. This order will be granted as the father has already filed his Application to vary some of these terms of the separation agreement including decision-making responsibilities and equal parenting time. The mother in her Answer and Response seeks a further s. 30 assessment, that the father attend for random drug tests and that he has a third party present for his parenting time.

[104] Further, as the separation agreement attaches Dr. Butkowsky's recommendations for a parenting plan and makes some changes to his recommendations, this can cause some confusion for enforcement. It is therefore important that the terms of the separation agreement are clearly set out.

### **Did the mother fail to comply with the terms of the separation agreement ?**

[105] It is important to clarify at the outset that the separation agreement does not require the father's parenting time to be supervised.

[106] The parties agreed that the father employ a nanny but the separation agreement clearly states that the presence of the nanny is not as a supervisor but to assist the father and her presence in the father's sole discretion. In other words, they agreed that the father

did not need supervision and that he did not need the nanny to be present, if chose not to do so. There is no requirement that the nanny be employed full-time. It is also important to note that the separation agreement was entered into when B. was 4 years old and she is now 10 years old. Whether there is an ongoing need for a nanny will be the subject of further discussion or a trial if that becomes necessary.

[107] According to the mother despite the agreement to appoint a PC the father never paid Dr. Butkowsy his retainer and subsequently the father refused to attend.

[108] However, the mother took no steps to enforce that provision in the separation agreement. If the mother felt that there were serious issues that required the involvement of the PC and that the father was in breach of the separation agreement then she should have commenced a court proceeding to enforce the agreement especially as any attempts to negotiate between counsel were not fruitful.

[109] According to the mother as of October 2020, she began to have concerns about the father's mental state. She relies on statements of the child with respect to an incident where the child called her frantically because she could not wake up the father. Yet the mother took no steps through the court process to change or impose restrictions on the father's parenting time.

[110] The mother also became concerned about the father's mental state due to a series of very inappropriate text messages he sent. Although it was perhaps reasonable for the mother to initially become concerned, she took no steps to change the terms of the father's parenting time. Even after the JFCS investigated and the society was satisfied that there were no protection concerns regarding the child spending time with the father, the mother still took it upon herself to begin to reduce the father's parenting time and put restrictions on his parenting time.

[111] The mother attempted to justify her actions by relying on her sole decision making authority to violate the terms of the separation agreement "to protect" her daughter. Again, if the mother genuinely believed that the child was at risk in the care of the father she needed to return to court to vary the terms of the separation agreement. She failed do so.

[112] Since at least the Fall of 2021, the mother has used a self-help remedy to interfere with the father's parenting time without any authority. I draw a negative inference from the mother's failure to deal with her concerns through the court process.

[113] The father reluctantly agreed to the reduction of his parenting time and the imposition of various restrictions such as having his mother or the nanny supervising his parenting time and not driving B. to and from her dance classes that reduced his time with B.

[114] The mother has made unfounded allegations that she was required to restrict the father's parenting time as it "appeared the father was using alcohol and drugs." But the mother did not avail herself of the terms of the separation agreement that provide that she can request the father undergo drug/alcohol testing. Nor is there any evidence that the father has abused the use of alcohol or the use of non-prescription drugs.

[115] I find that the mother simply wished to use the father's inappropriate texts messages as a means of revising the terms of the father's parenting time to suit herself.

[116] I am satisfied that although the father's text messages were inappropriate, they only expressed his anger and frustration with the mother's curtailing and interfering with his relationship with his daughter. He apologized for these texts and is now involved in counselling that will assist him in better coping with his anger and frustration.

[117] There is no question that the father is not a perfect parent but his behaviour does not warrant the mother unilaterally imposing restrictions on his parenting time.

[118] The father voluntarily arranged for a psychiatric examination by Dr. Srinivasan. In view of his past addiction and the mother's allegations, it is understandable that the father would be concerned that the court and the mother might have had concerns that his behaviour represented a serious relapse.

[119] I have reproduced extensively from the psychiatric report of Dr. Srinivasan. The mother has retained another psychiatrist and the father voluntarily attended for another IME with Dr. Iosif. Any allegations that Dr. Srinivasan's report is flawed or uninformative at this stage of the proceedings is not persuasive. The request for further documents that mostly relate to 2012 and 213 when the father was addicted to opioids is not of particular relevance. Dr. Iosif has not provided even a preliminary report despite the mother's counsel being provided with almost all of the relevant medical records.

[120] This is a temporary motion and at this stage the court must make decisions based on evidence that is not subject to cross-examination or further evidence that may be available at trial.

[121] I am satisfied on the evidence before this court that the mother breached the terms of the separation agreement and that she was not justified to so doing. I am satisfied that the father's diagnoses of mild depression and anxiety is being managed and do not pose any risk to his daughter or require any level of supervision.

[122] I also find that the mother has breached the terms of the separation agreement with respect to her requirement to advise the father of important appointments and their outcome and her further obligation to seek the father's input regarding any major decisions regarding the child.

[123] The child has been seeing a therapist for many years. The mother deposed that the child wished to stop the counselling and this was done briefly but then resumed.

[124] There is no evidence that the mother ever advised the father of this or sought his input. Although the issue was resolved when the child agreed to continue with her counselling. It is an example of the mother marginalizing the father's role.

[125] The mother is also in breach of the terms of the separation agreement in insisting that she drive B. to and from her dance classes during the father's parenting time. The separation agreement stipulates that if there is an extra-curricular activity during the father's parenting time, he has the right to drive the child.

### **Enforcement of the terms of the separation agreement**

[126] Having found that the mother breached the terms of the separation agreement, the next step is what if any enforcement order, should be made by this court.

[127] Counsel for the father seeks an order for police enforcement that is opposed by the mother.

[128] It is submitted by mother's counsel that the motion for police enforcement was not served on the police, that such an order is exceptional and should be used sparingly and would traumatize the child.

[129] The mother does not offer any alternative to enforcement. I assume this may be because she takes the position that this issue can be left to the PC.

[130] It will be important for the PC to carefully review with both parents the separation agreement (now a court order) to ensure that the terms are clearly understood as the mandate of the PC in this case is to mediate/arbitrate any dispute regarding the interpretation and/or implementation of the terms of the agreement.

[131] However, the mother has already failed to comply with the terms of the agreement and imposed her own restrictions and reductions of the father's parenting time. She has done so for the last couple of years. She continued to do so after receiving the comprehensive psychiatric report regarding the father's current mental health. The mother also continued to breach the terms of the separation agreement and this court's order of June 7, 2022 by again imposing terms that were not ordered.

[132] Courts have been clear that self-help remedies should not be condoned and must be discouraged. If a parent believes that a court order or separation agreement is no longer in a child's best interests then their recourse is to apply to the courts. A court order or agreement is binding unless changed by the court. See for example, *Blair v. Hamilton* 2018 ONSC 7328; *Ng v. Charles* 2016 ONSC 2946; *Phillips v. Phillips* 2021 ONSC 2480.

[133] If the mother genuinely had concerns about the safety and well-being of B. while in the care of the father she had an obligation to seek to change the terms of the separation agreement. The mother registered the separation agreement for enforcement of child support in November 2021 but at the same time did not commence any court proceedings to vary the parenting terms. I draw a negative inference from her failure to do so.

[134] The mother then attempted to delay the enforcement of the terms of the separation agreement when the father attempted to do so in the SCJ by arguing that only the OCJ had jurisdiction.

[135] Justice Pazaraz in the case of *Patterson and Patterson* 2014 ONSC 1419 set out various principles with respect to police enforcement that can be summarized as follows:

- S.36 of the CLRA is available to address a present and existing problem and not a future or potential problem



- S.36 of the CLRA does not make police enforcement available “as a long-term multiple use, on demand enforcement tool
- Police enforcement of custody and access may give rise to a wide range of negative emotions and consequences in the child
- Police enforcement may be essential for immediate retrieval of a child from a dangerous or inappropriate situation but for ongoing enforcement, the parties must look for less destructive and more creative alternatives
- Police should be served with notice if the proposed order is broad order
- Police enforcement should be used sparingly, in exceptional circumstances and as a last resort and then only when required in the best interests of a child
- Chronic non-compliance with a custody order is likely a problem that the police can't fix anyways

[136] I accept these general principles. But in the *Patterson* case and most of the caselaw regarding the appropriateness of using a clause for police enforcement the situations involved children who were refusing to exercise access to a parent or refusing to return to the care of a custodial parent.

[137] In this case, it is not B. who is refusing to spend parenting time with her father, it is the mother imposing unwarranted restrictions and reducing that time.

[138] I also find that to defer this motion for service on the police is not in the child's best interests. As a practical matter, such motions are rarely served on the police and the police rarely object to enforce an order for police enforcement just because the Notice of Motion for this relief was not served on them. If the police refuse to enforce the order then the police may return to court to ask to be relieved on that duty. See *L.(N.) v. M.(R.R.)*, 2016 ONSC 809.

[139] What is most relevant is that if the mother complies with the terms of the separation agreement (to now be a court order) there will be no need for police enforcement. This is not a case where a child is refusing to spend time with her father. This is a situation where the mother is simply not complying with terms of the father's parenting time.

[140] I find that a police enforcement clause is necessary to ensure that the mother will not longer unilaterally change the terms of the father's parenting time.

[141] I find this is necessary as the mother has continued to breach the terms of the separation agreement even after the court order of June 7<sup>th</sup>. I would have expected that once that order was made that the mother would comply. Having failed to do so, the mother needs to understand that it is up to her to comply with court orders and if not, she will be the cause for any emotional upset caused to the child by the father being required to enlist the police to require the mother to comply with the terms of the court order.

## Conclusion

[142] I find that it is necessary to clarify the terms of the separation agreement that will, as a result of this decision, now be made a court order. In particular, it is necessary for the mother and any third party to understand that the father's parenting time is not to be supervised. I find that the wording in the separation agreement is confusing.

[143] I also find that on a temporary basis, there should be an order that states the father is no longer required to employ a nanny. I find that the inclusion of this requirement and the vague wording has been inappropriately used by the mother to impose restrictions and curtail the father's parenting time. It has only increased the conflict between the parties and is not in B.'s best interests. Further, based on the extensive evidence before this court on this motion there is no necessity for such a requirement.

[144] Therefore, paragraph 14 (i) of the Draft Order will be deleted and the following substituted:

On a temporary basis, the Applicant shall have parenting time with the child in accordance with the terms of this order. For clarity, the father shall not be required to employ a nanny or have a third party present when B. is in his care.

The Respondent shall not be permitted to modify, reduce, or restrict the Applicant's parenting time in any way without prior written consent by both parties or further court order.

There will be a further order for police enforcement in accordance with s. 36 of the CLRA.

There will be an order on consent to appoint Ricardo Theoduloz as a parent coordinator to mediate/arbitrate any disputes between the parties with respect to the interpretation or implementation of the terms of this Order and to mediate/arbitrate any appeals by the Applicant regarding major decisions. Any other terms of the PC agreement shall be on consent of the parties.

There will otherwise be an order in accordance with the Draft order submitted by the Applicant's counsel that is attached.

[145] Applicant's counsel to prepare this order and submit it to my attention through the trial coordinator's office.

[146] If there is a dispute between counsel as to the form of the Order, both counsel to make brief written submissions regarding any dispute and submit their preferred wording and their own draft orders (in Word format).

[147] If counsel are unable to settle the issue of costs, Applicant's counsel to serve and file within 14 days, brief written cost submissions, not to exceed 3 pages, with only any offer to settle and bill of costs attached. Respondent's counsel to serve and file her cost submissions on the same terms. No copies of case law are to be filed but can be referenced in the cost submissions.

[148] I wish to thank both counsel for their thorough presentation on the issues on these motions

Released: August 30, 2022

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Signed: Justice Roselyn Zisman