ONTARIO

Superior Court of Justice

Justices' Office
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Re: Reilly v. Zacharuk- Reasons for Decision (December 5, 2017)

Please find attached a copy of Justice LeMay's Reasons for Decision in the above-noted matter dated today.

Thank you.

CITATION: Reilly v. Zacharuk, 2017 ONSC 7216
COURT FILE NO.: FS-13-79320-00
DATE: 2017 12 05

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
Pamela Joyce Reilly	P. Sicco, Counsel for the Applicant
Applicant	
- and -	
Christopher James Zacharuk	John P. Schuman, Counsel for the Respondent
Respondent	
	HEARD: August 25, 2017

REASONS FOR DECISION

LEMAY J

[1] The Applicant, Pamela Reilly, and the Respondent James Zacharuk, have a final Order of Trimble J. addressing all of the issues in their family law dispute. As part of that Order, the parties were to deal with any disputes through mediation/arbitration with a parenting coordinator.

[2] However, they both brought further motions before the Court dealing with custody and access.

[3] The Applicant brought a motion returnable on August 25th, 2017. The Applicant served three separate notices of motion, one on August 4th, 2017, one on August 8th, 2017 and one on August 18th, 2017. Ultimately, the Applicant was seeking the following relief:

a) An Order to have all of the Respondent's access to the parties elder child, Kaeden, suspended until further Order of this Court

b) An Order to have the parenting coordinator, Ilana Tamari (hereinafter "the Arbitrator"), replaced by someone appointed by the Court.

c) An Order stating that the Arbitrator's award of July 31st, 2017 is of no force and effect.

d) In the alternative to c, an Order setting aside the Arbitrator's award under section 46 of the *Arbitration Act, 1991.*

e) In the alternative to d, an Order setting aside the Arbitrator's award under section 45 of the *Arbitration Act, 1991.*

[4] It was interesting that the Applicant's notice of motion was served on August 4th, 2017, but not returnable until August 25th, 2017. Under the family law rules, a matter can be heard seven (7) days after the motion was served. Given the immediacy of the issues, I would have expected the matter to come before the Court sooner.

[5] The Respondent brought a cross-motion, seeking dismissal of the Applicant's motion, compliance with the Order of Trimble J., striking of various

paragraphs of the Applicant's Affidavit of August 3rd, 2017, and enforcement of the Arbitrator's award.

[6] The motions were heard on August 25th, 2017 as a short motion on a particularly busy motions list, where more than thirteen hours of motions were scheduled before me. At the conclusion of argument, I dismissed the Respondent's motion relating to the suspension of the Respondent's access to Kaeden, and directed the parties, in strong terms, that they were to ensure that access resumed immediately. I also indicated that I would provide more complete reasons for this decision.

[7] I reserved on the question of whether the parenting coordinator's award should be set aside, and whether she should be replaced by someone appointed by the Court.

[8] In the sections below, I have set out my complete reasons for my decision to direct that the Respondent's access to Kaeden was to resume immediately, as well as the reasons for determining that the Arbitrator's award should be upheld and enforced.

Background Facts

a) The Parties

[9] The parties were married on May 22nd, 2009. They have two children, Kaeden, born May 4th, 2010 and Joel, born April 22nd, 2012. The parties separated November 14th, 2013 and were divorced on April 28th, 2016.

[10] As part of the divorce, there was a final Order made by Trimble J. on April 28th, 2016. Under that Order, the Applicant has sole custody of the children, and

the Respondent has regular access, including access on alternate weekends, time during March break and Christmas, and one week during the summer.

b) The Events of July, 2017

[11] July 8th to 9th, 2017 was a weekend when the Respondent had his regular access with the children. He took them camping overnight at a provincial park. The Respondent then returned the children to the Applicant in Parry Sound on July 9th, 2017.

[12] The Applicant alleges that, when Kaeden came home, he told the Applicant that the Respondent had shoved him hard, and that Kaeden had lost his balance as a result. On July 11th, 2017, the Applicant reports this incident to the OPP in Caledon, and the OPP commenced an investigation.

[13] The Applicant alleges that she was told by Officer Paliuannan of the OPP that Kaeden should not have any visits with the Respondent until the Courts were engaged and had made a decision. This was allegedly to protect Kaeden and prevent the fabrication of evidence.

[14] On July 12th, 2017, the OPP contact the Respondent, who immediately contacted Ms. Tamari, the Parenting Coordinator. On the Respondent's evidence, the OPP did not advise him that he could not see his children while the investigation was ongoing.

[15] On July 14th, 2017, the Applicant noted discoloration on Kaeden when he was coming out of the swimming pool. She reported this to Dr. Gans, Kaeden's pediatrician, who reported it to the CAS. The CAS then contacted the Applicant on July 18th, 2017, and came to interview her, Kaeden and Joel personally on July 20th, 2017.

[16] It is worth reproducing Dr. Gans's note, which was prepared some weeks later, in its entirety:

> Name Zaharuk-Reily, Kaeden
>
> Address D.O.B 04/05/2017
>
> Date 03/08/2017
>
> To Whom It May Concern
>
> Kaeden was seen in my office July 14/2017. At this visit he disclosed that six days prior to this visit he was on a camping trip with his father. He was playing with bubbles, Dad did not want to attract animals and father pushed Kaeden who then tripped, fell to the ground and hit his shoulder. Kaeden stated he wasn't afraid of his father and felt safe with him. On physical exam there was no bruising- CAS was notified.

[17] In paragraph 20 of her Affidavit, the Applicant states that Kaeden told her on July 16th, 2017 that he had been pushed on 3 or 4 other occasions and that, when he was pushed, "he was scared and hurt and that he felt nervous at Daddy's house."

[18] In the meantime, immediately after being contacted by the OPP, the Respondent contacted the Arbitrator, who then attempted to contact the Applicant on several occasions both by e-mail and by telephone. According to the Arbitrator's award, the only response that the applicant provided came on July 14th, 2017, where she stated in an e-mail:

> "Dear Ms. Tamari,
>
> Thank you for your email. I am not aware of any issues that require PC involvement at this time. I will contact you if an issue warranting your involvement arises in the future.
>
> Sincerely,
>
> Pam Reilly

[19] The Applicant did not file any of her correspondence with the parenting coordinator, but does not deny the existence of this e-mail. Instead, the Applicant stated (at paragraph 30 of her Affidavit):

> Ms. Tamari's emails brought me back to those awful days when Mr. Zacharuk and his lawyers were, I felt, harassing me for pursing my rights. I spent some $225,000 litigating with Mr. Zacharuk. I just could not cope with the pressure. All I could do is look after the children. I was dealing with three different OPP officers, two in Parry Sound, one in Caledon. I was dealing with the Peel CAS. I was getting counselling from Ms. Karen Bouganim to assist me developing strategies to support Kaeden and communicate with him in a sensitive manner about what had happened, Kaeden needed a lot of comfort and cuddles, he felt very vulnerable and needed a lot of reassurance, I was scared and I was scared to read Ms. Tamari's e-mails.

[20] I will deal more fully with the correspondence between the parties and the parenting coordinator below. It is clear, however, that the parenting coordinator was attempting to contact the Applicant throughout the time between July 14th, 2017 and July 22nd, 2017.

[21] It is also clear from the materials filed that the Applicant did not communicate anything at all to the Respondent between July 9th, 2017 and July 22nd, 2017.

[22] On July 22nd, 2017, the parties were to meet at the Caledon Recreation and Wellness Centre, and the Applicant was to turn the children over to the Respondent for a weekend visit and his week of summer vacation. At that time, the Applicant advised the Respondent that he would not be getting the children. The children were not present.

[23] The Respondent asked the Applicant, through the My Family Wizard program, why the Respondent was not getting the children for his week of summer vacation. The Applicant never replied to this request for information.

[24] On July 27th, 2017, the OPP contacted the Applicant and advised her that they will not be proceeding with a criminal assault charge because "they did not believe Kaeden, having spoken to witnesses". These witnesses were not identified to the Applicant.

c) The Events Leading to the Parenting Coordinator's Decision

[25] For these parties, the role of the parenting coordinator is explained in paragraphs 49 and 50 of the Order of Trimble J. Those paragraphs read as follows:

> 49. The Applicant and Respondent shall appoint Ilana Tamari, or another agreed upon professional, to assist them with the implementation of the terms of the Minutes of Settlement, and any Agreement or Court Order. The parties shall execute a Parenting Coordination Agreement for a period of three years. The cost of the Parenting Coordinator will be shared by the parties equally.
>
> 50. The Parenting Coordinator shall have the authority to conduct secondary arbitrations to resolve issues related to the implementation of the terms of the Minutes of Settlement, and any Agreement or Court Order. The Parenting Coordinator shall have the discretion to reapportion costs in relation to the secondary arbitration as between the parents.

[26] In addition, there is a seventeen page agreement that the parties have signed setting out the roles and powers of the Arbitrator, the parenting coordinator, and the responsibilities of the parties. I will refer to that agreement as necessary.

[27] The Respondent involved the Parenting Coordinator on July 12th, 2017, immediately after he heard from the OPP. As noted at paragraph 18, above, the only communication from the Applicant to the parenting coordinator was an e-mail on July 14th, 2017 telling the parenting coordinator that there were no issues that required her involvement with the family.

[28] On July 20th and 22nd, 2017, the parenting coordinator e-mailed the Applicant. On July 22nd, 2017, the Arbitrator directed the Applicant to respond on two issues. First, to explain why the Applicant was not communicating through

Our Family Wizard. Second, to confirm that the Respondent would have the children for access. No response was provided by the Applicant.

[29] A further e-mail was sent by the Arbitrator on July 24th, 2017, telling the Applicant that she was not entitled to unilaterally withhold the boys from the Respondent, and requesting an urgent response.

[30] On July 25th, 2017, a notice of arbitration was served by the Respondent, requesting a hearing in writing.

[31] On July 27th, 2017, the Arbitrator e-mailed the parties, as follows:

> I wish to inform you both, that the OPP and Most notable [sic] Cst. Heather Nicholson from the OPP contacted me yesterday on two separate occasions. First off, she contacted me to confirm my role as Parenting Coordinator on the file and to obtain some historical information.
>
> Later in the day, Ms. Nicholson called to indicate that the OPP found the allegations made by the Mother, Ms. Pam Reilly baseless and that they would not be pursuing any charges whatsoever against Chris Zacharuk after completing their investigation and interviewing the children.
>
> **As there are no charges pending and the matter has now been closed, I demand that Pam email me by the end of the day to inform me that she will be returning the children to the Father's care and that he can enjoy his vacation time with them.**
>
> Should I not hear from you Pam by the end of business day today at 5 pm, then **I will have no choice but to Arbitrate Returning The Children to Chris** and that he will be allotted make-up time added on to this truncated vacation given the allegation that were baseless. If need be I will ask the courts to permit the Police to enforce such access.

[32] The Applicant responded to their email later in the day on July 27th, 2017, and advised that she was aware that the OPP would not be proceeding with criminal assault charges, but that the Peel CAS were also investigating, and she did not have any contact indicating that their investigation was complete. In response to this e-mail, the Arbitrator advised the Applicant that the children needed to be with their father for the scheduled vacation.

[33] On July 28th, 2017 at 10:33 am, the Arbitrator directed that the Respondent (who had asked for Arbitration) was to provide his submissions by the end of the day on July 28th, 2017, the Applicant could provide her response, and the father would have a right of reply. All of this was to be done in writing, and the Arbitrator directed that all three sets of submissions were to be completed by July 31st, 2017 at 2:00 pm. The Applicant's submissions were duly provided at 2:00 pm on July 28th, 2017.

[34] On July 28th, 2007 at 5:00 pm, Mr. Sicco, on behalf of the Applicant asked for a delay in providing the submissions. He set out his schedule, and advised that he could not meet with his client until Wednesday August 2nd, 2017, even though he had met with her at length already that afternoon. He then stated as follows:

> I am advised that according to the Divorce Order, the children are to be in my client's care this week and that Mr. Zacharuk's next period of parenting time pursuant to the Court Order would be next weekend.
>
> I therefore respectfully request that no Award be made at this time. I propose a three-way conversation on Wednesday so that we may discuss the process moving forward.

[35] There was no further communication between the arbitrator and the parties, and on July 31st, 2017, the Arbitrator issued an award. In that award she outlined her concerns with the adjournment request. She also ordered a make-up week of access to replace the one lost in the summer of 2017, a further make-up week of access with the children as a result of the disruption that the loss of access caused, a refreshing of the parenting coordinator's retainer, and $4,000.00 in costs payable by the Applicant.

[36] The Applicant then sought to have this decision set aside, and to suspend the operation of the Order of Trimble J. The Respondent seeks to have the decision enforced, and an Order that Trimble J.'s final order is in full force and effect. The matter came before me on August 25th, 2017 as a short motion.

Issues

[37] Based on the facts I have set out above, and my review of the materials filed by the parties, the following issues must be resolved:

a) Should any of the paragraphs of the Applicant's Affidavit be struck?

b) Should access to Kaeden be stopped pending completion of an investigation and/or other Court proceedings?

c) Should Arbitrator Tamari's award be set aside or varied? Is there a reasonable apprehension of bias? Was the Applicant denied procedural fairness?

d) What remedy should be ordered by the Court in this case?

[38] I will address each of those issues in turn.

Issue #1 - Whether Paragraphs in the Applicant's Affidavit Should Be Struck?

[39] The Respondent is seeking to have paragraphs 5-8, 13, 17, 20, 21 and 24-26 of the Applicant's Affidavit of August 3rd, 2017 struck under Rules 14(18) and 1(8.2) of the *Family Law Rules*. These paragraphs deal with the incident of alleged pushing in July, Kaeden's alleged statements to the Applicant that the Respondent had pushed him on other occasions and the Respondent's conviction for assault in 2014.

[40] This issue was not pursued by counsel in argument, and I am not prepared to strike these paragraphs. In particular, I will outline what the evidence shows about the alleged incident of pushing as it informs my conclusions on both whether

access provisions in Trimble J.'s Order should be suspended and whether there is any reasonable apprehension of bias on the part of the arbitrator.

[41] However, I also note that both sides have included extraneous evidence that should be commented on.

[42] On the Applicant's side, she has included mention of the Respondent's conviction for assault on July 14th, 2014. It is clear from reading the Applicant's material that this is supposed to be evidence that would support a conclusion that the Respondent was also violent with the children. However, I do not accept it as such for three reasons. First, it was three years old at the time that the incident happened. Second, the Respondent was given an absolute discharge, in large part because he had attended counselling and anger management. In addition, under the terms of the Order of Trimble J. the Respondent is required to continue to see a mental health professional and continue to take his medications. There is no evidence before me of any claimed breach of this Order. Third, this conviction was a known fact at the time that the Order of Trimble J. was entered, and unsupervised access was still ordered.

[43] The Applicant has also mentioned other incidents that she discovered after July 9th, 2017, where the Respondent has allegedly pushed Kaeden in the past. I have three concerns with these statements. First, they were not discussed between the parties. I will return to the significance of that fact below. Second, there are no specifics about these allegations.

[44] Finally, and most importantly, it appears that the Applicant (and her family) may be engaging the children, particularly Kaeden, in discussions about the litigation before the Courts. The solicitation of these other incidents is one example. The Respondent's evidence that Kaeden told the Respondent that the

Applicant's brother told Kaeden that he could end a visit if the Respondent was mean to him is another example.

[45] I make no findings about whether there is actually any communication with the children about this litigation. I simply note that the Courts would be gravely concerned if there was, and that the parties are both reminded **not** to communicate with the children about this litigation. The parties are also reminded that, in their case, this is a specific requirement set out in paragraphs 6 and 7 of Trimble J.'s Order.

[46] On the Respondent's side, he has pointed to the fact that it took some months for the Applicant to agree to the terms of the consent Order of Trimble J. I can appreciate that the Respondent might have found that frustrating. However, I do not see how it is relevant to the issues that I have to decide, and raising it does not assist the Court.

[47] In addition, I note that the Applicant's brother Damian Reilly, provided an Affidavit on August 22nd, 2017, outlining the text message exchange he had with the Respondent. In that exchange it appears that the Respondent refers to Mr. Reilly as an "asshole".

[48] This evidence is not particularly helpful to the Court in deciding the issues in this motion. However, I do note that it is not an appropriate way for the Respondent to behave.

Issue #2- Should Access to Kaeden Be Stopped?

[49] As I told the parties at the conclusion of argument, I am of the view that access to Kaeden should not be stopped. I will go further, and say that access to

Kaeden, including access for the summer vacation, should never have been stopped and there was, on the record before me, no reasonable basis for the Applicant's decision to deny the Respondent access to Kaeden between July 10th and August 25th, 2017.

[50] My analysis starts with the question of whether there is any actual evidence that there was an incident of pushing on July 9th 2017. I find that there is no reliable evidence that this incident happened before the Court for three reasons.

[51] First, the only pieces of evidence that the Applicant relies on are hearsay. She starts with the statement made by Kaeden on July 9th, 2017 when he comes home and speaks to the Applicant. From there, the Applicant seeks to rely on evidence from the CAS and the family doctor.

[52] However, the information that the family doctor gathered from Kaeden, is hearsay, and was presumably gathered in the presence of the Applicant. It is not any more reliable than Kaeden's initial statement to the Applicant. Further, the Applicant's own evidence on how Kaeden was feeling is inconsistent with what is in the family doctor's note. The Applicant states that Kaeden is "nervous" about visiting his father, and the family doctor states that Kaeden has no problems visiting his father. This type of internal inconsistency leads to serious concerns about the reliability of the Applicant's evidence as a whole. However, it is difficult to make credibility findings solely on a review of the Affidavits, and I will confine myself to making my conclusions on things that can be clearly ascertained as facts.

[53] The other evidence is that the Respondent noticed some discolouration on the shoulder when Kaeden came out of the pool on July 14th, 2017. This evidence is not helpful, as this was only several days after the fact, and could have happened at any time. In addition, there is no evidence (either from the doctor or from anyone

else) as to how severe this discolouration was, or what the potential causes of it were. Indeed, Dr. Gans noted that, on physical examination, there was no bruising.

[54] Second, there is the affidavit evidence of the Respondent, and his brother, who were both present. They have both sworn Affidavits that describe essentially the same incident. On their version of events, Kaeden and Joel were horsing around and got in trouble for doing so. There was, on this evidence, no pushing.

[55] Finally, there is the evidence of the various organizations that were involved in investigating the Applicant's complaints. By the end of July, the OPP had concluded, **on the Applicant's own evidence**, that they did not believe Kaeden, and would not be pursuing the investigation.

[56] As of the hearing on August 25th, 2017, the Peel Region CAS had not formally closed their investigation. However, they had provided the parties with a voice mail outlining that, although they had not made a formal decision, they "would not be proceeding with a child protection application". This was placed before me at the hearing.

[57] The Applicant, although acknowledging the message from the CAS, wanted to have only supervised access between Kaeden and the Respondent until the CAS had finished their investigation. I rejected that request, noting that there was no need to wait for the CAS's formal decision as they had notified both parties that they were not planning any child protection applications, and given the conclusions of the OPP that Kaeden's story was not believable.

[58] This brings me to the reasons the Applicant gave for unilaterally cancelling the Respondent's access to Kaeden. The Applicant asserted, in her Affidavit, that she was "following the advice of Officer Paliuannan, which had not changed." This advice, allegedly given to the Applicant on July 12th, 2017, was that the

Respondent's access should be stopped until the Courts had been engaged and had made a decision.

[59] On this point, I start by noting that I am not convinced that Officer Paliuannan actually provided this advice. I reach that conclusion for four reasons. First, there was no independent evidence that Officer Paliuannan actually said this before me. Second, it does not seem like the type of advice that an officer would provide in a family law case where litigation is likely to be ongoing. Third, there is no evidence that the Respondent was given corresponding advice by any OPP member. Finally, this advice has to be seen in its context. According to the Applicant, Officer Paliuannan also advised the Applicant in the first interview with Kaeden that the Respondent would be charged. This is also unlikely, as the police would have wanted to obtain additional information before deciding whether to charge someone, particularly in a high conflict family law case.

[60] Even assuming that this advice was given, however, the Applicant's decision to follow it even until the hearing before me was, in my view, unreasonable for two reasons. First, and most importantly, the parties have a parenting coordinator. That person's job is to expeditiously resolve disputes like this. The Applicant should not be taking advice about whether to breach court orders from a police officer. Instead, she should have followed the process set out in the final Order of Trimble J., and obtained the assistance of the parenting coordinator. Second, the advice itself became unreasonable when the OPP told the Applicant that they would not be pressing any charges because they had interviewed other witnesses and **did not believe** Kaeden. At that point, access should have returned to its normal schedule or, in the alternative, the Applicant should have raised her issues with the parenting coordinator and permitted their prompt adjudication.

[61] The Applicant bases her request for a suspension of the access provisions of the Order of Trimble J. on her allegations that there was an incident on July 9th, 2017. Having found that there is no reliable evidence of this incident, and no reasonable basis for the Applicant's request, I dismiss it.

[62] Conversely, the Respondent's motion that the Order of Trimble J. should be in full force and effect is granted.

Issue #3- Should the Arbitrator's Award Be Set Aside or Varied?

[63] The Arbitrator's award is governed by the *Arbitration Act, 1991*. Secton 59.6(1) of the *Family Law Act* sets out the requirements for a family arbitration award to be enforceable. It appears to me that all of these conditions are met in this case, and I certainly did not hear any argument from counsel for the Applicant that these conditions are not in place.

[64] As a result, the arbitration award is enforceable under the *Family Law Act* unless the Applicant can show that it should be set aside.

[65] In light of this conclusion, the arbitration agreement between the parties makes it clear that the only way that the Arbitrator's award can be set aside is through the application of sections 45(1) or 46 of the *Arbitration Act*. The Applicant pointed to two bases on which the Arbitrator's award can be set aside. First, whether there is a reasonable apprehension of bias with respect to the Arbitrator. Second, whether the Arbitrator failed to grant an adjournment to Mr. Sicco, counsel for the Applicant, when he requested one. I will deal with each issue in turn.

[66] The Respondent argued that the Applicant had not demonstrated that there was an issue of law where the Arbitrator had erred. The Respondent stated that the only legal issue in the case was whether the party seeking a suspension in access can justify that suspension. I disagree. Questions of whether there is a

reasonable apprehension of bias, and whether a party was denied natural justice, are always questions of law that can be the subject of review by a reviewing court, and I will conduct that review.

a) Reasonable Apprehension of Bias

[67] In order to establish a reasonable apprehension of bias, the Applicant must show that an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that the Arbitrator would not decide the matter fairly. See *Committee for Justice and Liberty v. Canada (National Energy Board)* ([1978] 1 S.C.R. 369.

[68] This principle has been applied in the context of a family law mediation/arbitration process in *McClintock v. Karam* (2015 ONSC 1024). In that decision, Gray J. stated (at paragraphs 68 to 70):

> [68] As stated by de Grandpré J., one of the considerations is the "special circumstances of the tribunal". In this case, the tribunal is a mediator/arbitrator, and he has been constituted by agreement. It must be concluded that the parties, in agreeing to mediation/arbitration, would understand the nature of the process of mediation/arbitration. The informed person, in deciding whether there is a reasonable apprehension of bias, would also understand the nature of the process of mediation/arbitration.
>
> [69] In order to effectively mediate, the person appointed must engage in a process that has a good deal of informality. Mediative techniques include persuading, arguing, cajoling, and, to some extent, predicting. Mediation is a process to secure agreement, if possible. All of those techniques, as well as others, will come into play in trying to secure agreement.
>
> [70] If the mediator/arbitrator must move to the arbitration phase, it cannot be expected that he or she can entirely cleanse the mind of everything learned during the mediation phase, and of every tentative conclusion considered, or even reached, during the mediation phase. However, at a bare minimum the parties are entitled to expect that the mediator/arbitrator will be open to persuasion, and will not have reached firm views or conclusions.

[69] In this case, the highest that the Applicant's case that there was a reasonable apprehension of bias could be put is based on the July 27th, 2017 e-

mail from the Arbitrator, which is set out at paragraph 31 of my reasons. In that e-mail, the Arbitrator demanded that the Applicant e-mail her to confirm that the children would be returned to the Respondent.

[70] However, this e-mail has to be read in context. There are three points that make it clear that there is no reasonable apprehension of bias in this case:

a) As noted by Gray J., this is a mediation and arbitration process. A reasonable person would expect the mediator to have made comments outlining his or her views in the course of the discussions with the parties.

b) In this case, the July 27th, 2017 communication comes only after the Arbitrator had investigated the facts independently, including having spoken to the OPP investigator directly. As a result, there is a factual underpinning to the Arbitrator's concerns.

c) The Arbitrator had also e-mailed the Applicant on a number of occasions, and asked the Applicant to explain her actions. In particular, the July 24th, 2017 e-mail from the Arbitrator to the Applicant made that precise request.

[71] In the circumstances, there is no reasonable apprehension of bias and this argument is rejected.

[72] I am fortified in my conclusion that there was no actual bias or reasonable apprehension of bias by the detailed review of the evidence that I was required to perform. The strong comments that the Arbitrator makes about the Applicant's unilateral conduct in withholding the children from the Applicant were, in my view, justified on the factual record before the Arbitrator.

b) Failure to Grant an Adjournment

[73] The relevant statutory section is paragraph 6 of section 46(1), of the *Arbitration* Act which reads as follows:

> **46. (1) Setting aside award** -- On a party's application, the court may set aside an award on any of the following grounds:
>
> ...
>
> 6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case or was not given proper notice of the arbitration or of the appointment of an arbitrator.
>
> ...
>
> 8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.

[74] In this particular case, the argument is, in essence, that by failing to grant the adjournment request on July 27th, 2017, and failing to respond to it until she issued her award on July 31st, 2017, the Arbitrator exceeded her jurisdiction and issued an unreasonable award.

[75] I start with what was requested on July 27th, 2017. In argument before me, Mr. Sicco referred to his request as an extension for two days. I certainly was of the view that this was what Mr. Sicco requested. However, a close examination of the request shows that Mr. Sicco does not provide any deadline for making his submissions. This is concerning to me, as the matter needed a prompt resolution, and not setting a specific date for making submissions would have left the matter floating, perhaps for a number of weeks.

[76] Indeed, the Arbitrator addressed her concerns with delay in her reasons for denying the extension request. Those concerns are as follows:

> **It is regrettable that Ms. Reilly's counsel, Mr. Sicco, could draft a lengthy email noting that they were unable to respond yet and needed an extension rather than assisting Ms. Reilly in crafting one or two-page response to the Father's responding material. Furthermore, the idea that there would be a "possible" offer to settle put forth by the Mother's counsel without consequences and deterrents for parents who unduly withhold the children from the other parent, especially in high conflict divorces where there is a need for a Parenting Coordinator. A Parenting Coordinator is to assist in Implementation of the parenting plan and if need be to Arbitrate when issues arise. This is such a matter, where this writer, felt an imminent Arbitral Award was and is in the best interests of the children.**

[77] The Respondent argued that the adjournment request was simply a further attempt to delay the Arbitrator's decision in this matter. The Respondent argued that the Applicant was delaying this matter in order to ensure that the appeal period for any Arbitrator's decision would only expire after the end of the summer. On the Respondent's submissions, if the Applicant could delay the decision until after July 31st, then the appeal period for appealing the Arbitrator's award would only expire in September, after the opportunity for make-up summer access had been lost. It is clear that the Arbitrator was concerned about this issue, and it is clear that it is a legitimate concern.

[78] However, it is troubling to me that the Arbitrator did not provide her ruling on the extension request immediately, and in advance of the ruling on the merits of the case. By not clearly warning the Applicant that she was not being given an extension, the Applicant may have lost the opportunity to make submissions to the Arbitrator.

[79] However, the potential lost opportunity for the Applicant to make submissions has to be balanced against the fact that the Applicant had been given several opportunities to engage with the arbitrator, and chose to ignore the arbitrator's requests for information. I have reproduced the Applicant's explanation

for ignoring the arbitrator's requests for information at paragraph 19. It is without merit for a number of reasons, as follows:

a) The Applicant's statement that she had to work on strategies to support Kaeden has no support in the record. If the Applicant had wanted to demonstrate that Kaeden had issues as a result of the events on the camping trip, she could have provided materials from Ms. Bouganim.

b) In any event, the Applicant's statements that Kaeden needed a lot of comfort are contradicted by the note from Dr. Gans, reproduced at paragraph 16 of these reasons.

c) Finally, the Applicant considered that she is pursuing "my rights". This is a troubling statement, as it is the children's rights that are actually at issue in this case, rather than the Applicant's rights.

[80] In light of these comments, the only conclusion open to me is that the Applicant was ignoring the arbitrator, and the adjournment request was a further attempt to put the Arbitrator off and unreasonably deny summer access to the Respondent. I am fortified in this conclusion by the fact that the Applicant's counsel did not actually offer any deadline at all for his submissions. He just wanted a three way call several days after the submissions were due.

[81] I acknowledge that the concerns raised by the Applicant about procedural fairness are significant, as procedural fairness lies at the heart of any arbitration system. However, those concerns must be considered in the context in which the Applicant's adjournment request was made. A review of that context leads me to conclude that the adjournment request was correctly viewed by the Arbitrator as a

delaying tactic. Fairness is the provenance of both sides in a dispute, and delay in this case would have (and did) prejudice the interests of both the Respondent and the children

[82] This brings me to a second important principle that applies to these children. This is, after all, a custody dispute, and the paramount consideration of the Court should be the best interests of the children.

[83] I am of the view that the Arbitrator had the best interests of the children in mind when she made her decision. It is also clear to me that the Arbitrator had those interests in mind when she refused to grant an extension. The Applicant had engaged in self-help remedies by unilaterally withholding access to the children in the summer. As I have set out in my reasons on Issue #2, there was no reasonable basis for withholding access to either child in the summer.

[84] The maximum contact principle is an important part of family law. Children are generally healthier and happier, and achieve more, when they have regular contact with both of their parents. The arbitrator's award was a genuine effort to ensure that the Respondent had significant contact with his children in the summer, when they are not in school and can spend concentrated time with him.

[85] The Applicant's attempt to adjourn this matter, and her leisurely approach to this appeal, were designed to ensure that the Respondent did not have access to the children during the summer. As I have said, there was no reasonable basis for denying the Respondent's access to the children. The arbitrator acted correctly in attempting to restore that access, and remedy the lost access, as quickly as possible.

[86] The Applicant had an opportunity to be heard by the Arbitrator. She chose not to use that opportunity and, instead, to delay the matter. The Applicant cannot now rely on that delay as a basis for setting aside the Arbitrator's Order.

[87] The Applicant's motion in this regard is dismissed.

Remedy

[88] As set out above, I have upheld the Arbitrator's award. I must also deal with the question of remedy. The financial orders provided by the Arbitrator are within the scope of her jurisdiction under the agreement between the parties, and they are upheld. The timelines for complying with the Arbitrator's Orders shall apply as if the Arbitrator's decision was issued today.

[89] The Arbitrator also ordered two weeks of make-up access to the Respondent. It was originally intended that at least one week of access would take place last summer. However, this motion prevented that access from occurring.

[90] As a result, I am directing that the parties discuss the two weeks access, and attempt to resolve when that access will take place. If they cannot agree on that issue, then they will appear before me on December 21st, 2017 at 9:00 am for no more than an hour to discuss the following two issues:

a) Do I have the jurisdiction to determine which what make up time be given, or is that a matter for the Arbitrator to determine?

b) If I have the jurisdiction, when should the make-up time be taken?

[91] If the parties do not agree on these issues, this appearance is mandatory, and cannot be adjourned even on consent without my leave.

[92] On this appearance, the parties are directed that they may provide no more than two (2) single-spaced written pages of argument, and an Affidavit of no more than three (3) single-spaced written pages, with no more than five (5) attachments. Any materials may be served and filed by December 15th, 2017.

Disposition and Costs

[93] For the foregoing reasons, I order as follows:

a) The Order of Trimble J. is to remain in full force and effect, and access is to continue as set out in that Order.

b) The Arbitrator's award is upheld.

c) The parties are to either agree on the implementation of the make-up time in the Arbitrator's award, or are to appear before me to argue that issue on December 21st, 2017 at 9:00 am.

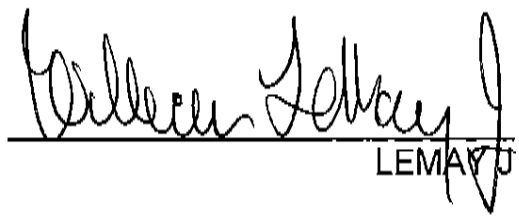
d) For the December 21st, 2017 appearance, the parties are directed that they may provide no more than two (2) single-spaced written pages of argument, and an Affidavit of no more than three (3) single-spaced written pages, with no more than five (5) attachments. Any materials may be served and filed by December 15th, 2017

[94] Costs submissions are due from each side seven (7) days after the release of these reasons. They are not to exceed four (4) double-spaced pages, exclusive of bills of costs, offers to settle and case-law.

[95] Reply submissions are due seven (7) days thereafter, and are not to exceed two (2) double-spaced pages.

[96] Extensions of time on the costs submissions will not be granted, even on consent, without my leave. In other words, should a party require an extension, they will have to ask me for it.

[97] In the course of my oral comments to the parties, I directed counsel in particular to the provisions of Rule 24 dealing with bad faith. It is my expectation that counsel will address the question of whether the Applicant has conducted herself in a bad faith manner in their costs submissions. The length allotted to the submissions takes that fact into account.



LEMAY J

Released: December 5, 2017

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Pamela Joyce Reilly

Applicant

- and –

Christopher James Zacharuk

Respondent

REASONS FOR DECISION

LEMAY J

Released: December 5, 2017