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# FACSIMILE TRANSMISSION

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**Date:** SEPT. 21. 2012

**Re:** KROUPIS - YANOVSKI v. YANOVSKI
# FS-09-352000

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ATTACHED PLEASE FIND MADAM JUSTICE HEKMAN'S REASONS FOR JUDGMENT WITH RESPECT TO THE ABOVE-NOTED MATTER

**CITATION:** Kroupis-Yanovski v. Yanovski, 2012 ONSC 5312
**COURT FILE NO.:** FS-09-352000
**DATE:** 20120921

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | |
|---|---|
| **BETWEEN:** | |
| Kathy Kroupis-Yanovski<br>Applicant/Respondent in Appeal | *John Schuman,* for the Applicant/Respondent in Appeal |
| **– and –** | |
| George Yanovski<br>Respondent/Appellant in Appeal | *Aaron Franks, Michael Zalev* for the Respondent/Appellant in Appeal |
| | **HEARD:** July 9, 2012 |

**HERMAN J.**

[1] Is final offer selection a permissible process in family law arbitrations where the parties have agreed to the process?

[2] The appellant, Mr. George Yanovski, appeals the decisions of the Arbitrator, Stephen Grant, dated February 9, 2012 and April 16, 2012. The Arbitrator used the process of final offer selection and chose the offer of the respondent, Ms. Kathy Kroupis-Yanovski, to determine child support, spousal support and the equalization of property.

[3] The appellant contends that, notwithstanding the parties' agreement to the final offer selection process, the arbitration did not meet the requirements of the *Arbitration Act, 1991*, S.O. 1991, c. 17 and the *Family Law Act*, R.S.O. 1990, c. F.3.

[4] The appellant argues that the arbitration did not comply with the law for three reasons:

(i) Final offer selection is ill-suited to resolve multiple issues;

(ii) The process did not include an opportunity to provide sworn testimony or to cross-examine; and

(iii) The Arbitrator's reasons were inadequate.

[5] The respondent's position is that the process used by the Arbitrator complied with the law. Furthermore, the appellant agreed to the process and cannot now object to it.

Background

[6] The parties married on September 29, 1990. They separated on May 15, 2009.

[7] They have two children, who are currently 19 and 12 years of age. The older daughter resides primarily with the appellant. The younger daughter spends equal time with each parent.

[8] The appellant is a general manager of Janovski Counter Tops Ltd., a company which supplies laminate countertops. The company is owned by the appellant's father and uncle.

[9] The respondent worked as an investment customer service representative at the Royal Bank until 1999, at which time she stopped working in order to raise the children and manage the household. The respondent resumed part-time employment at some point after the parties' separation.

[10] On August 28, 2009, the respondent issued an Application in which she sought a divorce, sole custody of the children, child support, spousal support and equalization of net family properties.

[11] The Appellant filed his Answer on October 1, 2009.

[12] On January 13, 2010, the parties consented to an order for a custody and access assessment. On August 27, 2010, Dr. Butkowsky held a disclosure meeting with the parties to inform them of his recommendations.

[13] The parties sold their matrimonial home on June 17, 2011. The net proceeds of sale were $852,924.83.

The Mediation/Arbitration Agreement

[14] On September 2, 2010, the parties consented to an order referring all the issues to mediation/arbitration. Greer J. appointed the mediator/arbitrator and provided that the mediator/arbitrator would have all powers of a Superior Court judge as between the parties. Furthermore, the costs of mediation/arbitration were to be borne equally by the parties.

[15] Further to the order of Greer J., the parties signed a Mediation/Arbitration Agreement, dated September 27, 2010.

[16] In their Agreement, the parties appoint the Arbitrator to mediate and, if mediation is unsuccessful, arbitrate the various issues between them, that is, custody and access, child support, spousal support, and property issues.

[17] The Agreement provides that the arbitration will be conducted in accordance with the law of Ontario and the law of Canada, as it applies in Ontario. Property and support issues will be determined in accordance with the *Family Law Act*.

[18] The parties agree to waive all rights to litigate the issues in court, subject to their rights of judicial review and appeal.

[19] They also agree that, if the matter proceeds to arbitration, the Arbitrator will determine the procedure in consultation with the parties' counsel. The Agreement provides that the procedure will be similar to a court procedure wherever possible.

[20] After the evidence has been received and the submissions on law have been made, the Arbitrator will deliver an award. The award will be final and binding and may be incorporated into a consent order or judgment of the Superior Court.

[21] The right to review the award is in accordance with s. 46 of the *Arbitration Act* and is only be on a question of law.

[22] By signing the Agreement, each party confirms that he or she has received independent legal advice. A Certificate of Independent Legal Advice is attached to the Agreement.

The Mediation/Arbitration Process

[23] The parties attended several mediation sessions with the Arbitrator.

[24] The parties agreed to adopt the parenting recommendations of Dr. Butkowsky. They were unable to come to a resolution of the issues of child support, spousal support and the equalization of property. These issues were left to the Arbitrator to determine.

[25] The Arbitrator proposed, and the parties agreed, to proceed by way of arbitration through final offer selection. In its simplest form, final offer selection is a process by which each party submits an offer and the decision-maker selects one of those offers.

[26] According to an e-mail exchange in May 2011, the parties agreed that: final offer selection would be used to resolve the remaining issues of support and equalization; each party would prepare written offers with written submissions explaining their offers; they would have seven days within which to decide whether to accept the other party's offer; if neither offer was accepted within seven days, the Arbitrator would hold a brief oral hearing on the merits of the offers; the Arbitrator would then select the better offer, provide short reasons for his decision and make an award on the terms of that offer.

[27] The respondent delivered her offer to settle and her submissions on June 22, 2011, followed by supplemental submissions, dated August 17, 2011.

[28] The appellant requested and was granted extensions. He delivered his offer to settle and his submissions on September 23, 2011.

[29] The appellant confirmed his position on the process in his submissions. He indicated that the parties had agreed to a process whereby each party would present a comprehensive offer to settle, accompanied by submissions. The Arbitrator was required to issue a final award incorporating all of the terms of one of those offers. He did not have the authority or jurisdiction to make an award incorporating some of the provisions of one offer and other provisions of the other offer, nor did he have the authority or jurisdiction to make an award containing terms that he designed.

[30] The respondent delivered her reply submissions at the beginning of November 2011.

[31] On November 2, 2011, the Arbitrator convened a telephone conference during which he asked counsel if he could pick and choose aspects of each offer or a position between the offers. The Arbitrator gave counsel an opportunity to speak to their respective clients.

[32] A further telephone conference was held a week later, on November 9, 2011. The Arbitrator referred to this discussion in his Arbitration Award. He noted that, having reviewed the parties' offers, he detected "a certain asymmetry of position". The Arbitrator invited the parties to consider a modified form of final offer selection by permitting him to exercise his discretion to fashion a result that may be different from either or both of their final offers. "However, as was their right, they specifically rejected this option".

[33] According to the respondent's affidavit, it was counsel for the appellant who said that his client did not want to change the terms. At that point, there was no need for the respondent to indicate her position, since, absent both parties' agreement to change the process, the Arbitrator and the parties were bound to follow the final selection process.

[34] The appellant delivered his response to the respondent's reply submissions on or about November 15, 2011.

[35] On November 28, 2011, the Arbitrator held a short oral hearing. He gave the parties an opportunity to clarify a few points. He also encouraged them to "re-tool" their offers and provide new offers in the first week of December.

[36] The parties provided amended offers in December 2011. The respondent's offer was severable, in that it was open to the appellant to accept one or more of the parts, which would resolve some of the issues. Furthermore, if the appellant's offer was also severable, it would be open to the Arbitrator to select only parts of each offer. However, the appellant presented a non-severable offer. As a result, the Arbitrator was not able to pick and choose items but had to select one of the parties' offers in its entirety.

[37] The respondent modified her offer on January 3, 2012, to reflect the changes in the *Federal Child Support Guidelines* S.O.R 97-175.

[38] The Arbitrator delivered his Arbitration Award on February 9, 2012. He selected the respondent's offer.

[39] The parties provided written cost submissions.

[40] The Arbitrator issued a Supplementary Arbitration Award, dated April 16, 2012, in which he corrected factual errors in the original Arbitration Award and awarded costs to the respondent.

The Arbitration Award

[41] The Arbitrator chose the respondent's offer over the appellant's. In his opinion, her offer was more reasonable and realistic in all of the circumstances.

[42] The Arbitrator described the parties' respective positions as follows: "To say there is a fundamental difference in the parties' underlying assumptions and contentions is an understatement".

*Equalization of Property*

[43] As a result of the Arbitrator having chosen the respondent's offer, there was to be no equalization payment and the net proceeds of sale of the matrimonial home would be divided equally, less an amount for retroactive support.

[44] The main property issue was the appellant's interest in the business in which he worked and which was owned by his father and uncle.

[45] The Arbitrator accepted the appellant's position that he had no legal interest in the business and that he had no sources of income other than the business. However, the Arbitrator was of the opinion that the appellant likely had a beneficial interest in the business, which provided him with access to additional funds. In reaching this conclusion, the Arbitrator took into consideration the amount spent by the family and the family's ability to retire the mortgage.

[46] The Arbitrator agreed with the respondent that the appellant's claimed loans were statute-barred and that the likelihood of the loans ever being called was improbable, if non-existent. (The Supplementary Award indicated that the appellant may have abandoned his claims on certain loans.)

[47] The Arbitrator found that the credits claimed by the appellant were, by and large, inappropriate and somewhat speculative, "if capable of proof at all were the case to be heard in full". (A question was raised in the Supplementary Award as to whether the appellant had claimed certain credits.)

[48] The Arbitrator also found that the respondent's net family property statement reasonably omitted the appellant's claimed indebtedness as well as any interest he might have in the company.

*Child and Spousal Support*

[49] The Arbitrator concluded that the respondent's offer with respect to both spousal and child support was more consistent with legal principles as well as the true underlying matrix in the case.

[50] The parties' different positions on support turned largely on their divergent positions with respect to the appellant's annual income: the appellant claimed an income of $62,000, while the respondent claimed the appellant's actual income was between $160,000 and $180,000.

[51] The Arbitrator stated that the appellant's income "may well be closer, on a balance of probabilities" to the range proposed by the respondent. He noted that the appellant admitted certain additional income, by way of bonus income and tax-free benefits, both of which required a gross-up.

[52] In the opinion of the Arbitrator, the respondent's position on spousal support better reflected the factors and objectives contained in the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.). In particular, the respondent had sustained an economic disadvantage as a result of the marriage and marriage breakdown. Her offer more fairly reflected the compensatory aspects of spousal support.

[53] With respect to child support, the Arbitrator concluded that the appellant's offer of child support was "easily less reflective" of the shared parenting arrangement than the respondent's offer.

[54] While the appellant's proposed proportionate sharing of the special and extraordinary expenses was more reflective of the statutory norm, the difference was marginal if one factored in the higher income that, in the opinion of the Arbitrator, the appellant likely enjoyed.

Statutory Framework

[55] The *Family Law Act* and the *Arbitration Act* govern family arbitrations, family arbitration agreements and family arbitration awards. The *Family Law Act* prevails in the event of any conflict between the two acts (*Family Law Act*, s. 59.1).

[56] Significant changes were made to the law that applies to family law arbitrations with the enactment of the *Family Law Statute Amendment Act, 2006*, S.O. 2006, c.1. It amended provisions of the *Arbitration Act*, the *Family Law Act* and the *Child and Family Services Act*, R.S.O. 1990, c. C-11.

[57] The following requirements apply to family law arbitrations:

> 1. A process that is not conducted exclusively in accordance with the law of Ontario or another Canadian jurisdiction is not a family arbitration and the decision has no legal effect. The arbitrator shall decide the dispute in accordance with law, including equity. (*Family Law Act* s. 59.1, *Arbitration Act*, s. 32 (4))
>
> 2. A family arbitration agreement is a "domestic contract". The agreement and any amendments to the agreement must be in writing, signed by the parties and witnessed. Each of the parties must receive independent legal advice and the lawyer must complete a certificate of independent legal advice. (*Family Law Act*, ss. 51, 55(1), 59.6 (1))

3. Every arbitrator who conducts a family arbitration must receive training approved by the Attorney General. The arbitrator must separately screen the parties for power imbalances and domestic violence. (*Family Arbitration*, O. Reg 134/07, ss. 2, 3).

4. The arbitrator may determine the procedure to be followed, in accordance with the Act. The arbitration may be on the basis of documents or the arbitrator may hold hearings for the presentation of evidence and oral argument. (*Arbitration Act*, ss. 20, 26)

5. The arbitrator shall decide the dispute in accordance with the arbitration agreement. (*Arbitration Act*, s. 33)

6. The parties shall be treated equally and fairly. Each party shall be given the opportunity to present a case and respond to the other party's case. (*Arbitration Act*, s. 19)

7. The arbitration award shall be in writing, with reasons. (*Arbitration Act*, s. 38(1))

8. The waiver of the right to object as a result of the failure to make a timely objection does not apply to family law arbitrations. (*Arbitration Act*, s. 4(2))

9. A party may appeal an award to the court on a question of law with leave. If the arbitration agreement so provides, a party may appeal on a question of fact or mixed fact and law. (*Arbitration Act*, s. 45)

10. The court may set aside an award on appeal on a number of grounds. One of those grounds is that the procedures followed in the arbitration did not comply with the *Arbitration Act.* (s. 46 (1))

Standard of Review

[58] By virtue of the parties' Mediation/Arbitration Agreement, this appeal is limited to a question of law. Therefore, the standard of review is correctness (see *Moran v. Cunningham*, [2010] W.D.F.L. 2393, 2009 CarswellOnt 8359 (S.C.)).

[59] A court should not interfere with an arbitration award unless the arbitrator acted on the basis of a wrong principle, disregarded material evidence or misapprehended the evidence (*Likins v. MacKenzie*, 2003 CarswellOnt 3007 (S.C.) at para. 8, *Robinson v. Robinson*, [2000] O.J. No. 3299, 2000 CarswellOnt 3264 (S.C.) at para. 5).

Is There an Error of Law?

[60] The appellant submits that the Award cannot stand because the process and the Award do not comply with the law of Ontario.

[61] The appellant does not argue that the Arbitrator did not follow the substantive law of Ontario and Canada in arriving at his decision. Rather, the appellant argues that the Arbitrator did not follow Ontario law with respect to the process employed in the arbitration. He makes three basic points:

> 1. The process of final offer selection was contrary to law because the arbitrator had to determine multiple issues.
>
> 2. The process was contrary to law because the decision was not based on sworn testimony and cross-examination.
>
> 3. The Arbitrator's reasons were inadequate.

[62] In support of his position, the appellant relies on the following:

(i) the court process;

(ii) the order that appointed the Arbitrator;

(iii) the law on when an oral hearing, sworn testimony and an opportunity for cross-examination are required;

(iv) the parties' Mediation/Arbitration Agreement; and

(v) the law on the adequacy of reasons.

[63] Furthermore, the appellant submits that the parties are unable to contract out of the legal requirements. Therefore, the parties' agreement to the process cannot make legal an otherwise illegitimate process.

[64] The respondent submits, firstly, that the process was not contrary to the law. Secondly, the appellant is precluded from challenging the process in view of his agreement to the process and his failure to object at the time.

*Material facts*

[65] The material facts are not in dispute: both parties agreed to a process whereby the Arbitrator would select one of the parties' offers in its entirety; each of the parties had legal counsel; and each party had an opportunity to provide written submissions, respond to the other party's written submissions and attend a brief oral hearing. There is no suggestion of inequality of bargaining power or duress.

[66] There was no oral testimony or opportunity to cross-examine, nor did either party request such an opportunity. There was no sworn evidence, with the exception of each party's financial statement. In addition to each party's financial statement, the Arbitrator had documentary evidence submitted by the parties, which included net family property statements, income tax

returns, notices of assessment, bank account statements, credit card statements and DivorceMate calculations.

*Similarity to the court process*

[67] Final offer selection is not a process that a court would ordinarily apply in adjudicating a family law dispute. Does this mean that a family law arbitrator is precluded from using the process?

[68] The appellant submits that the requirement that the arbitration process be conducted in accordance with the law of Ontario means that the arbitrator must utilize a process that an Ontario family court could use.

[69] The requirement to comply with Ontario law and Canadian law does not, in my opinion, mean that the arbitration process must mirror the court process.

[70] Amendments to the law concerning family law arbitrations in Ontario were introduced in 2005. The purpose of the amendments was to ensure that family law arbitrations would be conducted exclusively under Ontario and Canadian law and that there would be adequate protection for vulnerable individuals and the interests of children.

[71] In enacting the amendments, the government was responding to a concern about the application of other laws, religious laws in particular, to resolve family law disputes. These other laws and processes might not comply with Canadian laws, such as the *Canadian Charter of Rights and Freedoms.* (see Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion – Executive Summary" December 2004; and Ontario, Legislative Assembly, *Official Report of* Debates (*Hansard*) No.17(15 November 2005) at 1350 (Hon. Michael Bryant (Attorney General))

[72] At the same time, the amendments confirmed that arbitration is a legitimate way in which to resolve family law disputes. In introducing the amendments, the Attorney General stated that "everyone has the right to resolve their disputes when their dispute arises, using their method of choice" (*Hansard* No. 17 at 1350).

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

[74] It is evident from the statutory provisions that the arbitration process need not be the same as a court process. Section 26(1) of the *Arbitrations Act* enables an arbitrator to determine the procedure to be followed and provides that the arbitration may be on the basis of documents or the arbitrator may hold hearings for the presentation of evidence and oral argument.

[75] There are, however, minimum requirements that apply to the arbitration process: (i) the parties must be treated equally and fairly; (ii) each party must have an opportunity to present a

case and respond to the case of the other party; and (iii) the arbitration must be conducted in accordance with the law of Ontario and Canada and no other law.

[76] In *Kainz v. Potter*, 2006 CarswellOnt 3703, [2006] W.D.F.L. 3464, 33 R.F.L. (6th) 62(S.C.), Linhares de Sousa J. reviewed the requirement in s. 19 of the *Arbitration Act* that the parties be treated equally and fairly. She articulated the requirement that an arbitrator "conduct [the] arbitration hearing in a manner that is fair and equal to both parties and that allows both parties to present their case and respond to the case of the other party" (*Kainz* at para. 61).

[77] In annotated comments to *Kainz v. Potter*, Philip Epstein (Philip Epstein, Annotation of Ontario Superior Court of Justice, 2006, *Kainz v. Potter*. Online, Carswell: 2006 CarswellOnt 3703) emphasized the need to comply with the rules of natural justice:

> No matter what the parties agree to as a form of arbitration process, they cannot abrogate or avoid the rules of natural justice. That is to say, the hallmark of an arbitration is that it is conducted with neutrality and fairness to both sides. Natural justice implies that each party know the case that they have to meet and that they are given a full opportunity to present their case.

[78] The requirements were also considered in *Hercus v. Hercus*, [2001] O.J. No. 534, [2001] O.T.C. 108 (S.C.) at para. 75, where Templeton J. stated:

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

[79] There is, in my opinion, no basis for concluding that there was unequal or unfair treatment of either party in this case. Each party agreed to the process. Each party had legal counsel. Each party was given an opportunity to present his or her case and respond to the case of the other party. There is no suggestion of bias on the part of the Arbitrator.

[80] The appellant relies on the decision of the Ontario Court of Appeal in *Berry v. Berry*, 2011 ONCA 705, [2011] O.J. No. 5006 in support of his proposition that the process of final offer selection is not permissible.

[81] *Berry v. Berry* was a mobility case. Juriansz J.A. determined that the trial judge had committed both an error of fact and an error of law in seeing the task as choosing between parenting plans. Similarly, on the application for a stay of the order pending appeal (2010 CarswellOnt 10983, [2012] W.D.F.L. 45, 7 R.F.L. (7th), 29 at para. 3), Rosenberg J.A. expressed concern that the trial judge felt he was faced with a simple binary decision of picking one of the parties' parenting plans.

[82] There are two difficulties with applying the *Berry* decision to the arbitration in this case: it was a review of the decision of a judge, not an arbitrator; and it involved a determination of the

best interests of the child. I agree that it may be open to challenge an arbitrator's use of final offer selection to determine custody and access on the basis that the process might not have provided an adequate means to determine the best interests of a child. However, in the case at hand, the final offer selection process was only used to determine financial issues.

[83] The appellant does not take the position that final offer selection can never be used in family law arbitration. He argues that while such a process could be used where there is a discrete issue in dispute, it is ill-suited to a situation in which there are multiple issues.

[84] The Arbitrator appears to have recognized that the process was not ideal once he received the parties' initial offers and submissions. He provided the parties with the option of dealing with the offers on an issue-by-issue basis or selecting an option between the offers. The appellant clearly indicated he did not want to vary the process. While the respondent provided a severable offer, the appellant did not. He confirmed that the arbitrator had no choice but to select one offer in its entirety.

[85] While I might agree that the process was not ideal for dealing with multiple issues, it is not my job, on an appeal on a question of law, to decide which arbitration process would have been the most suitable one for resolving the parties' dispute. Rather, my job is to determine whether the chosen process is contrary to law. I cannot conclude that the law precludes the use of final offer selection in family law arbitrations to determine financial and property issues.

*The order appointing the Arbitrator*

[86] The order of Greer J., dated September 2, 2010, was issued on consent. It referred the issues in the proceeding to the Arbitrator for mediation/arbitration. It further provided that the mediator/arbitrator "shall have all powers of a Superior Court judge as between the parties."

[87] The appellant submits that these powers include the powers to receive affidavits, conduct an oral hearing, hear sworn testimony and provide the opportunity to cross-examine.

[88] In my opinion, the order of Greer J. granted these powers to the Arbitrator in the event he needed to use them. It does not mean that the Arbitrator was required to follow the procedures of a Superior Court trial, nor does it mean that he was required to use all the powers available to a Superior Court judge.

*The requirement for an oral hearing*

[89] There is no general requirement that a family law arbitration be conducted by way of an oral hearing, with sworn testimony and the opportunity to cross-examine and re-examine. However, the appellant submits that this is a requirement where the determination of credibility is central to the arbitrator's decision. At the very least, he contends that the Arbitrator should have asked for affidavit evidence, with an opportunity given to each party to cross-examine on the affidavits.

[90] The appellant's income was central to the determination of child and spousal support. The appellant submits that a determination of his income depended on a determination of credibility.

[91] The appellant points to the decision of the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, which deals with the amendments to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. These amendments enable judges to weigh evidence, assess credibility and draw inferences of fact, on the basis of affidavits, in deciding summary judgment motions.

[92] The Court articulated the "full appreciation test" as a benchmark for deciding whether a trial was required in the interest of justice:

> In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. (*Combined Air Mechanical* at para. 51)

[93] Courts have drawn similar conclusions in family law cases. In *Ierullo v. Ierullo*, [2006] O.J. No. 3912, 216 O.A.C. 78 (C.A.) at para. 18, Gillese J.A. concluded that, because of the need to make credibility findings on a significant matter in dispute, the motion could not properly be decided without a trial.

[94] Similarly, in *R. (N.E.) v. M.(J.D.)*, 2011 NBCA 57, 377 N.B.R. (2d) 147, the New Brunswick Court of Appeal indicated that where there were completely conflicting affidavits and a highly visible level of animosity, the motion judge should have disregarded counsel's agreement not to call *vive voce* evidence or to conduct cross-examination and should have set the matter down for a full hearing.

[95] These cases are, in my opinion, of limited value in determining what process is required at an arbitration. Family law motions and summary judgment motions are exceptions to the general rule that when the parties cannot resolve their dispute the case proceeds to trial. There is no such presumption at work in the case of arbitrations, where parties have chosen not to go through the court system and have chosen not to resolve the issues in dispute by way of interim motions and a trial.

[96] The appellant claimed his income was $62,000 for support purposes. The respondent, on the other hand, claimed that it was in the range of $160,000 to $180,000.

[97] In concluding that the appellant's income was likely closer to the respondent's figure than the appellant's, the Arbitrator noted the following: "even at a glance", the appellant's 2010 total income was $82,555, not the claimed $62,000; the appellant admitted to certain additional income by way of bonus income and tax-free benefits, with the result that his claimed income needed to be grossed-up in order to determine his income for support purposes; and there appeared to be additional income that did not appear on his income tax return.

[98] It is not an infrequent occurrence for a family law judge to increase the support payor's "line 150 income" (the income on the income tax return) for the purpose of determining support. This is often done in cases where the support payor is self-employed or is employed by a family business. Although a judge has sworn evidence – either an affidavit at a motion or oral evidence at a trial - the judge frequently relies on the same kind of evidence the Arbitrator had to determine the appellant's income: financial statements, including expenses; income tax returns and notices of assessment; evidence of past income-splitting; and evidence of spending, including bank account statements and credit card statements.

[99] It was open to the Arbitrator to rely on this evidence in determining that the appellant's income was likely closer to the respondent's position. I cannot conclude that the Arbitrator erred in law in reaching this conclusion without the benefit of sworn testimony and the opportunity for cross-examination.

*The Mediation/Arbitration Agreement*

[100] The appellant argues that the process did not comply with the parties' Agreement, in that the parties' Agreement required a court-like process. Section 33 of the *Arbitration Act* requires an arbitrator to decide the dispute in accordance with the arbitration agreement. Section 46 of the Act provides that the court may set aside an award where the procedures did not comply with the Act.

[101] Although the parties, through their counsel, agreed to the process, the appellant submits that their agreement did not have the effect of amending the Mediation/Arbitration Agreement. The appellant relies on the requirement that amendments to a family arbitration agreement be in writing, signed by the parties and witnessed (*Family Law Act*, ss. 59.1(1) and s. 55(1)).

[102] The pertinent provision of the Agreement is the following:

> 19. **Procedure on Hearing**: The procedure for the arbitration hearing will be determined by the Arbitrator in consultation with counsel for the parties. It will be similar to court procedure where possible and, in particular:
>
> (a) all witnesses will be sworn (or affirmed) and will be subject to cross-examination and re-examination, except the Arbitrator may direct that some or all of the Evidence-in-Chief by some or all of the witnesses be given by affidavit or statement as the Arbitrator may direct;
>
> (b) all usual admissibility rules apply as in a court proceedings *(sic)*;
>
> (c) unless the parties and Mr. Grant agree otherwise, the oral evidence at the arbitration hearing will be recorded by a court reporter and the transcripts made available to both parties upon either party's request and at the requesting party's expense; and
>
> (d) unless the parties and Mr. Grant agree otherwise, the *Family Law Rules* shall apply, with necessary modifications, to the arbitration hearing.

[103] The hearing, itself, was brief. There were no witnesses or cross-examination and re-examination. The bulk of the arbitration proceeding was conducted in writing, through offers, submissions and responses to submissions.

[104] Although the agreement provided that the procedures would be "similar to court procedure where possible" and that "witnesses would be sworn ... and would be subject to cross-examination and re-examination", I cannot conclude that the process that was followed contravened the Agreement and the *Arbitration Act* for the following reasons: the Arbitrator determined the process, in consultation with the parties' counsel, as provided for in the Agreement; the parties agreed to the procedure; the appellant refused to alter the procedure when it was suggested by the Arbitrator and when the respondent provided a severable offer; and the Agreement does not clearly mandate the utilization of a court-like hearing, but instead uses the language of "similar to court procedure where possible".

[105] If one accepts the appellant's interpretation that the Mediation/Arbitration Agreement required sworn testimony and cross-examination, the parties' agreement to proceed by way of final offer selection constitutes, at most, an amendment to their Agreement. If it is an amendment to a family arbitration agreement, it did not comply with the technical requirements in that it was neither signed by the parties nor witnessed (*Family Law Act*, s. 59.1(1) and s. 55(1)).

[106] It would, in my opinion, be patently unfair to the respondent to allow the appeal solely on the basis of this technicality. There is no suggestion of unequal bargaining power or duress, nor is there any suggestion that the appellant did not understand what he was agreeing to. The appellant had legal counsel. The appellant reiterated his support for the process on several occasions. It was the appellant, not the respondent, who took the position that the process could not be altered.

[107] I agree with the appellant that the parties cannot confer legitimacy on a process that is contrary to the law by way of agreement. However, for the reasons I have expressed elsewhere in this decision, the parties did not agree to a process that was contrary to the law when they agreed to the process that was followed in this case.

*The adequacy of the reasons*

[108] The appellant contends that the Arbitrator's reasons were inadequate. He describes the Arbitrator's reasons as merely conclusory.

[109] Section 38 of the *Arbitration Act* provides that an arbitration award shall state the reasons on which the award is based. The parties agreed, through their counsel, that the Arbitrator would provide brief reasons.

[110] The appellant relies on the requirement for reasons articulated in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at para. 24:

> At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds

> for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

[111] This principle has been followed in numerous cases since then, including judicial decisions in family law cases (*Young v. Young*, (2012) 63 O.R. (3d) (112)168 O.A.C. 186 (C.A.)).

[112] Family law arbitrators are also required to provide adequate reasons (*Likins v. MacKenzie* at paras. 25, 38). However, in determining whether an arbitrator's reasons are adequate it is important to keep in mind the features that distinguish arbitrations from court proceedings.

[113] Parties choose the arbitration route, at least in part, because it will be less costly and speedier than litigating through the court system. In this case, the parties agreed that the arbitrator would provide brief reasons, presumably because lengthy reasons have the potential to add expense and delay.

[114] Another distinguishing feature is that, unlike the court system, family law arbitrations are generally private proceedings. Indeed, parties may choose the arbitration route because of their desire for privacy.

[115] Nonetheless, an arbitrator's reasons are important so that the losing party knows why he or she has lost and for the purpose of appeal. Reasons are also mandated by the *Arbitration Act*. The reasons may be brief, but they must be sufficient to explain why the arbitrator reached his or her conclusion.

[116] In this case, the Arbitrator concluded that the respondent's offer more closely conformed to the statutory objectives, jurisprudential principles and the evidence. In reaching this conclusion, he reviewed the pluses and minuses of each party's offer with respect to each of the issues before him, that is, property, child support and spousal support. In so doing, the Arbitrator considered both the evidence and the relevant legal principles, in particular, the factors and principles for the determination of support.

[117] In my opinion, while the Arbitrator's reasons are not lengthy (in accordance with the parties' agreement), they are sufficient to explain why the Arbitrator preferred one offer over the other and for the purpose of appellate review. As a result, I conclude that they were sufficient to meet their required purpose.

*Inability to contract out of the requirements of the law.*

[118] The respondent submits that having agreed to the process, the appellant cannot now claim that the process was faulty. The appellant's position is that the parties cannot agree to an arbitration process that is contrary to the law.

[119] Given my conclusion that the process was not contrary to the law, there is no need to consider whether the appellant's agreement to the process precludes him from challenging the process on appeal.

Summary and Conclusion

[120] Family law arbitrations are governed by the provisions of the *Family Law Act* and the *Arbitrations Act.*

[121] Family law arbitrations are not required to mirror the court process. In choosing the arbitration route over the court process, the parties chose a process which they hoped would be speedier and less expensive. After initially agreeing to the final selection process, the appellant confirmed his support for the process and refused to alter the process when given the opportunity to do so.

[122] The process complied with the minimum requirements applicable to family law arbitrations: the parties were treated equally and fairly; each party was given an opportunity to present his or her case and to respond to the other party's case; and the Arbitrator applied the law of Ontario and Canada, and no other law.

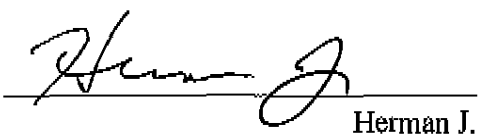
[123] There is no evidence of unfairness, inequality of bargaining power or duress. Each party was represented by legal counsel.

[124] The Arbitrator's reasons were adequate: the Arbitrator explained why he reached his decision, and the reasons were sufficient for the purpose of appeal.

[125] In these circumstances, I cannot conclude that the process was contrary to law, nor can I conclude that the Arbitrator committed an error of law.

[126] The appeal is therefore dismissed.

[127] I would encourage the parties to resolve the matter of costs. If they are unable to do so, the respondent may provide written costs submissions within 14 days. The appellant has a further 14 days within which to provide submissions in response. The submissions will be brief: no more than five pages in length, plus a costs outline.



Herman J.

**Released:** September 21, 2012

**CITATION:** Kroupis-Yanovski v. Yanovski, 2012 ONSC 5312
**COURT FILE NO.:** FS-09-352000
**DATE:** 20120921

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Kathy Kroupis-Yanovski

Applicant/Respondent in Appeal

**– and –**

George Yanovski

**Respondent/Appellant in Appeal**

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**REASONS FOR DECISION**

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**Herman J.**

**Released:** September 21, 2012

ONTARIO

Superior Court of Justice
(Name of Court)

Court File Number
FS-09-352000

at 393 University Avenue, 10th Floor, Toronto, Ontario M5G 1E6
(Court office address)

Endorsement

Date
Sept. 21, 2012

Applicant(s): Kathy Kroupis-Yanovski ☐ Present
Counsel: [illegible] ☐ Present
☐ Duty Counsel

Respondent(s): George Yanovski ☐ Present
Counsel: Karen Grant, Michael Zalev. ☐ Present
☐ Duty Counsel

☐ Order to go in accordance with minutes of settlement or consent filed.

☑ Factums are required on all motions (two days prior)

The appeal is dismissed. Reasons are attached.
Written cost submissions may be provided.

[signature]