

CANADA / JUDGMENT

Botten v. Botten

2024 BCSC 39

COURT

Supreme Court of British Columbia

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2024 BCSC 39 Botten v. Botten

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Botten v. Botten,

2024 BCSC 39

Date: 20240110

Docket: E223307

Registry: Victoria

Between:

Gregory James William Charles Botten

Appellant

And

Kelsey Elizabeth Botten, also known as Kelsey Elizabeth Dupuis

Respondent

Before: The Honourable Mr. Justice Brongers

On appeal from: An award of an arbitrator dated September 16, 2022

Reasons for Judgment

Counsel for the Appellant:

S. Rapoport

Counsel for the Respondent:

E. Neary

Place and Date of Hearing:

Victoria, B.C.

September 18-19

and 22, 2023

Place and Date of Judgment:

Victoria, B.C.

January 10, 2024

OVERVIEW

- [1] This is an appeal of an arbitration award brought pursuant to s. 19.19 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [2] The appellant is Gregory Botten ("Mr. Botten"). The respondent is Kelsey Dupuis ("Ms. Dupuis"). They were once married and lived together in Victoria. There is one child of their marriage, who is now 6 years old (the "Child").
- [3] The primary issue in dispute is whether Ms. Dupuis should be permitted to relocate the Child to Rome, Italy. Ms. Dupuis has sought such authorization since she wishes to reside in Rome with her new spouse. Mr. Botten is opposed to the relocation as he wishes to remain in Victoria.
- [4] The parties agreed to have their dispute resolved by an arbitrator. The arbitrator authorized the Child's relocation to Rome with Ms. Dupuis. In his reasons for decision, the arbitrator said that Ms. Dupuis had discharged her onus to show that the advantages to the Child of the proposed relocation outweigh its disadvantages. The arbitrator's award also addresses certain other parenting and child support issues.
- [5] Mr. Botten disagrees with the arbitrator's award and has appealed it to this Court. Mr. Botten says that the arbitrator committed multiple errors, mostly in relation to the relocation issue. Accordingly, Mr. Botten submits that the award should be overturned by application of ordinary appellate review standards. Ms. Dupuis, on the other hand, says that the arbitrator's decision to authorize the Child's relocation is deserving of deference on a reasonableness standard and ought not to be disturbed on appeal.
- [6] I have now had an opportunity to review the appeal record and consider the parties' submissions. I agree with Mr. Botten that the standard of appellate review to be applied is the ordinary one, and not reasonableness. However, even on this less deferential standard, I am not persuaded that the arbitrator erred in finding that the Child's proposed relocation should be permitted.

- [7] That said, I find that the arbitrator's award in relation to parenting authority over the choice of the Child's school was made in excess of the arbitrator's jurisdiction. This specific portion of the award will therefore be set aside. As for the balance of the award, including authorization for the Child's relocation to Rome, it will be confirmed.

BACKGROUND

Factual Background

- [8] Mr. Botten and Ms. Dupuis met while working for the same employer in Victoria. They began living together on August 15, 2014, and were married on September 3, 2016. The Child was born about a year later.
- [9] The parties separated on March 1, 2020. They entered into a separation agreement on September 1, 2020 (the "Separation Agreement"). Under its terms, Mr. Botten and Ms. Dupuis are to continue as the Child's guardians, share parenting responsibilities, and have equal parenting time on a 4/3/3/4 schedule. A desk order divorce was granted by the Court on June 28, 2021.
- [10] In May 2021, Ms. Dupuis informed Mr. Botten that she wished to relocate to Rome with the Child. Rome is where Ms. Dupuis' new spouse, Simone Baldi ("Mr. Baldi"), lives. Ms. Dupuis had been in a relationship with Mr. Baldi in the early 2010's when Ms. Dupuis was working in Rome, prior to being with Mr. Botten. Ms. Dupuis has now re-established this relationship, and married Mr. Baldi in September 2022. They explored the possibility of Mr. Baldi relocating to Victoria, but determined this to be impractical.
- [11] Ms. Dupuis and Mr. Botten discussed whether they might reach an agreement on the Child's relocation to Rome, but were unable to do so. They did, however, agree to have the issue decided through a process of mediation-arbitration.
- [12] On March 23, 2022, the parties signed an agreement to participate in family law mediation/arbitration (the "Participation Agreement"). It provided that Eugene Raponi, K.C. (the "Arbitrator"), a British Columbia lawyer who specializes in family law, would first conduct a mediation to attempt to resolve the parties' disputed issues, failing which he would conduct a binding arbitration.
- [13] The mediation took place on March 28 and 30, 2022. It was unsuccessful. The parties then proceeded to arbitration. It occurred over three half-days during the week of August 22, 2022.

The Arbitrator's Award

- [14] The Arbitrator issued his arbitration award (the "Award") and underlying summary reasons ("Reasons") on September 16, 2022. It was a term of the Participation Agreement that the Arbitrator would only provide summary reasons for his decision, unless one of the parties requested otherwise prior to the pronouncement of the Award. No such request was made.
- [15] The Award contains thirteen terms. The most significant term is the first one. It allows the Child to relocate with Ms. Dupuis from Victoria to Rome effective December 31, 2022, or such later date as may be agreed upon by the parties (the "Relocation Term").
- [16] The remainder of the Award deals with such matters as parenting time, travel logistics and expenses, child support, and the cost of schooling and extracurricular activities. The Award also contains a term that addresses the parties' respective authority regarding selection of the Child's school (the "School Selection Term"). It provides that in the event they cannot agree, Ms. Dupuis is entitled to choose the Child's school, subject to Mr. Botten's right to apply for directions to an arbitrator or to the Court.

The Appeal

- [17] On October 19, 2022, Mr. Botten filed the present appeal with the Court. Ms. Dupuis' notice of interest was filed on November 2, 2022.
- [18] By consent, Justice Saunders issued an order on November 22, 2022 staying the Award until June 30, 2023, with the exception of the School Selection Term and another term regarding school expenses. The order also provided that the stay could be extended on application.
- [19] The appeal came on for hearing before me over the course of three days during the week of September 18, 2023. Mr. Botten's primary position is that the Award should be amended to prohibit relocation of the Child. Ms. Dupuis' primary position is that the Award permitting the Child's relocation should be confirmed.
- [20] At the conclusion of the hearing on September 22, 2023, I took the appeal under reserve. As agreed to by the parties, I also extended the stay of the Award until the date of release of this judgment.

ISSUES

- [21] Counsel for Mr. Botten asserts that there are seven "primary errors" in the reasons of the Arbitrator. She argues that, taken together, they demonstrate that the Arbitrator's analysis of whether relocation was in the Child's best interests was fundamentally flawed. Counsel for Ms. Dupuis has joined issue with respect to all seven errors alleged by counsel for Mr. Botten.

- [22] The analysis of Mr. Botten's appeal will therefore be conducted in accordance with counsel for the parties' proposed framework, with one exception. Specifically, counsel for Mr. Botten has raised the propriety of the School Selection Term as a sub-issue of whether the Award was wrongly founded upon speculation. In my view, however, this is a discrete jurisdictional issue that deserves separate consideration.
- [23] Accordingly, I will adjudicate this appeal by addressing the eight-part question of whether the Arbitrator erred by:
- (a) improperly considering Ms. Dupuis' plans if relocation is denied;
 - (b) misapplying the burden of proof;
 - (c) basing his decision on speculation;
 - (d) improperly assessing the parties' willingness to support the Child's relationship with the other parent, and to ensure continuing contact between the Child and the other parent;
 - (e) failing to apply the maximum contact principle;
 - (f) improperly assessing the terms of the parties' separation agreement;
 - (g) failing to provide a balanced assessment; or
 - (h) exceeding his jurisdiction by issuing the School Selection Term as part of the Award.
- [24] This question will be answered after a discussion of the legislative framework and the standard of appellate review that applies to this appeal. I will conclude with a determination of what is the appropriate order to be issued.

ANALYSIS

Legislative Framework

- [25] Fundamentally, this case is an appeal from an arbitration award that decided whether the relocation of a child of the marriage of divorced parents should be authorized.
- [26] The applicable legislation that governs the scope of the appeal is s. 19.19 of the FLA. It provides for a right of appeal of family law arbitral awards to this Court, as follows:
- (1) A party to an arbitration may appeal to the Supreme Court an arbitration award on any question of law or on any question of mixed law and fact.
- ...
- (3) On an appeal, the Supreme Court may do one or more of the following:
 - (a) confirm, amend or set aside the arbitration award;

- (b) remit the arbitration award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.
- [27] The legal framework for deciding child relocation applications by divorced parents is set out at ss. 16.9 to 16.96 of the Divorce Act, R.S.C. 1985, c 3 (2nd Supp.). It effectively provides that such applications should only be granted if there is a determination that the proposed relocation is in the child's best interests. That determination must be made by taking into account eighteen factors that are set out in ss. 16(3) and 16.92(1) of the Divorce Act.

Standard of Review

The Parties' Positions

- [28] Mr. Botten submits that the ordinary standard of appellate review applies. As such, the review standard for conclusions of law is correctness. For questions of mixed fact and law, the review standard is that of palpable and overriding error. The primary basis for Mr. Botten's position is that the Legislature has expressly provided for a statutory right of appeal in the FLA. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov] at paras. 36 to 52, the Supreme Court of Canada stated that this is an expression of legislative intent that appellate standards of review are to be applied, albeit in the context of an administrative law case.
- [29] On the other hand, Ms. Dupuis submits that it is the more deferential standard of reasonableness that applies. To that effect, Ms. Dupuis relies mainly on earlier Supreme Court of Canada jurisprudence which has expressly held that, with some exceptions, reasonableness review is to be conducted for appeals of arbitrator's decisions made within their expertise: *Sattva Capital Corp. v. Creston Molly Corp.*, 2014 SCC 53 [Saatva] at paras. 102 to 106; and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 [Teal] at paras. 74 to 76. Ms. Dupuis argues that since Vavilov does not expressly overrule Saatva and Teal, the principles set out in the latter two judgments continue to apply to arbitration award appeals.

Discussion

- [30] The Supreme Court of Canada's clear pronouncements in Saatva and Teal once left little doubt that appeals of decisions made by arbitrators were reviewable on a reasonableness standard. Vavilov upended this certainty.
- [31] Vavilov instructs courts to look to legislative intent when determining the extent of deference to be afforded to administrative decisions that are subject to judicial challenge. Reasonableness review is presumed, unless the legislature intended a different standard to apply. In particular, if a statute expressly provides for a statutory appeal, then the less deferential appellate standards of review identified in *Housen v. Nikolaisen*, 2002 SCC 33 [Housen] are applicable. For questions of law, the standard is correctness. For mixed questions of fact and law, it is the palpable and overriding error standard, unless there is an extricable legal principle to be considered: Vavilov at paras. 36 and 37.

- [32] However, the Supreme Court of Canada in *Vavilov* did not indicate whether courts are to also apply this new analytical framework when reviewing decisions of private arbitrators, or whether it is confined to reviews of decisions made by public tribunals and administrative officials.
- [33] An opportunity to address this issue arose approximately one year after *Vavilov* was decided, in the case of *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [Wastech]. This was an appeal of an arbitrator's decision brought pursuant to s. 31 of the Arbitration Act, RSBC 1996, c. 55 [Old BC Arbitration Act]. It was heard by all nine judges of the Supreme Court of Canada. While there was unanimous agreement that the arbitrator's decision must be set aside, two sets of reasons for this conclusion were issued by the Court.
- [34] The minority opinion of three judges (Côté, Brown, and Rowe JJ.) contained an express statement that, post-*Vavilov*, statutory appeals of arbitrator's decisions ought to be subject to the *Housen* appellate review standards, and not the reasonableness standard set out in *Sattva* and *Teal*:
- [119] There are important differences between commercial arbitration and administrative decision-making (*Sattva*, at para. 104). Those differences do not, however, affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. As this Court explained in *Vavilov*, "a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts" (para. 39). This interpretive principle applies in similar manner to statutory rights of appeal from arbitral awards:
- ...
- [120] Factors that justify deference to the arbitrator, notably respect for the parties' decision in favour of alternative dispute resolution and selection of an appropriate decision-maker, are not relevant to this interpretive exercise. What matters are the words chosen by the legislature, and giving effect to the intention incorporated within those words. Thus, where a statute provides for an "appeal" from an arbitration award, the standards in *Housen* apply. To this extent, *Vavilov* has displaced the reasoning in *Sattva* and *Teal* Cedar. Concluding otherwise would undermine the coherence of *Vavilov* and the principles expressed therein.
- [35] However, this analysis was neither adopted nor rejected by the other six judges of the Court. Instead, the majority opinion (written by Kasirer J.) stated that this is an issue better left for another day, particularly since the arbitrator's award under review could not have stood regardless of the standard of review employed: *Wastech* at para. 46. That day of final reckoning has yet to come, at least at the Supreme Court of Canada level.
- [36] There are nevertheless a number of Canadian trial and intermediate appellate court decisions that have grappled with the issue of whether *Vavilov* changed the standard of review for appeals from arbitration decisions, with varying outcomes. Examples include:

- (a) *Allstate insurance Company v. Her Majesty the Queen (Ontario)*, 2020 ONSC 830: the Ontario Superior Court found that Vavilov changed the standard of review applicable to insurance arbitrators' decisions from reasonableness to correctness, given the existence of a statutory appeal mechanism;
 - (b) *Cove Contracting Ltd. v. Condominium Corporation No. 012 5598 (Ravine Park)*, 2020 ABQB 106: the Alberta Court of Queen's Bench found that Vavilov applies only to judicial reviews of administrative decisions, not appellate reviews of arbitration decisions which continue to be governed by *Saatva and Teal*;
 - (c) *Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1: the Northwest Territories Court of Appeal concluded that the revised standard of review framework described in Vavilov applies to commercial arbitration decisions reviewed as a result of a right of appeal given by statute, and therefore the *Housen* standards apply; and
 - (d) *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, 2022 MBKB 239: the Manitoba Court of King's Bench found that *Saatva and Teal* remain good law notwithstanding Vavilov, and therefore the reasonableness standard of review applies to appeals of arbitrators' decisions.
- [37] With respect to the courts in British Columbia, however, the trend has been to acknowledge the uncertainty surrounding what standard of review applies to appeals of arbitrators' decisions post-Vavilov and post-Wastech, but to then conclude that the outcome of the appeal would be the same no matter what standard is used. Examples include the decisions of our Court of Appeal in *Mann v. Grewal*, 2023 BCCA 88, *Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.*, 2022 BCCA 407, *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294, and *Nolin v. Ramirez*, 2020 BCCA 274; as well as the decisions of this Court in *Lekakis v. Lekakis*, 2023 BCSC 376, *A.E.E. v. M.T.E.*, 2022 BCSC 1534, and *J.E.A. v. V.J.A.*, 2022 BCSC 171.
- [38] However, a notable exception to this approach is the recent decision of Justice Stephens in *Zemtsova v. Shevlev Estate*, 2023 BCSC 1375 [Zemtsova]. This was an appeal of a family law arbitration award under s. 31(3.1) of the Old BC Arbitration Act (a legislative provision that has been repealed and replaced by s. 19.19 of the FLA). Justice Stephens concluded that appellate standards of review should apply to such appeals. He explained that, in accordance with the Supreme Court of Canada's comments in Vavilov, this conclusion is inescapable since this Court's review authority stems from a statutory right of appeal. Justice Stephens also felt that reduced deference is particularly appropriate for family law arbitration matters, especially those that engage consideration of the best interests of the child: *Zemtsova* at paras. 78 to 80.

- [39] The Zemtsova decision is binding upon me in accordance with the doctrine of horizontal stare decisis: *R. v. Sullivan*, 2022 SCC 19. That doctrine provides that when an issue has been decided by a judge at the same level of court, it should be followed, except in three narrow circumstances:
- 1) the rationale of an earlier decision has been undermined by subsequent appellate decisions;
 - 2) the earlier decision was reached per incuriam (i.e., through carelessness or by inadvertence); or
 - 3) the earlier decision was not fully considered (e.g., when made in exigent circumstances).
- [40] None of these circumstances apply here. In particular, neither our Court of Appeal nor the Supreme Court of Canada have addressed the issue of what standard of review applies to family law arbitration appeals since *Zemtsova* was decided on August 9, 2023. Furthermore, there can be no suggestion that Justice Stephens' decision was made carelessly, inadvertently, or without full consideration. Reasons for judgment in *Zemtsova* were issued in writing following a period of deliberation that was evidently used to carefully consider the parties' submissions on the question: *Zemtsova* at para. 62. In fact, no less than 21 paragraphs of his reasons are devoted to the standard of review issue: *Zemtsova* at paras. 61 to 81.
- [41] Accordingly, I must conclude that the standard of review applicable to this appeal is the ordinary appellate standard as prescribed in *Housen*. For questions of law, it is correctness. For questions of mixed fact and law, it is palpable and overriding error.
- [42] Before turning to the substantive appeal, however, I note that I have reached this conclusion while being cognizant that this is a s. 19.19 FLA appeal, and not one brought pursuant to s. 31(3.1) of the Old BC Arbitration Act as was the case in *Zemtsova*. While the former statutory provision has replaced the latter, their wording is for all intents and purposes identical.
- [43] Furthermore, it is clear from the relevant Hansard debates that this legislative change was not intended to substantively modify the nature of family law arbitration appeals, even though the source of the Court's jurisdiction to hear them was moved from our province's arbitration statute to its family law statute. Attorney General David Eby (as he then was) explained this to the Legislative Assembly of British Columbia on February 27, 2020, as follows:

The bill also moves family law arbitration from the current Arbitration Act to the Family Law Act. The Family Law Act is the primary family law statute in the province and is a better fit for the provisions. ... Despite the change in statute, the Family Law Act sections in this bill do not create significant changes for family law arbitration practice. The sections have been modernized and aligned with the language of the new Arbitration Act where appropriate, but the policy underlying the practice remains largely unchanged.

Question 1: Double Bind

The Parties' Positions

[44] The first alleged error that Mr. Botten has identified in the Award relates to the Arbitrator's application of s. 16.92(2) of the Divorce Act, which provides:

In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

[45] This is sometimes called the "double bind" provision. It precludes relocation application decision-makers from considering the hypothetical question of where the applicant might choose to live in the event the relocation is denied. If this were a relevant consideration, the parent seeking to relocate would face a negative consequence no matter what answer is given. If the parent says they will relocate even if their child must stay behind, that may unfairly suggest a lack of concern for the child's best interests. If the parent says they will not relocate without their child, that may unfairly suggest a lack of conviction that relocating is in the child's best interests. Of course, the responding parent's answer to this hypothetical question can also create unfairness to them.

[46] The Supreme Court of Canada clearly explained the double bind dilemma and the preventive intent behind s. 16.92(2) of the Divorce Act in *Barendregt v. Grebliunas*, 2022 SCC 22 [Barendregt] at paras. 138 to 140:

[138] ... Considering a parent's willingness to move with or without the child can give rise to a double bind: a parent can either appear to be putting their own interests ahead of their child, or they risk undermining the strength of their relocation application.

[139] This risk has led appellate courts in many provinces to discourage trial judges from relying on a parent's representations about whether they will move without the children ...

[140] The same approach is now reflected in the Divorce Act: s. 16.92(2) precludes the court from considering whether the moving parent would relocate with or without the children. I would add that a responding parent could just as easily fall victim to the problematic inferences associated with the double bind ... Therefore, in all cases, the court should not consider how the outcome of an application would affect the parties' relocation plans.

[citations omitted]

[47] Mr. Botten submits that the Arbitrator violated s. 16.92(2) by implicitly considering the hypothetical of whether Ms. Dupuis would move to Rome by herself if the Child was prohibited from relocating with her. Mr. Botten says that the Arbitrator did so by effectively presuming that Ms. Dupuis would move without the Child if the Arbitrator were to deny the relocation application.

- [48] Ms. Dupuis disputes Mr. Botten's assertion. She says that the Arbitrator considered the best interests of the Child by examining two scenarios: (1) the Child relocates to Rome with Ms. Dupuis; and (2) the Child remains in Victoria with Mr. Botten. The Arbitrator did not consider a scenario in which both Mr. Botten and Ms. Dupuis would remain with the Child in Victoria. As such, Ms. Dupuis submits that the Arbitrator did not contravene s. 16.92(2).

Discussion

- [49] The first alleged error raises a question of law, reviewable on a standard of correctness. It is whether the Arbitrator violated s. 16.92(2) of the Divorce Act by considering what Ms. Dupuis would do in the event her application to relocate to Rome with the Child were denied. If the answer is yes, this would constitute an impermissible application of the law that must be corrected by this Court.
- [50] Having carefully reviewed the Reasons, however, I can find no indication that the Arbitrator committed this alleged error. At no point in the Reasons is there a statement that can reasonably be construed as an analysis of how Ms. Dupuis would respond if the Arbitrator were to find that the Child ought to remain in Victoria. I also do not agree with counsel for Mr. Botten's assertion that it can be inferred that such impermissible reasoning was conducted from certain sentences in the Reasons since they show the Arbitrator was "presuming that [Ms. Dupuis] would relocate without [the Child]". The passages in question are the following:
- [45] Both parents acknowledge that [the Child] requires stability, but the fact that one of the parties is relocating halfway around the world will have an impact on that. ...
- ...
- [50] ... As in the previous factor, the question that must be addressed is what arrangement can best facilitate [the Child's] relationship with the parent who lives in a community far away. Whether [the Child] remains in Victoria with [Mr. Botten] or moves to Rome with [Ms. Dupuis], the other, non-resident parent's relationship with [the Child] will suffer.
- ...
- [65] As noted above, [the Child's] relocation to Italy with [Ms. Dupuis] will have a significant impact on [the Child's] relationship with [Mr. Botten]. Similarly, [the Child's] remaining in Victoria with [Mr. Botten] will have a significant impact on [the Child's] relationship with [Ms. Dupuis] following a move to Italy.
- [51] These passages demonstrate that the Arbitrator was examining whether the best interests of the Child would be served by relocating with Ms. Dupuis to Rome, or by remaining in Victoria with Mr. Botten. Section 16.92(2) of the Divorce Act does not prohibit such an examination. To the contrary, the correctness of this approach was effectively recognized by our Court of Appeal in *Link v. Lenskyj*, 2022 BCCA 341 [Link], an appeal from a trial judge's authorization of the relocation of a child from Kelowna to Australia with the applicant

parent over the objection of the respondent parent. Justice Fenlon wrote at para. 7 that:

- [7] The [trial] judge began his reasons for judgment by correctly identifying the issue before him: what parenting arrangement is in [the child's] best interests, and in particular whether it is in [the child's] best interest to relocate to Australia with his mother, or to remain in Kelowna with his father.
- [52] A similar conclusion was reached by the Alberta Court of Appeal in *Nurmi v. Nurmi*, 2023 ABCA 123, a case involving a proposed relocation to Bulgaria from Calgary. It stated that s. 16.92(2) required the trial judge in that case to assess the best interests of the children by assuming that the applicant parent will relocate and the responding parent will stay in place:
- [15] So, the options are to assume the applicant will relocate and consider whether it is in the best interests of the children to remain with the applicant or to remain with the respondent. Remaining with the applicant in Canada is not an option for the court to consider.
- [53] Finally, it is also worth noting the very recent decision of our Court of Appeal in *C.C. v. S.P.R.*, 2023 BCCA 422; aff'g 2022 BCSC 1503. It involved an application by a child's mother to relocate from Vancouver to Kamloops over the objection of the child's father who wished to remain in Vancouver. At trial, counsel for the parties urged the judge to consider "four scenarios" for the child's residence: (1) primary residence with the mother in Kamloops; (2) primary residence with the father in Vancouver; (3) shared parenting in Kamloops; and (4) shared parenting in Vancouver. However, the trial judge only considered the first two scenarios, explaining his rationale for doing so as follows:
- [129] My view, which accords with Dr. LaTorre's conclusion, is that it would be in S.R.'s best interest if both parents lived in the same city and exercised equally shared parenting time. However, the parties have not presented living in the same city as an option. I cannot compel either party to move and s. 16.92(2) of the Divorce Act prohibits me from considering whether the claimant would continue to remain in Kamloops without S.R. or move back to the Lower Mainland should I refuse to order the relocation of S.R.
- [54] The Court of Appeal held that the trial judge's approach was the correct one:
- [21] The judge was correct to conduct the assessment under s. 16.92 and to consider S's best interests in the context of the plans presented by each party: S primarily residing with his father in the Lower Mainland or S residing primarily with his mother in Kamloops. There were no other options proposed by the parties. The father was not in a position to move to Kamloops, and the mother had already moved to Kamloops and asked the court for permission to live there with S.
- [55] In sum, I find that the Arbitrator did not contravene s. 16.92(2) of the Divorce Act as alleged by Mr. Botten.

Question 2: Burden of Proof

The Parties' Positions

[56] The second alleged error that Mr. Botten has identified in the Award relates to the Arbitrator's application of s. 16.93(1) of the Divorce Act, which states:

If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

[57] Since the Separation Agreement provides that the parties shall have equal parenting time, this provision applies to impose the burden of proof on Ms. Dupuis to show that relocating the Child to Rome would be in the Child's best interests. Section 16.93(1) stands in contrast to ss. 16.93(2) and 16.93(3) of the Divorce Act. The latter two provisions address the burden of proof in cases where: (a) a child resides primarily with the applicant; and (b) a child's living arrangements are other than those specified at ss. 16.93(1) and 16.93(2), respectively.

[58] Mr. Botten submits that the Arbitrator wrongly imposed an equal burden on both parties to demonstrate why the proposed relocation is or is not in the Child's best interests. The Arbitrator is alleged to have done this by assessing the impact the relocation would have on the Child's relationship with Mr. Botten by engaging in consideration of the impact on the Child's relationship with Ms. Dupuis if relocation were denied and Ms. Dupuis moved to Rome alone. Mr. Botten argues that this is contrary to the effective presumption against relocation imposed by s. 16.93(1) for parents who have agreed to equal parenting time.

[59] Ms. Dupuis, on the other hand, says that the Reasons of the Arbitrator confirm that he was alive to the notion that Ms. Dupuis bore the burden of proof. She argues that the mere fact the Arbitrator concluded that Ms. Dupuis had met this burden does not mean that it was misapplied.

Discussion

[60] While both parties urge the Court to treat this alleged error as a mixed question of fact and law, I disagree. Like the first alleged error, the issue of whether the Arbitrator gave effect to a provision of the Divorce Act that he was required to apply is a question of law that is reviewable on a non-deferential correctness standard.

[61] It is beyond dispute that in light of the terms of the Separation Agreement, the Arbitrator was bound by s. 16.93(1) to impose the burden of proof on Ms. Dupuis to show that the proposed relocation to Rome is in the Child's best interests. If the Arbitrator had imposed the burden on Mr. Botten to show the opposite, or applied an equal burden on both parties to justify their respective positions, he would have fallen into reviewable error. However, I can see no indication that the Arbitrator took either of these impermissible approaches from my review of the Reasons.

- [62] It is true that the Arbitrator did not explicitly cite or quote s. 16.93(1) in his Reasons. However, he noted in his summary of the parties' positions that they both agreed that Ms. Dupuis has the burden of proving that relocating to Rome would be in the Child's best interests (Reasons at paras. 22(a) and 26(a)). More significantly, the Arbitrator expressly found at para. 74 of the Reasons that Ms. Dupuis had met her burden in this case:
- [74] [The Child] should be allowed to relocate to Rome. I find that the advantages to [the Child] outweigh the disadvantages and I find [Ms. Dupuis] has discharged her onus of proof in that regard.
- [emphasis added]
- [63] Furthermore, I do not agree with Mr. Botten that I should infer that the Arbitrator somehow relieved Ms. Dupuis from this burden because of the manner in which he assessed how the Child's relationship with the parents would be impacted if Ms. Dupuis were to move to Rome without the Child. As has already been noted in the previous section of this analysis, it was entirely acceptable for the Arbitrator to compare whether it would be in the best interests of the Child to remain in Victoria with Mr. Botten or to move to Rome with Ms. Dupuis, so long as he was conscious of where the burden of proof lies and made sure to impose it on the proper party.
- [64] In other words, if the Arbitrator had found on the evidence that the best interests of the Child would be served equally by remaining in Victoria as would be the case if the Child were to move to Rome, then the Arbitrator would have been obligated by s. 16.93(1) of the Divorce Act to dismiss Ms. Dupuis' application. However, the Arbitrator did not so find so. He determined instead that relocating to Rome would be in the Child's best interests when compared to staying in Victoria. Given this assessment, the Arbitrator correctly applied s. 16.93(1) by allowing Ms. Dupuis' relocation application.
- [65] In sum, I find that the Arbitrator did not contravene s. 16.93(1) of the Divorce Act as alleged by Mr. Botten.

Question 3: Speculation

The Parties' Positions

- [66] The third alleged error that Mr. Botten has identified in the Award relates to the manner in which the Arbitrator came to the conclusion that relocation was in the Child's best interests. Mr. Botten notes that the Arbitrator found that, along with Ms. Dupuis' generous proposals for facilitating the Child's relationship with Mr. Botten, there were three "determinative" factors supporting this conclusion. They related to benefits for the Child stemming from: (a) being in a two-parent household; (b) attending a "world class international" school; and (c) experiencing educational, linguistic, travel, and cultural opportunities in Europe. Mr. Botten submits that these findings were made in error as they were based on mere speculation, not evidence.

[67] Ms. Dupuis disagrees. She says that all of these findings of fact had an evidentiary foundation. As such, the Arbitrator's conclusion that the advantages to the Child of relocating to Rome outweigh the disadvantages of leaving Victoria does not warrant being interfered with on appeal.

Discussion

[68] As a preliminary observation, it is not open to Mr. Botten to appeal the Arbitrator's findings of fact. This stems from s. 19.19 of the FLA which limits appeals from family law arbitration awards to questions of law and mixed questions of fact and law. As was noted in *Barendregt* at para. 1, an appeal is not a retrial and the Court has no licence to review the evidence afresh. It also cannot entertain an appeal based on evidence that is not before this Court: *Anins v. Anins*, 2022 BCCA 441 at para. 14.

[69] At best, whether the Arbitrator erred in the manner alleged by Mr. Botten under the rubric of "speculation" is a mixed question of fact and law. As such, the Court will only intervene if Mr. Botten demonstrates that the Arbitrator committed a palpable and overriding error in reaching his impugned conclusion based on the evidence that was before him.

[70] In my view, the Arbitrator did not so err when he made the following findings at paras. 75 and 76 of his Reasons:

[75] In his testimony, [Mr. Botten] acknowledged [the Child] would benefit from:

- a) having the opportunity to be in a two-parent household
- b) attending a "world class international" school
- c) the educational, linguistic, travel and cultural opportunities available to her in Europe.

[76] I find that those advantages, coupled with [Ms. Dupuis'] generous proposals aimed at accommodating or facilitating [the Child's] relationship with [Mr. Botten] are determinative in arriving at my decision.

[71] All three of the factors referenced in para. 75 of the Reasons were supported by evidence that was before the Arbitrator. In particular, Ms. Dupuis' uncontradicted affidavit evidence stated that Mr. Baldi would become a "bonus parent" for the Child within the context of their planned two-parent household. That same evidence addressed the accessibility of international schooling in Rome for the Child, as well as opportunities for exposure to travel, languages, and culture in Europe. Mr. Botten did not take issue with any of this in his responding affidavit evidence, and acknowledged that these opportunities would be beneficial for the Child in his oral testimony before the Arbitrator. Accordingly, I do not find that the Arbitrator's conclusion is the product of a palpable and overriding error.

[72] I also cannot agree with counsel for Mr. Botten's criticism of the sufficiency of the Arbitrator's reasons for finding these particular factors "determinative" in concluding that relocating to Rome is in the Child's best interests. In my view, they are adequate given that

the Participation Agreement provided that the Arbitrator need only provide summary reasons for the Award. Furthermore, Mr. Botten chose not to exercise his contractual right to request more detailed reasons. In these circumstances, Mr. Botten's complaint on appeal that the Arbitrator's reasons are insufficient rings hollow.

- [73] In sum, I find that the Arbitrator's assessment of whether the proposed relocation is in the best interests of the Child is not improperly based on mere speculation as alleged by Mr. Botten.

Question 4: Support of Child's Relationship and Contact With Other Parent

The Parties' Positions

- [74] The fourth alleged error identified by Mr. Botten relates to the Arbitrator's analysis of two of the specific factors that must be considered on a relocation application as per ss. 16(3)(c) and 16.92(1)(f) of the Divorce Act.
- [75] The s. 16(3)(c) factor is each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse. The s. 16.92(1)(f) factor is the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility, or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses.
- [76] Mr. Botten submits that the Arbitrator misapplied both s. 16(3)(c) and s. 16.92(1)(f) of the Divorce Act to the case before him, in two ways. First, by comparing the parties' respective travel proposals for the Child in the event the relocation is allowed or denied, when only Ms. Dupuis' proposal ought to have been considered. Second, by drawing upon Ms. Dupuis' travel proposal to support the Arbitrator's finding that Ms. Dupuis was the more supportive parent than Mr. Botten was.
- [77] Ms. Dupuis submits instead that the Arbitrator properly considered her parenting time proposals in reaching his conclusion that the s. 16(3)(c) and s. 16.92(1)(f) factors weighed in favour of the Child's relocation. Ms. Dupuis says that Mr. Botten is effectively inviting the Court to reweigh the factors in order to reach a different conclusion, which is not permitted on appeal.

Discussion

- [78] I agree with the parties that this alleged error is a mixed question of fact and law. The issue is therefore whether the Arbitrator committed a palpable and overriding error when he applied his findings of fact to consideration of the Child's best interests in relation to the factors set out at ss. 16(3)(c) and 16.92(1)(f) of the Divorce Act.

[79] In keeping with the summary nature of his Reasons, the Arbitrator simply explained his assessment of these factors as follows:

16(3)(c) - Each Spouse's Willingness to Support the Child's Relationship with the Other Spouse

[54] This, in my view, is a significant factor and, as noted above, it strongly favours [Ms. Dupuis'] application.

...

16.92(f) [sic] - The Reasonableness of the Relocating Parent's Proposals

[71] I find that [Ms. Dupuis'] proposals in this regard are both reasonable and generous.

[80] With respect to the s. 16(3)(c) factor, it is apparent that the factual elements "noted above" by the Arbitrator included those set out at paragraphs 28, 46, 48, 49, and 53 of the Reasons. They can be summarized as follows:

- (a) Mr. Botten's position is that if Ms. Dupuis moves to Italy, she should be solely responsible to pay for the Child's transportation to and from Victoria for Ms. Dupuis' exercise of parenting time (Reasons, para. 28);
- (b) The essence of Mr. Botten's position is that Ms. Dupuis should not pursue her relationship with Mr. Baldi or move to Italy, and that as Ms. Dupuis is to blame for the disruption, she should suffer the consequence rather than Mr. Botten (Reasons, para. 46);
- (c) Ms. Dupuis is willing to support Mr. Botten's relationship with the Child through generous parenting time and travel proposals, including that she travel with the Child to and from Rome each year with no requirement on Mr. Botten's part to assist in that travel other than pay one half of the travel expenses (Reasons, para. 48);
- (d) While Mr. Botten is not unable to travel, he is unwilling to do so given his sciatica which makes travel uncomfortable for him; Mr. Botten has also not offered to assist in the physical travel arrangements (Reasons, para. 49); and
- (e) Ms. Dupuis is much more willing to facilitate the Child's relationships with friends and family than is Mr. Botten (Reasons, para. 53).

[81] As for the s. 16.92(1)(f) factor, the only proposal considered by the Arbitrator was that of Ms. Dupuis, which he explained at paragraph 24 of the Reasons as follows:

24. [Ms. Dupuis] maintains that the ideal situation would be for [Mr. Botten] to relocate to Europe and for shared custody to continue but, if that is not possible, then she has set out a detailed proposal that she says is as generous as possible to [Mr. Botten] to ensure a continued strong relationship with [the Child]. Her proposal provides the following accommodations in that regard:

- a) Either

- i. no requirement by [Mr. Botten] to pay table support, but an obligation that he pay one-half of travel costs for [the Child] and an accompanying adult (either [Ms. Dupuis] or other appropriate adult that she arranged for, but no requirement for [Mr. Botten] to travel), or
- ii. an obligation by [Mr. Botten] to pay table support, but no obligation to pay travel costs for [the Child] and an accompanying adult nor any obligation on his part to travel, ...

[82] In my view, no palpable and overriding error was committed by the Arbitrator in his assessment of the two factors, which was based on the evidence before him.

[83] In particular, it was not only open to the Arbitrator to consider each party's willingness to support the development and maintenance of the Child's relationship with the other spouse, but a requirement that he do so under s. 16(3)(c). This was noted by the Court of Appeal in *Link* at paras. 30 and 31:

[30] The appellant says that he had no burden to establish that he would make reasonable arrangements to facilitate the mother's access, whereas the mother did have such a burden under the Family Law Act which she asserted at trial should be the governing legislation. He says it is not surprising, therefore, that the respondent provided such evidence and he did not. However, evidence of this kind is also relevant under the Divorce Act which identifies "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse" as a factor to be considered in determining the best interests of the child: s. 16(3)(c). Other than his submissions on an appropriate parenting schedule, the appellant has not pointed to any evidence given by him in-chief or reflected in the s. 211 report indicating how he would support B.'s relationship with his mother and facilitate her parenting time if the court were to disallow the relocation.

[31] In my view, it was open to the judge on the evidence before him to conclude that the respondent exhibited more willingness to support the child's relationship with the appellant. I would accordingly not accede to this ground of appeal.

[84] I also do not agree with Mr. Botten that by taking into account the parties' respective travel proposals for his s. 16(3)(c) analysis, a palpable and overriding error was committed, particularly since this was not the only basis for the Arbitrator's finding that the relative extent of Ms. Dupuis' willingness to support the Child's relationship with Mr. Botten was a factor that militated in favour of allowing the relocation. In addition, Mr. Botten is wrong to suggest that the Arbitrator also examined his travel proposals for the purposes of the s. 16.92(1)(f) analysis when the wording of paragraph 71 of the Reasons clearly references only Ms. Dupuis' proposals.

[85] In sum, I find that the Arbitrator's assessment of the Child's best interests through the lens of the ss. 16(3)(c) and 16.92(1)(f) factors was not made in error as alleged by Mr. Botten.

Question 5: Maximum Contact Principle

The Parties' Positions

[86] The fifth alleged error that Mr. Botten has identified in the Award relates to the Arbitrator's application of s. 16(6) of the Divorce Act, which states:

In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

[87] Mr. Botten submits that while the Arbitrator mentioned this provision in his Reasons, he failed to actually apply it. Had the Arbitrator applied s. 16(6) as required, he would have found that the Child's physical separation from Mr. Botten was a significant negative factor that weighs against relocation.

[88] Ms. Dupuis disagrees. She submits that it is apparent from the Arbitrator's reasons that s. 16(6) of the Divorce Act was considered and applied, but that the Arbitrator properly did not allow this provision to overshadow his overall analysis of whether relocation was in the Child's best interests.

Discussion

[89] As was the case with respect to Mr. Botten's second alleged error, I cannot agree with the parties that the issue he raises under the rubric of "maximum contact principle" is a mixed question of fact and law. In my view, this is another allegation that the Arbitrator failed to give effect to a provision of the Divorce Act that he was required to apply. As such, it is subject to correctness review.

[90] There is no dispute that the Arbitrator was aware of s. 16(6) of the Divorce Act. Under the heading "Maximum Contact", he wrote the following at paragraph 73 of the Reasons:

[73] Section 16(6) of the Divorce Act requires the adjudicator to consider the maximum contact principle. Both parties concede that the maximum contact principle is not absolute. "In many, if not most, relocation cases, reduced parenting time for one parent is the only realistic potential outcome, and in such cases the focus must be on the consequences to the child of the reduced parental interaction that would result from the proposed relocation" (Joseph v. Washington, 2021 BCSC 2014 at para. 98, citing A.D.W., v. B.J.W., 2018 BCSC 1179).

[91] While the Reasons contain no further explicit discussion of the principle, I am satisfied that it was applied by the Arbitrator. This can be seen from paragraphs 2 and 3 of the Award, which sets out the parties' parenting time following the Child's relocation:

2. If [Mr. Botten] relocates to Rome, Italy, the parties shall continue to share custody of Evelyn on the terms set out in the Separation Agreement, including the 4/3/3/4 parenting schedule.
3. If [Mr. Botten] does not relocate to Italy, then [the Child's] primary residence shall be with [Ms. Dupuis] and [Mr. Botten] shall have parenting time with [the Child] as follows:

- (a). two three-week periods every summer in Victoria, which may be extended to include longer consecutive blocks of time and/or a longer overall duration as agreed upon by the parties,
- (b). up to 3 weeks in Victoria during [the Child's] school Spring Break,
- (c). daily video or telephone calls at times agreed upon by the parties, and
- (d). reasonable and generous in-person access in Europe.

[92] These terms reflect a clear attempt to provide Mr. Botten with as much parenting time as is reasonably possible under both the scenario whereby Mr. Botten also relocates to Rome, and the scenario whereby Mr. Botten remains in Victoria. The terms for the latter naturally reflect that there will necessarily have to be a reduction in Mr. Botten's parenting time as the non-moving parent. This is an acknowledged and accepted consequence of relocation in the vast majority of cases, as was noted in the *A.D.W., v. B.J.W.*, 2018 BCSC 1179 decision cited by the Arbitrator:

[50] The Court in *Gordon* also stated that the maximum contact principle set out in the Divorce Act is a mandatory consideration but not an absolute one: at para. 24. A proposed relocation will not necessarily be denied solely on the basis that it will have the effect of reducing a parent's parenting time with the child: at para. 25. As observed by the Court in *McArthur*, at para. 117, the fact that there will be reduced parenting time for the non-moving parent to see his or her children is an obvious outcome of relocation in the vast majority of cases. The focus of the Court must be on the consequences to the child of the reduced parental interaction which would result from the proposed relocation.

[emphasis added]

[93] Of course, Mr. Botten is not arguing that the Arbitrator was wrong to allocate parenting time for the Child in accordance with paragraphs 2 and 3 of the Award. His argument is that that the Award's Relocation Term which authorizes the Child to move to Rome was made contrary to s. 16(6) of the Divorce Act. However, such an argument overstates the impact that s. 16(6) has on the relocation analysis. In particular, this provision does not preclude relocation simply because the geographical distance between the parents will render it impractical for the parties to maintain equal parenting time going forward, as Mr. Botten's argument suggests. This was effectively decided by the Supreme Court of Canada in *Barendregt* at paras. 131 to 135 where it was observed that, going forward, the "maximum contact principle" is better referred to as the "parenting time factor". It was also clearly explained by Justice Kirchner of this Court in *B.M.W.G. v. J.W.G.*, 2022 BCSC 1346 at paras. 31 and 32:

[31] The maximum contact principle does not create a presumption of shared parenting or imply that as much contact as possible with both parents will necessarily be in the child's best interests: *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 134 [*Barendregt*]. In *A.D.W. v. B.J.W.*, 2018 BCSC 1179 at para. 50 [*A.D.W.*], Justice Dardi noted that a proposed relocation "will not necessarily be denied solely on the basis that it will have the effect of reducing a parent's

parenting time with the child". She added that a reduction in parenting time for the non-moving parent is an "obvious outcome" in the vast majority of relocation cases.

- [32] Thus, the maximum contact principle must be observed but it "cannot overshadow the best interests of the child": D.D.R. v. K.T.R., 2019 BCSC 1805 at para. 35 [D.D.R.]. As the Court of Appeal noted in K.W. v. L.H., 2018 BCCA 204 at para. 132 [K.W.], "[i]f it was otherwise, then a parent would never be allowed to relocate because in almost every case, relocation will lessen the contact between the child and one of the parents."
- [94] In sum, I find that the Arbitrator did not fail to apply s. 16(6) of the Divorce Act or otherwise err in his consideration of the parenting time factor as alleged by Mr. Botten.

Question 6: Separation Agreement

The Parties' Positions

- [95] The sixth alleged error that Mr. Botten has identified in the Award relates to the Arbitrator's analysis of another specific factor that must be considered on a relocation application, namely, the existence of an agreement that specifies the geographic area in which the child is to be reside. Section 16.92(1)(e) of the Divorce Act requires such agreements to be taken into account by adjudicators of relocation applications.
- [96] Mr. Botten submits that the Arbitrator misapplied s. 16.92(1)(e) by finding that the term of the parties' Separation Agreement prohibiting relocation of the Child without written consent of the other parent or a court order is simply procedural in nature. Mr. Botten says that the Arbitrator erred by not considering what substantive impact this aspect of their agreement has on whether Ms. Dupuis should be permitted to relocate the Child to Rome.
- [97] Ms. Dupuis takes the position that Mr. Botten misconstrues the terms of the Separation Agreement. She says that the parties did not agree to an absolute prohibition on the Child's relocation; rather, they agreed that the Child could not be moved outside of Victoria in the absence of further agreement or judicial authorization. As such, the Arbitrator did not err by concluding that the geographic clause in the Separation Agreement had been complied with by virtue of their agreement to have Ms. Dupuis' relocation application decided through arbitration.

Discussion

- [98] As submitted by the parties, this alleged error is a mixed question of fact and law. The issue is therefore whether the Arbitrator committed a palpable and overriding error when he applied his findings regarding the scope and effect of the Separation Agreement to his assessment of the Child's best interests while considering the parties' agreement regarding the geographic area in which the Child is to reside pursuant to s. 16.92(1)(e) of the Divorce Act.

[99] Under the heading "Co-Parenting Decision-Making", the Separation Agreement contains the following term at paragraph 9:

9. Neither parent will move [the Child] from the Greater Victoria Area without
 - a) the written consent of the other parent, or
 - b) a court order.

[100] In addition, paragraph 13 of the Separation Agreement provides:

13. In the event of a disagreement between [Ms. Dupuis] and [Mr. Botten] about any parental responsibility for [the Child], the parents will attempt to resolve the issue in mediation, as provided in the "Dispute Resolution" clauses in this Agreement.

[101] The "Dispute Resolution" clauses in the Separation Agreement include paragraph 117, which reads:

117. If [Ms. Dupuis] and [Mr. Botten] cannot resolve an issue that has been the subject of mediation, then the parents will proceed to an adjudication process, such as court proceedings or arbitration, depending on the circumstances.

[102] At paragraphs 69 and 70 of his Reasons, the Arbitrator considered the impact of the terms of the Separation Agreement that relate to the geographic location where the Child is to reside:

16.92(d) [sic] - Existence of an Agreement That Specifies a Geographic Area in Which the Child Is to Reside

[69] The parties' agreement provides that neither parent will relocate Evelyn from Greater Victoria without written consent or court order.

[70] The parties are complying with this provision by the very fact of this proceeding. Accordingly, this factor is neutral.

[103] I agree with Mr. Botten that these words indicate that the Arbitrator found that the terms of the Separation Agreement that address how the parties may relocate the Child outside of Greater Victoria are largely procedural in nature. Fundamentally, the Arbitrator found that it had been agreed that no such relocation would take place absent the taking of certain procedural steps, namely, the signing of a written agreement or formal adjudication of this issue. At the same time, the Arbitrator did not find that the parties had agreed substantively that the Child would necessarily be raised in Greater Victoria, or that the parents must both continue to reside in the same community as the Child. In my view, however, this does not constitute an error on the Arbitrator's part.

[104] In conducting his assessment, the Arbitrator was essentially engaging in an exercise of contractual interpretation. As was stated by the Supreme Court of Canada in *Saatva* at para. 47, this must be done in accordance with the following principles:

... the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". ... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[citations omitted]

[105] From my review of the Separation Agreement and my understanding of the evidence that was before the Arbitrator, I find that it was open to him to conclude that paragraphs 9, 13, and 117 were simply designed to ensure that neither party would unilaterally relocate the Child from Greater Victoria. Such an interpretation reflects the ordinary meaning of the wording of these paragraphs, consistent with the surrounding circumstances known to the parties. It conforms with the parties' apparent understanding that, in the event one party wishes to relocate with the Child in the face of opposition by the other, the issue would be procedurally addressed through formal dispute resolution. Accordingly, the Arbitrator did not commit a palpable and overriding error by concluding that the s. 16.92(1)(e) factor is neutral in terms of determining the best interests of the Child.

[106] In sum, I find that the Arbitrator did not misapply s. 16.92(1)(e) of the Divorce Act as alleged by Mr. Botten.

Question 7: Balance of the Assessment

The Parties' Positions

[107] The seventh alleged error that Mr. Botten has identified in the Award relates to the general approach taken by the Arbitrator to his assessment of Ms. Dupuis' relocation application. Mr. Botten says that it was one-sided and not balanced. In particular, Mr. Botten argues that while the Arbitrator purported to find that the advantages of relocation outweighed the disadvantages by reference to three "determinative" factors, the Arbitrator did not identify and assess any disadvantages to relocating, notably its impact on the Child's relationship with Mr. Botten.

[108] Ms. Dupuis disagrees and says that the Arbitrator provided a balanced assessment of the Divorce Act factors that took into account both parties' positions. She submits that the Arbitrator did not make any improper presumptions or otherwise engage in prohibited reasoning. As such, the Arbitrator's decision should be confirmed.

Discussion

[109] While it initially appeared to me that Mr. Botten was attempting to raise a procedural fairness or reasonable apprehension of bias argument, this is not the case. As explained by counsel for Mr. Botten, the concern being raised is not partiality but rather the Arbitrator's

allegedly incomplete and skewed consideration of the relocation issue. Such an approach was held to be problematic in two appellate level relocation cases that she brought to my attention: *D.A.M. v. C.J.B.*, 2017 NSCA 91 ["D.A.M."] at paras. 31 to 36; and *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 ["Hejzlar"] at para. 52. As such, I accept that this is a valid challenge to the Arbitrator's decision which is to be assessed as a question of mixed fact and law on the palpable and overriding error standard.

- [110] That being said, I am unable to agree with Mr. Botten that this is a case like *D.A.M.* or *Hejzlar*, each of which were appeals from trial court judgments. Accepting, as I must, that the Arbitrator was engaged to adjudicate the parties' dispute in a relatively rapid and cost-effective manner through the issuance of summary reasons, I do not find they demonstrate an imbalance in the assessment of the parties' evidence regarding the Child's best interests.
- [111] In particular, the Arbitrator recognized several examples of advantages to the Child of remaining in Victoria with Mr. Botten. These include the fact that Mr. Botten offers the Child the continuity of the current environment, including a familiar home and community, continued connection with Mr. Botten's friends and family, as well some childhood friends (Reasons at para. 47). The Arbitrator also recognized the main disadvantage of the Child's relocation to Italy, namely, its significant impact on the Child's relationship with Mr. Botten (Reasons at para. 65). However, the Arbitrator ultimately concluded that the advantages of the proposed relocation outweigh the disadvantages. The fact that this conclusion was reached does not, of course, demonstrate that the Arbitrator's assessment was unbalanced.
- [112] In sum, I find that the Arbitrator did not conduct an unbalanced assessment of the evidence and thereby commit a palpable and overriding error in issuing the Relocation Term as alleged by Mr. Botten.

Question 8: School Selection Term

The Parties' Positions

- [113] The eighth and final error that Mr. Botten has identified in the Award relates to the School Selection Term that was issued by the Arbitrator.
- [114] Mr. Botten submits that the parties did not consent to having the Arbitrator determine their respective authority over the choice of the Child's school. Instead, the Participation Agreement limited the scope of the arbitration to just the issues of relocation and child support. By nevertheless imposing the School Selection Term on the parties, Mr. Botten submits that the Arbitrator exceeded his jurisdiction.
- [115] Ms. Dupuis took the position that the issue of what school the Child should attend in Rome is ancillary to the issues of relocation and child support. Therefore, the Arbitrator did not act outside of his jurisdiction by issuing the School Selection Term. If this position is rejected by the Court, however, Ms. Dupuis accepts that the School Selection Term should be set aside, but without disturbing the balance of the Arbitrator's Award.

Discussion

- [116] The issue of whether an arbitrator acted in excess of their jurisdiction is a question of law, reviewable on a standard of correctness.
- [117] In *Voong v. GPUN Broadway Investment Inc.*, 2017 BCSC 1521 at paras. 44 to 47, Justice Warren helpfully canvassed the guiding principles for applications to challenge arbitral awards on the basis of an alleged excess of jurisdiction. They can be summarized as follows:
- (a) an arbitrator's jurisdiction flows from the parties' arbitration agreement, and is generally limited to answering the question submitted by the parties and any questions necessary for a determination of that question (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, [1999] B.C.J. No. 554 at para. 31; *aff'd* 2000 BCCA 62);
 - (b) the parties to an arbitration agreement are not presumed to have agreed to submit all matters that may arise between them to arbitration (*Cut & Run Holdings v. Booze Bros. Holdings et al.*, 2005 BCSC 167 at paras. 24-25);
 - (c) if the arbitrator issues an award that goes beyond the scope of their arbitration agreement, they will have exceeded their jurisdiction and committed arbitral error (*BC Gas Inc. v. Westcoast Energy Inc.*, [1990] B.C.J. No. 2924 at paras. 22 and 40); and
 - (d) the scope of an arbitration agreement is determined by an analysis of the nature of the disagreement, the words of the arbitration clause, and the terms of the contract as whole in their factual context (*St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 21).
- [118] In the case at bar, the Participation Agreement sets out the matters which the parties had agreed to be decided by the Arbitrator as follows:
- 1) Eugene Raponi, Q.C. will be the Mediator/Arbitrator with respect to the following issues in dispute between the spouses:
 - a. [Ms. Dupuis'] application to relocate to Italy with [the Child], and
 - b. Child Support.
- [119] Both of these issues - relocation and child support - are also the subject of express provisions in the parties' Separation Agreement concluded previously. Relocation is addressed at paragraphs 9, 10(b), and 10(c) of the Separation Agreement. Child support and related matters (e.g., special or extraordinary expenses, the Child's medical and dental insurance coverage, etc.) are addressed at paragraphs 38 to 63 of the Separation Agreement. Accordingly, I accept that by expressly indicating in the Participation Agreement that the Arbitrator is to decide Ms. Dupuis' relocation application and child support issues, the parties contractually bestowed jurisdiction upon the Arbitrator to make awards in relation to these issues.

- [120] On the other hand, the Separation Agreement also includes a provision regarding parental authority over decisions respecting the Child's education, including the nature, extent and location. It is at paragraph 10(d). It provides that Ms. Dupuis and Mr. Botten shall have equal responsibility and authority to make these decisions.
- [121] In my view, if the parties had also intended to have the Arbitrator consider a modification to their equal parenting authority over the choice of the Child's school, this would have been expressly identified as an issue for the Arbitrator's consideration in the Participation Agreement. As it was not, the Arbitrator did not have the jurisdiction to impose the School Selection Term on the parties. I also do not agree with Ms. Dupuis that the issue of which school the Child should attend in Rome is an ancillary question to the matters of relocation and/or child support that must necessarily be decided in order to answer the relocation and child support issues that are properly before the Arbitrator.
- [122] In sum, I find that the Arbitrator exceeded his jurisdiction by issuing the School Selection Term as alleged by Mr. Botten. This is an error of law that must be corrected on appeal.

Conclusion and Remedy

- [123] I have concluded that, with the exception of the School Selection Term, the Arbitrator committed no reviewable errors by issuing the Award. Accordingly, I will exercise my authority pursuant to s. 19.19(3) of the FLA to confirm all of the terms of the Award other than the School Selection Term, which will be set aside.

DISPOSITION

- [124] For the reasons set out above, I order the following:
- (a) paragraphs 1 to 8 and 10 to 13 of the Award dated September 16, 2022 are confirmed;
 - (b) paragraph 9 of the Award dated September 16, 2022 is set aside; and
 - (c) the continued stay of the Award that was ordered pending the outcome of this appeal is lifted effective immediately.
- [125] Ms. Dupuis has been substantially successful in this proceeding. As such, she will be awarded her costs of responding to Mr. Botten's appeal, to be assessed at the scale of ordinary difficulty.

"Brongers J."

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