

CANADA / JUDGMENT

Botten v. Dupuis

2024 BCCA 284

COURT

British Columbia Court of Appeal

DECIDED

7 August 2024

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2024 BCCA 284 Botten v. Dupuis

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Botten v. Dupuis,

2024 BCCA 284

Date: 20240807

Docket: CA49643

Between:

Gregory Botten

Appellant

(Appellant)

And

Kelsey Dupuis

Respondent

(Respondent)

Before:

The Honourable Chief Justice Marchand

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated

January 10, 2024 (Botten v. Botten, 2024 BCSC 39, Victoria Docket E223307).

The Appellant, appearing in person:

G. Botten

Counsel for the Respondent:

E. Neary

Place and Date of Hearing:

Victoria, British Columbia

June 6, 2024

Place and Date of Judgment:

Vancouver, British Columbia

August 7, 2024

Written Reasons by:

The Honourable Chief Justice Marchand

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fisher

Summary:

The appellant and the respondent married in 2016 and separated in 2020. They have one child together. In 2021, the respondent informed the appellant she wished to relocate the child to Rome, where her fiancé (now spouse) lived. They agreed to have the issue decided by mediation-arbitration. The arbitrator's award consisted of 13 terms, including one term allowing the child to relocate to Rome with the respondent. Another term provided that, if the parties were unable to agree on what school the child would attend, the respondent was entitled to choose and the appellant had the right to apply to an arbitrator or the court for directions.

The appellant appealed the arbitrator's decision to the Supreme Court of British Columbia. The judge set aside the school selection term of the arbitration award on the basis it was outside the arbitrator's jurisdiction. He confirmed all other terms of the award. On further appeal to this Court, the appellant contends that: (1) the arbitration was procedurally unfair; and (2) the appeal judge erred by failing to consider the impact of setting aside the school selection term on the arbitrator's overall decision. He also brings an application to adduce additional evidence to support aspects of his appeal.

Held: Application to adduce additional evidence dismissed; appeal dismissed. The arbitration was not procedurally unfair. There is no indication in the record that the appellant raised procedural fairness concerns before either the arbitrator or the appeal judge. The appellant had a fair opportunity to adduce whatever evidence he wished regarding educational options for the child. Further, on any objective reading of the arbitrator's reasons it is abundantly clear the arbitrator's relocation decision would have been the same without the school selection term.

None of the appellant's proposed additional evidence undermines the reality that the parties will ensure the child receives an excellent education. The outcome of the respondent's relocation application turned on her superior parenting time and travel proposals, not choice of school.

Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

- [1] Child relocation cases are among the most difficult cases to decide, particularly where, as here, one of two good parents wishes to relocate far from the other good parent for good faith reasons. Yet, a decision must be made.
- [2] In this case, the appellant, Gregory James William Charles Botten, and the respondent, Kelsey Elizabeth Dupuis, began living together in Victoria on August 15, 2014, and were married on September 3, 2016. Their only child was born approximately one year later (the "child").
- [3] The parties separated on March 1, 2020 and entered into a separation agreement on September 1, 2020. Under the terms of the separation agreement, both parties continued as the child's guardians, and shared parenting responsibilities and parenting time equally. A divorce order was granted on June 28, 2021.
- [4] In May 2021, Ms. Dupuis informed Mr. Botten she wished to relocate the child to Rome, where her fiancé (now spouse) Simone Baldi lived. Ms. Dupuis and Mr. Baldi had explored the idea of Mr. Baldi moving to Victoria, but found it was not practical. Ms. Dupuis and Mr. Botten were unable to reach an agreement on relocating the child to Rome. They agreed to have the issue decided by mediation-arbitration.
- [5] On March 23, 2022, the parties signed an agreement to participate in family law mediation-arbitration to resolve Ms. Dupuis' relocation application and child support (the "Participation Agreement").
- [6] Mediation was unsuccessful so the parties proceeded to arbitration. The arbitration was held over three and a half days during the week of August 22, 2022. The parties provided direct evidence by way of affidavit and were subject to cross-examination.
- [7] The Participation Agreement provided the arbitrator would issue summary reasons, unless, prior to pronouncement of his award, one of the parties requested otherwise. Neither party made such a request.

- [8] The arbitrator issued his award on September 16, 2022. It consisted of 13 terms, including one term allowing the child to relocate to Rome with Ms. Dupuis effective December 31, 2022, or a later date as agreed by the parties.
- [9] The arbitrator concluded the advantages of the child relocating to Rome outweighed the disadvantages. His conclusion largely turned on factors discussed at paras. 75-76 of his summary 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]'s generous proposals aimed at accommodating or facilitating [the child]'s relationship with her father are determinative in arriving at my decision.
- [10] The award also addressed parenting time, travel logistics and expenses, child support, and the cost of schooling and extracurricular activities. Term nine provided, if the parties were unable to agree, Ms. Dupuis was entitled to choose the child's school and Mr. Botten had the right to apply to an arbitrator or the court for directions (the "school selection term").
- [11] On October 19, 2022, Mr. Botten filed a notice of appeal in the Supreme Court of British Columbia. By consent, the majority of the award, including the relocation term, was stayed until the release of the appeal judgment.
- [12] Mr. Botten's first level appeal was heard on September 18-19 and 22, 2023. The appeal judge released his reasons for judgment on January 10, 2024, indexed as 2024 BCSC 39 [RFJ]. The judge set aside the school selection term of the arbitration award on the basis it was outside the arbitrator's jurisdiction. He confirmed all other terms of the award: RFJ at paras. 122-124.
- [13] On further appeal to this Court, Mr. Botten primarily contends the appeal judge erred by failing to consider the impact of setting aside the school selection term on the arbitrator's overall decision. More specifically, he submits:
1. The child's attendance at a "world class international" school was a determinative factor in the arbitrator's relocation decision.
 2. The child's attendance at such a school was dependent on Ms. Dupuis exercising her power under the school selection term to select that type of school.
 3. However, once the judge set aside the school selection term, Ms. Dupuis no longer had the unilateral ability to select the child's school.

4. It was, therefore, speculative the child would actually attend a "world class international" school.
 5. In the absence of this determinative factor, it is impossible to know how the arbitrator would have weighed the remaining factors and the entirety of the arbitrator's award must be set aside.
- [14] In the alternative, Mr. Botten submits the arbitrator followed a procedurally unfair process.
- [15] Finally, Mr. Botten applies to adduce additional evidence regarding the child's schooling options. Most of the proposed additional evidence relates to events following the release of the appeal judge's reasons for judgment.

Legislative Framework

- [16] Significant amendments to the Divorce Act, R.S.C. 1985, c. 3, (2nd Supp.) came into force on March 1, 2021. As a result of these amendments, in determining whether to permit a contested relocation, a court must consider only the best interests of the child: Divorce Act, ss. 16, 16.92. Of relevance to this appeal, these sections provide, in part, as follows:

Best interests of child

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

Primary consideration

- (2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

- (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
 - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
 - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
 - (d) the history of care of the child;

- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
- (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
- (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Parenting time consistent with best interests of child

- (6) 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.

Best interests of child -- additional factors to be considered

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

- (a) the reasons for the relocation;
- (b) the impact of the relocation on the child;
- (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;

- (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- (f) 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; and
- (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

[17] These provisions governed the decision made by the arbitrator.

The Arbitrator's Award

[18] The arbitrator's summary reasons were 15 pages long. The arbitrator began his reasons by identifying the issues and summarizing the relevant background. He then turned to Ms. Dupuis' application to relocate with the child to Rome.

[19] After setting out the position of the parties, he made brief findings regarding the credibility of the parties. He then set out the relevant legal principles and reproduced ss. 16(3) and 16.92(1) of the Divorce Act.

[20] Given the parties agreed that many of the best interest factors under s. 16(3) were neutral, the arbitrator analyzed only the factors that were contentious. His findings included:

- Section 16(3)(a)--the child's need for stability: Both parties acknowledged the child's need for stability. In the event the parties no longer lived in the same community, both could offer a stable environment for the child. Mr. Botten would offer continuity of her current environment while Ms. Dupuis would offer a two-parent household, a new extended family, significant educational and cultural opportunities, and the continued involvement of her parents. The "most significant" difference, however, was Ms. Dupuis' willingness to support Mr. Botten's relationship with the child "through generous parenting time and travel proposals."

- Section 16(3)(b)--the nature and strength of the child's relationships: The child had a strong relationship with both of her parents. Regardless of the outcome, her relationship with the non-resident parent would suffer. Given her age, the child would be forming new friendships in both locations. Further, her relationships with relatives on both sides were "less significant" and could "easily be accommodated in any future parenting arrangement." This factor was therefore largely neutral except for Ms. Dupuis' superior willingness to facilitate the child's relationships with friends and family.

- Section 16(3)(c)--each spouse's willingness to support the child's relationship with the other spouse: For reasons already provided, this was a "significant factor" that "strongly favour[ed]" Ms. Dupuis.

- Section 16(3)(d)--the history of the child's care: Although Ms. Dupuis was the primary parent during her maternity leave, the parties had been "fully involved and active co-parents in an equal shared-parenting arrangement for over two years." This factor was therefore neutral.

- Section 16(3)(j)--consideration of any family violence: The arbitrator concluded there had been no family violence so this factor was not relevant.

[21] The arbitrator then turned to the "relocation factors" under s. 16.92 of the Divorce Act. His findings included:

- Section 16.92(a)--the reasons for the relocation: Ms. Dupuis' application to relocate with the child was made in good faith and did not weigh against relocation.

- Section 16.92(b)--the impact of the relocation of the child: The outcome of Ms. Dupuis' relocation application would have an adverse effect on the non-resident parent. Given the child's young age, her relocation was "of less significance than it would be to an older child." In addition, there would be an advantage to the child learning other languages if she relocated to Rome.

- Section 16.92(c)--amount of time spent with each parent: As the parties had shared parenting time with the child equally since separation, this factor was neutral.

- Section 16.92(d)--compliance with notice requirements: Ms. Dupuis had provided Mr. Botten with ample notice of her intention to relocate with the child.

- Section 16.92(d)--existence of an agreement that specifies a geographic area in which the child is to reside: The parties were complying with the requirement in the Separation Agreement that neither parent would relocate the child from Greater Victoria without written consent or court order. This factor was therefore neutral.

- Section 16.92(f)--the reasonableness of the relocating parent's proposals: Ms. Dupuis' proposals were reasonable and generous.

- Section 16.92(g)--compliance with obligations and likelihood of future compliance: Both parties had complied with the terms of the Separation Agreement.

[22] The arbitrator next briefly turned to consider the Divorce Act's s. 16(6) "maximum contact principle". The arbitrator reproduced the following excerpt from *Joseph v. Washington*, 2021 BCSC 2014 at para. 98, citing *A.D.W. v. B.J.W.*, 2018 BCSC 1179 at para. 50:

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.

- [23] The arbitrator then determined that Ms. Dupuis should be allowed to relocate with the child. His reasons were:
74. [The child] should be allowed to relocate to Rome. I find that the advantages to her outweigh the disadvantages and I find that [Ms. Dupuis] has discharged her onus of proof in that regard.
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]'s generous proposals aimed at accommodating or facilitating [the child]'s relationship with her father are determinative in arriving at my decision.
- [24] With respect to child support, the arbitrator found the cost and logistics of travelling to and from Italy would be challenging and expensive. He accepted Ms. Dupuis' "reasonable and generous" proposal. As a result, absent a significant change in circumstances, Mr. Botten would not have to pay child support while he resided in Victoria and Ms. Dupuis resided in Italy. Instead, the parties would equally share the travel costs associated with Mr. Botten's parenting time. The arbitrator also accepted Ms. Dupuis' proposal that she be responsible for the costs of the child attending private school.
- [25] The school selection term of the arbitrator's award provided as follows:
9. The parties shall have the obligation to discuss with each other the choice of [the child]'s school and the obligation to try to reach agreement, but, in the event that the parties cannot reach agreement despite their best efforts, [Ms. Dupuis] shall be entitled to make that choice and [Mr. Botten] shall have the right to apply for directions to an arbitrator mutually agreeable to them but, failing agreement, to the court.

The Appeal Judgment

- [26] After setting out the background, the appeal judge identified the seven issues raised by Mr. Botten. Taken together, Mr. Botten argued the errors demonstrated the arbitrator's relocation decision was fundamentally flawed: RFJ at paras. 21-23.
- [27] The judge next identified that s. 19.19 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides a right of appeal of family law arbitration awards to the Supreme Court of British Columbia only on questions of law or mixed fact and law, but not on questions of fact. He also noted child relocation applications brought by divorced parents will be granted only where the proposed relocation is in the best interests of the child as set out at ss. 16.9 to 16.96 of the Divorce Act: RFJ at paras. 26-27.

- [28] The judge then addressed the standard of review, an issue this Court and the Supreme Court of Canada have not resolved. He reviewed a number of conflicting authorities before ultimately concluding he was bound by the finding in *Zemtsova v. Shevaley Estate*, 2023 BCSC 1375 that the ordinary appellate standard of review applied. For questions of law it is correctness and for questions of mixed fact and law it is palpable and overriding error: RFJ at paras. 28-43.
- [29] Although Mr. Botten alleged the arbitrator made seven errors, he does not assert the appeal judge erred in his analysis of all of them. I will review the judge's reasons only so far as necessary for the purposes of Mr. Botten's further appeal. That means I will review only the judge's analysis of Mr. Botten's speculation and school selection arguments.
- [30] The appeal judge rejected Mr. Botten's argument that the factors identified by the arbitrator as being "determinative" were based on speculation, not evidence. The judge noted Ms. Dupuis gave uncontradicted affidavit evidence the child would have a two-parent household, attend a "world-class international" school and have educational, linguistic, travel and cultural opportunities in Europe. The judge also noted Mr. Botten acknowledged in his testimony these opportunities would benefit the child. Accordingly, the judge concluded Mr. Botten had not identified a reversible error: RFJ at paras. 70-71.
- [31] The appeal judge noted the Participation Agreement empowered the arbitrator to resolve only Ms. Dupuis' application to relocate with the child to Italy and child support. The arbitrator therefore did not have jurisdiction to decide issues relating to the choice of the child's school. In the judge's view, choice of school was not ancillary to the decision to relocate the child. Rather, it fell under a specific provision of the Separation Agreement that recognized the parties' equal responsibility and authority to make decisions regarding the child's education: RFJ at paras. 118-121.
- [32] In the result, the judge set aside the school selection term and upheld the balance of the arbitrator's award: RFJ at paras. 121-123.

Standard of Review

- [33] Section 19.19 of the FLA governs first level appeals from family law arbitration awards. It provides:

Appeal

- 19.19 (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.
- (2) The time limit for starting an appeal is 40 days, beginning on the day after the arbitration award is received by the party.
- (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.

[Emphasis added.]

[34] The FLA permits appeals from arbitration awards only on questions of law and questions of mixed fact and law. It does not allow for appeals on questions of fact.

[35] To date, this Court has not found it necessary to determine whether the standard of review on first level appeals is the usual appellate standard or the more deferential standard of reasonableness: see e.g., *Eldridge v. Eldridge*, 2024 BCCA 21 at para. 40, citing *Mann v. Grewal*, 2023 BCCA 88 at paras. 36-37. On the view I take of Mr. Botten's appeal, I am content to proceed, without deciding, on the basis the appeal judge was correct to apply the more stringent appellate standard of review.

[36] On the second level of appeal before this Court, the usual appellate standard of review applies to the appeal judge's decision. Questions of law are reviewed on a standard of correctness. Questions of mixed fact and law are reviewed on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 36; *Eldridge* at para. 36.

On Appeal

[37] Mr. Botten submits the appeal judge erred in a variety of inter-related ways.

[38] As noted above, Mr. Botten's primary argument is that the child attending a "world-class international" school was a determinative factor in the arbitrator's relocation decision. However, choice of school was outside the scope of the Participation Agreement. As a result, the arbitrator did not know what school the child would attend. The judge erred in principle by failing to consider or by misapprehending Mr. Botten's arguments regarding the impact of the arbitrator speculating about the child attending a school of Ms. Dupuis' unilateral choice.

[39] If the judge had considered his arguments, Mr. Botten submits the judge would have had to set aside the arbitrator's decision. Mr. Botten essentially argues that, like a three-legged table with one leg removed, absent the child's known attendance at a "world class international" school, the arbitrator's decision must fall.

[40] In the alternative, Mr. Botten submits the judge ought to have set aside the arbitrator's decision on the basis the arbitrator followed a procedurally unfair process. He says he understood choice of school was outside the scope of the Participation Agreement so he did not have an opportunity to provide evidence regarding schooling options, including, for example, "geographically flexible" ones.

Analysis

[41] Mr. Botten was represented by counsel before the arbitrator and before the appeal judge. He is representing himself on this further appeal. Although he put a great deal of thought and effort into his written and oral submissions, his submissions suffer from a number of fatal flaws.

The arbitration was not procedurally unfair

[42] First, I must dispel any notion Mr. Botten was subjected to an unfair procedure. That is simply not the case.

[43] The parties did not agree to have the arbitrator alter their equally shared parental authority over the choice of the child's school. But, that does not mean evidence about the child's schooling options was irrelevant. In fact, that evidence was highly relevant to determining whether it was in the child's best interests to relocate to Rome with her mother or remain in Victoria with her father: see e.g., Divorce Act, s. 16(3)(a).

[44] The record demonstrates both parties appreciated the significance of schooling to the arbitrator's decision. Both provided affidavit evidence on the topic. Ms. Dupuis provided information about three "prestigious" private schools she considered suitable for the child in Rome. Mr. Botten provided information regarding the private school the parties agreed the child would attend for Kindergarten if she remained in Victoria.

[45] Mr. Botten also replied by affidavit to Ms. Dupuis' evidence about schooling options in Rome. Mr. Botten was not critical of the quality of education offered at the schools identified by Ms. Dupuis but raised concerns about commute times to them. The parties were also cross-examined on schooling issues. Finally, Ms. Dupuis and Mr. Botten both made submissions to the arbitrator about their plans for the child's education.

[46] There is no indication in the record that Mr. Botten raised procedural fairness concerns before either the arbitrator or the appeal judge. Leaving aside the appropriateness of Mr. Botten raising procedural fairness issues for the first time on this second level of appeal, Mr. Botten had a fair opportunity to adduce whatever evidence he wished regarding educational options for the child. Respectfully, Mr. Botten's suggestion otherwise is not supported by the record.

The appeal judge's failure to address Mr. Botten's argument regarding speculation was not material

[47] On the first level of appeal, there was no issue the appeal judge had the authority under s. 19.19(3)(a) of the FLA to amend the arbitrator's award. Both parties acknowledged the appeal judge therefore had the jurisdiction to set aside the school selection term while upholding the balance of the award. Mr. Botten argued, however, the appeal judge should not do that.

[48] Mr. Botten argued, as he does in this Court, that: (1) the child attending a "world class international" school in Rome was a determinative factor; (2) absent the school selection term, the arbitrator did not know what school the child would attend; and (3) without one of three determinative factors, the arbitrator's relocation decision cannot stand.

[49] The issue arose most clearly in response to questions posed by the appeal judge to Mr. Botten's then counsel and again in reply. The key exchanges were:

THE COURT: ... I think you accept though it's not necessarily all or nothing, it's still open to the court if -- if the court agrees with you on [the argument the school selection term was outside the arbitrator's jurisdiction] to simply change the award so that there is no longer reference to how do we deal with choice of school, but the relocation is still permitted.

CNSL S. RAPOPORT: Well, I think that those are actually slightly different, two -- two slightly different things. So the way the arbitrator has reasoned at paragraph 74 to 76 makes it appear, to my reading, that you need all three factors together to sustain the advantage outweighing the disadvantage. So if any one of those three determinative factors fall then there's not enough to sustain the decision, and the appeal can be allowed. Now, a separate question that you asked, Justice, is under 19.19(a) am I able to amend part of an award?

THE COURT: Yes.

CNSL S. RAPOPORT: And I would say, yes, you are because you're entitled to under the statute, but when we look at it -- was the arbitrator's decision reasonable and how he reasoned, well, if he says we need these three things, and one of those three things is outside the scope of the authority, in my submission that's enough to say well then the decision can't stand because the way that he's articulated it --

THE COURT: The entire decision?

CNSL S. RAPOPORT: Yes.

THE COURT: As opposed to simply -

CNSL S. RAPOPORT: Yes.

THE COURT: -- this one aspect of it?

CNSL S. RAPOPORT: Absolutely, and it's the way that the arbitrator himself has presented his own -- his argument -- or his determination, rather, not his argument.

CNSL S. RAPOPORT: One final and I think really crucial point about the participation agreement, it limited the scope of the arbitrator's authority. I appreciate I made that point in my submissions, but here's where that is crucial, my friend is suggesting, Justice, that you can just simply set term 9 aside and we can go on our way, the award can continue. In my submission, term 9, given that it refers to choice of school, and given that choice of school is a determinative factor, if term number 9 is set aside then the whole internal rationale -- rationality of that reason -- of the reasons for the judgment is potentially set aside. How can we know -- because the arbitrator has

said clearly it's -- in 74 through 76, it's these determinative factors coupled with the travel proposal that allow me to arrive at my decision. So if one of the determinative factors falls then the whole internal rationale is --

THE COURT: I think you made that point [already.]

CNSL S. RAPOPORT: Yeah.

[Emphasis added.]

- [50] This excerpt demonstrates the appeal judge understood Mr. Botten's argument about the consequence of setting aside the school selection term, namely that the arbitrator's entire award must be set aside, and his reasons demonstrate he did not agree. However, he did not explain why.
- [51] While it would have been more complete to have the appeal judge's view, respectfully, Mr. Botten's argument was bound to fail. I say this for several reasons.
- [52] First, Ms. Dupuis never had the ability to unilaterally decide which school the child would attend. Even under the now set aside school selection term, she had the obligation to try to reach agreement with Mr. Botten regarding the child's school before being entitled to make that choice. If unhappy with her decision, Mr. Botten had the right to apply for directions to the court or a mutually agreeable arbitrator.
- [53] Now that the school selection term has been set aside, the parties equally share the parental responsibility of choosing the child's school. If they cannot agree, they may elect to return to an arbitrator or one of them will have to apply to the court. With or without the school selection term, the decision regarding which school the child will attend will be based only on the best interests of the child.
- [54] Second, the arbitrator never knew what school the child would attend but that does not mean one of the "determinative factors" was speculative. As correctly noted by the appeal judge, there was a body of evidence that supported the arbitrator's finding the child would benefit from attending a "world class international" school, not a specific one. This included Mr. Botten's own evidence.
- [55] As Mr. Botten notes, the judge subsequently spoke of the "accessibility" of "world class international" schools in Rome but there was no reason for the arbitrator (and hence the appeal judge) to think the child would not actually attend such a school. Mr. Botten had raised concerns about commute times but the arbitrator was evidently confident in Ms. Dupuis' ability to ensure the child would benefit from receiving a world class education in Rome.

[56] Third, Mr. Botten now has an equal say in choosing the child's school, but that does not mean he has a veto. If Mr. Botten does not exercise his parental responsibility regarding selection of the child's school reasonably, Ms. Dupuis can apply to the court to decide based only on the best interests of the child. Having already testified the child would benefit from attending a "world class international" school (that Ms. Dupuis will pay for), it is difficult to envision the child not attending such a school in Rome.

[57] Finally, even accepting Mr. Botten's arguments, the result would be the same.

[58] The choice of school was identified by the arbitrator as a determinative factor, not the determinative factor. In my respectful view, absent the choice of school factor, it is not impossible to know how the arbitrator would have weighed the remaining factors. In fact, it is clear.

[59] Contrary to Mr. Botten's submissions, the arbitrator articulated the advantages and disadvantages of the child remaining in Victoria or relocating to Rome. On the critical criteria, he found:

- Both parties could provide the child with a stable environment.
- The child would benefit from having continuity of her current environment if she remained in Victoria, but this was not particularly significant given her young age.
- Any impact on relationships with relatives on both sides could "easily be accommodated in any future parenting arrangement."
- The child would benefit from having a two-parent household, a new extended family, and significant educational and cultural opportunities if she relocated to Rome.
- Regardless of the outcome, the child's relationship with the non-resident parent would suffer.
- The "most significant" factor that "strongly favour[ed]" Ms. Dupuis was her willingness to support Mr. Botten's relationship with the child "through generous parenting time and travel proposals."

[60] Most statutory factors were agreed or determined by the arbitrator to be neutral. None tipped in favour of Mr. Botten. Several tipped in favour of Ms. Dupuis, namely: (1) the child's need for stability; (2) the nature and strength of the child's relationships; (3) each spouse's willingness to support the child's relationship with the other spouse; and (4) the impact of the relocation of the child. Of the statutory factors that tipped in favour of Ms. Dupuis, the decisive consideration in three of them was expressly her superior parenting time and travel proposals. The decisive consideration in the other factor that tipped in Ms. Dupuis' favour was the opportunity for the child to learn additional languages. Choice of school was not a decisive consideration in respect of any of the statutory factors.

- [61] I have no doubt the child's current school in Victoria is excellent. Given the commitment of both parents to the child's best interests, even if the child does not attend one of the "world class international" schools identified by Ms. Dupuis during the arbitration, there is no reason to think the child's schooling arrangements in Rome will not also be excellent.
- [62] Giving no weight to choice of school/school attendance, on any objective reading of the arbitrator's reasons, it is abundantly clear his relocation decision would have been the same.

Mr. Botten's proposed additional evidence is not admissible

- [63] The test for the admission of additional evidence in the context of family law appeals was recently clarified by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 29. Additional evidence will typically be admitted on appeal where:

it could not have been obtained for the trial by due diligence; it is relevant; it is credible; and it could have affected the result at trial.

- [64] Here, Mr. Botten seeks to adduce additional evidence relating to Ms. Dupuis' recent attempts to reach agreement with him about the child's school in Rome. In particular, Mr. Botten seeks to adduce an email to him from Ms. Dupuis dated April 27, 2024 in which she proposes the child attend the Core International School ("CIS"). In the email, Ms. Dupuis identifies a number of benefits of the child attending CIS, including:

- It is "very similar" to the international schools she identified during the arbitration.
- It is centrally located in Rome so would minimize commute times and enable the child to participate in extra-curricular activities.
- It follows a British/international curriculum with classes in English.
- Similar to the child's current school in Victoria, it has smaller class sizes and has an active and involved parent community.
- It offers various levels of Italian language classes.

- [65] In his affidavit, Mr. Botten offers his opinion that CIS is, for various reasons, inferior to the child's current school and not "world class". Mr. Botten also seeks to adduce additional evidence about a FaceTime conversation he had with Ms. Dupuis on April 30, 2024. During that conversation, Ms. Dupuis apparently expressed an openness to the possibility of adopting a geographically flexible educational strategy for the child, including options like homeschooling, private tutoring, or educational cooperatives.
- [66] In my respectful view, Mr. Botten's proposed additional evidence regarding CIS is not admissible because it fails the fourth criteria of the admissibility test. It could not have affected the result of the arbitration.

- [67] None of Mr. Botten's proposed additional evidence regarding CIS undermines the reality that Ms. Dupuis and Mr. Botten will ensure the child receives an excellent education in Rome. And, more importantly, as noted above, the outcome of Ms. Dupuis' relocation application turned primarily on her superior parenting time and travel proposals, not choice of school.
- [68] In my respectful view, Mr. Botten's additional evidence regarding Ms. Dupuis' apparent openness to geographically flexible schooling options for the child is not admissible because it fails the first criteria of the admissibility test. With the exercise of due diligence, Mr. Botten could have adduced this type of evidence before the arbitrator.

Disposition

- [69] For all of these reasons, I would dismiss Mr. Botten's application to adduce additional evidence and his appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Fisher"

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Prepared on 27 October 2026 · Esheria