
CANADA / JUDGMENT

Geary v. Geary

2017 BCSC 1063

COURT

Supreme Court of British Columbia

DECIDED

23 June 2017

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2017 BCSC 1063 Geary v. Geary

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Geary v. Geary,

2017 BCSC 1063

Date: 20170623

Docket: E140525

Registry: Victoria

Between:

Debbie Lynne Geary

Claimant

And:

Reathel Earl Geary III

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

N.J.W. Reid

Respondent on his own behalf:

R.E. Geary III

Place and Date of Hearing:

Victoria, B.C.

October 28, 2016

and January 3-6, 2017

Written Submissions of the Claimant:

January 31, 2017

and February 16, 2017

Written Submissions of the Respondent:

February 6 and 10, 2017

Place and Date of Judgment:

Victoria, B.C.

June 23, 2017

Introduction

- [1] This is a contentious family action that was briefly thought resolved by mediation/ arbitration under the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), and the Arbitration Act, R.S.B.C. 1996, c. 55. The sought for finality of arbitration was illusory as the respondent, Mr. Geary, appeals the Arbitration Award of an experienced family arbitrator (the "Arbitrator"). The claimant Ms. Geary applies to vary the Arbitration Award.
- [2] Although the respondent raises numerous issues and arguments, I will only address those relevant to the issues before me.

Background

- [3] The parties were married on September 9, 2001 in Rockland, Maine, U.S.A., having cohabited since May 2001. They resided in the United States until July 27, 2013. They moved to Victoria, B.C., from Eugene, Oregon, in July 2013. They separated on December 2, 2013 after 12.5 years together. At the time of hearing the claimant was 46 years of age and the respondent was 44 years of age.
- [4] They have two children, Shae Rosalyn Geary, born October 27, 2003, and Griffin Reathel Geary, born May 19, 2007. Griffin suffers from severe autism and requires full-time 24-hour care. He has the mental capacity of an 18-month-old child. He will likely require full-time care for the remainder of his life.
- [5] The claimant's background is as a data analyst and program administrator.

- [6] The respondent has an undergraduate degree in botany and has in the past been employed as a pharmaceutical sales representative and a financial planner.
- [7] In 2001 the parties moved to Johnson City, Tennessee. Both parties were employed. In October 2003 their daughter Shea was born and the respondent quit his job to stay at home with her for 18 months and to start an on-line investment advice company.
- [8] In the spring of 2005, when Shae was 18 months old, they moved to Seattle, Washington. The respondent worked full-time. The claimant was a stay-at-home parent doing freelance and analytics work part-time.
- [9] In December 2006, the parties moved to Vancouver, Washington. The claimant continued to do part-time freelance analytics work. She was six months pregnant with Griffin at the time. The respondent started gearsamples.com, an online business selling sales representative samples.
- [10] During the summer of 2007, they moved to Eugene, Oregon. There, they continued the same work as they were doing in Vancouver, Washington. In 2010, the respondent decided to pursue a career in photography and at Christmas 2010 he closed down gearsamples.com to do so.
- [11] Up until 2011, the parties were working either full- or part-time, except for periods of time when they each took time off to care for their children.
- [12] In February 2011, the claimant published her first book and by August 2011, her writing was generating enough income for her to quit her contract work. Her series of books was immensely successful on Amazon. The Arbitrator found that she earned about \$800,000 in royalties in 2012 and about \$1,175,000 in 2013. He found that the claimant's income since separation, annualized net of business expenses before tax, was about \$435,000 per year but by 2015, at the time of the arbitration, was estimated to be approximately \$150,000.
- [13] In 2012, the parties incorporated a U.S. corporation relating to the claimant's writing career and the respondent's photographic career. Between 2011 and 2013, they invested in the respondent's career, including equipment purchases, education, workshops and private mentoring. In 2012, the amount expended was \$25,000 and in the first seven months of 2013 they spent \$15,000. During that time the respondent worked at establishing himself as a photographer.
- [14] Between 2011 and their separation in 2013, the claimant estimates they made equal contributions to parenting. While she was writing, the respondent was, according to the claimant, spending long hours printing photographs in his studio in preparation for portfolio reviews, shows and travelling to portfolio reviews, workshops and networking opportunities. While the respondent disputes such, I am satisfied that they both contributed to the parenting of their children. I do not accept that the respondent was the primary care giver during those years.

- [15] They separated in December 2013 when the claimant became aware that the respondent was having an affair with a woman in Eugene, Oregon.
- [16] After separation in December 2013 they remained living in the same residence from December 2013 to November 2014. The claimant lived in the main portion of the home with the children and the respondent resided in the basement suite. In November 2014 the respondent rented his own condominium in Victoria, British Columbia, and from that time until February 2015, he parented the children on an approximately equal basis from his own residence. During that time, as he remained a U.S. citizen, he was not employed outside of the home except to the extent that he pursued his photography career.
- [17] The claimant initiated these proceedings on February 7, 2014. No claim for divorce was included as the parties had not been resident in Canada for a sufficient length of time.
- [18] On December 9, 2014, the parties entered into a consent order pursuant to which the claimant paid \$4,000 per month child support to the respondent and \$4,000 per month spousal support commencing on the 17th day of November 2014 and continuing on the 17th day of each month thereafter, subject to review after March 31, 2015.
- [19] The parties agreed to mediation and arbitration. The arbitration took place on January 21, January 30, February 4, February 16, and February 23, 2015. Both parties were represented by counsel. The arbitration addressed property division, parenting arrangements and child and spousal support.
- [20] The matter proceeded as a mediation/arbitration on the premise that the respondent would be parenting the children on an equal basis. He anticipated he would parent the children from a residence to be acquired in Victoria but would work from a residence in Bellingham, Washington. As a result, the Arbitration Award recognized each party's earning capacity would be affected by their parenting obligations, particularly given the special needs of their son.
- [21] On February 24, 2015, the Arbitration Award was issued.
- [22] The Arbitration Award ordered that the claimant pay prospective lump sum spousal support of \$232,600, pre-tax, discounted to present value, to cover a future period of 8.25 years plus \$110,985 was ordered as retrospective spousal support up to and including February 2015.
- [23] However, within 24 hours of the release of the award, the respondent announced that he was going to live in the United States and on March 23, 2015, he returned to Eugene, Oregon, where the woman with whom he was having an affair resided. He now resides at least part-time with her. In doing so, he abandoned equal parenting and left the children in the full-time care of the claimant.
- [24] Initially, he intended to continue his photography career, however, sometime after he moved to Eugene, Oregon, he enrolled in a two-year massage therapy program. He anticipates completing the course in the spring or summer of 2017.

Proceedings Subsequent to the Arbitration Award

- [25] The respondent's then solicitor filed the Arbitration Award in this court by way of a requisition on March 9, 2016, that simply asked that the attached award be filed. It contained no reference to the authority for its filing or the purpose of its filing.
- [26] On April 9, 2015, the respondent filed this Petition to the Court seeking to set aside the Arbitration Award. The respondent also commenced a divorce action. On April 23, 2015, the claimant filed her application for child support and contribution to extraordinary expenses.
- [27] On May 29, 2015, the parties were divorced. At that hearing the court also ordered that pursuant to s. 29 of the Arbitration Act, the Arbitration Award be enforceable by either party and that the appeal and all outstanding matters be adjourned to the hearing of this application, including the claimant's application for child support and a contribution to extraordinary expenses.
- [28] On August 29, 2016, the claimant filed an Amended Notice of Family Claim in which she sought a variation of parenting time, an order that the children's primary residence be with her, the imputing of income to the respondent, an order for child support, and a retroactive variation of spousal support.
- [29] The parties attempted to resolve the matters raised in this proceeding by way of a judicial settlement conference on April 13-14, 2016, before Dorgan J. A third day was set for May 5, 2016, but the respondent terminated his retainer with his counsel and refused to continue.

The Arbitration

- [30] As noted, the mode of dispute resolution agreed upon was what is commonly called "med/arb" or "mediation/arbitration". The relevant portions of the Family Arbitration Agreement (the "Agreement") entered into by the parties are:
- 1) Eugene Raponi, Q.C., will be the Mediator/Arbitrator with respect to the following Issues in dispute between the spouses:
 - a) Parenting Arrangements;
 - b) Division of Family Property/Debt; and
 - c) Child and Spousal Support.

The Mediation Process

- 12) The spouses will first attempt, with the assistance of the Mediator/Arbitrator, to negotiate a resolution of the issues in dispute.
- 13) Most mediation sessions will involve the spouses and their lawyers, in Joint session with the Mediator/Arbitrator, but, the Mediator/Arbitrator, at his discretion, may meet with the spouses and their lawyers separately.

- 14) Any agreement reached between the spouses through mediation will be binding only if it is in writing signed by the spouses.

The Arbitration Process

- 15) In the event that the mediation process does not result in a resolution of any or all of the Issues, the Mediator/Arbitrator will make a binding decision with respect to any Issues remaining outstanding.
- 16) The Mediator/Arbitrator will, unless otherwise expressly agreed by the spouses, determine his final award at the conclusion of the mediation as follows:
- a) By selecting the final offer of one of the spouses relating to Parenting Arrangements;
 - b) By selecting the final offer of one of the spouses relating to the Division of Family Property/Debt;
 - c) By selecting the final offer of one of the spouses relating to Child and Spousal Support.
- 17) In making his decision, the Mediator/Arbitrator will rely on the information exchanged in the course of the mediation, and will determine the process for obtaining any additional evidence he deems necessary to make a decision.
- ...
- 20) The Mediator/Arbitrator will decide any issues not resolved by mediation by applying the principles of law in the Family Law Act, the Divorce Act and any other applicable law.
- ...
- 23) The Mediator/Arbitrator will make his final award in writing but will not give written reasons for his decision, unless either spouse request[s] written reasons.
- 24) Subject to the terms of the Arbitration Act, the spouses are bound by the Mediator/Arbitrator's final decision and either party may seek to obtain an order from the Supreme Court of British Columbia in a form consistent with the award by the Mediator/Arbitrator, in accordance with the Arbitration Act.

Waiver of Rights to Litigate In Court

- 38) The parties waive any right to further litigate the issues listed in paragraph 1 of this Agreement Subject only to
- a) the right of appeal, stay or judicial review under the Arbitration Act and the Family Law Act, and
 - b) the right to enforce the provisions of an agreement reached in mediation or an award made in arbitration through the courts or otherwise.

- [31] The arbitrator noted that the claimant was now a Canadian citizen and the respondent an American citizen but was applying for residency status in Canada. The parties were recognized as guardians of the children and were to have week on week off -- alternating periods of seven days -- parenting time. The detailed parenting terms clearly anticipated that both parties would be resident in Victoria.
- [32] The portions of the Arbitration Award relevant to the appeal and the application to vary follow:

B. Division of Property

Equalization Payment

30. As a final settlement of both marital property and retroactive support, Reathel will be paid \$226,249 CAD from the York Place house proceeds trust account and Debora will be paid the balance. Debora will forthwith pay to Reathel the additional amount of \$30,989 USD by way of USD bank draft.
31. Reathel will receive 100% of Debora's Roth IRA, rolled over into his retirement account of the same type, as an equalization payment to balance their respective retirement accounts.
- [33] The Arbitration Award was effectively a 50/50 division of family property.
- [34] The Arbitration Award also provided as follows:

C. Child and Spousal Support

Spousal Support

37. Transfer of 100% of Debora's non-Roth US retirement accounts to Reathel's retirement accounts of the same type, with a current USD value of approximately \$195,000. That is approximately equal to 8.25 years of additional 50/50 NDI spousal support on an income of \$150,000 (present value of \$232,600 CAD, or \$188,000 USD at a 1.24 conversion rate).
38. Other than as provided in this Award, Reathel waives any further spousal support from Debora.
39. Debora waives any spousal support from Reathel.
40. Reathel will acknowledge receipt of the sum of \$110,895 in prior spousal support from Debora, so that Debora may claim these amounts in her personal taxes.

Child Support

41. In any calendar month in which he parents at least 40%, Debora will pay Reathel guideline child support, calculated as follows:
- a) March 2015 - August 2016, Reathel will be paid child support on the basis of a \$150,000 income, namely \$2,104 a month.

- b) In September 2016, a calculation will be made on actual child support owing from March 2015 - August 2016 based on actual net income earned during those months. A one-time adjustment payment will be made from Debora to Reathel or Reathel to Debora, as appropriate.
- c) Beginning September 2016, support will be set based on Debora's most recent fiscal year's net income, and Reathel's actual income for the prior twelve months or his income from the minimum imputed income schedule, whichever is higher.
- 42. \$25,000 of Reathel's family property and \$50,000 of Debora's family property will be retained in trust until September 2016, in the event of a need for a substantial support adjustment.
- 43. The parties will split agreed-upon s. 7 expenses on a 50/50 basis through May 2023. After that, s. 7 expenses will be based on the parties' actual incomes or incomes from the minimum imputed Income schedule, whichever is higher.
- 44. In respect to Griffin's long-term care needs, if Debora earns an actual income greater than \$150,000 at any time in the future, that income will not be considered current income for child support or s. 7 expense purposes, and she will be able to retain that income in her corporation for future use.
- 45. Reathel will be Imputed a minimum income based on the following schedule:
 - i. September 2016: \$30,000
 - ii. September 2018: \$50,000
 - iii. September 2021: \$75,000
 - iv. September 2024: \$100,000

Variation

- 46. In the event that shared parenting temporarily ceases, namely Reathel does not parent at least 40% of the time in any given calendar month, Debora will not owe Reathel child support. If shared parenting ceases for longer than three months, then this agreement may be varied as it pertains to the parenting schedule, parenting responsibilities, and the payment of child support.
- 47. Debora will claim both Children and all applicable credits on her Canadian taxes. Reathel can claim both Children for any purpose on his US taxes.
- 48. Debora will cover 100% of the MSP premiums for the Children.
- 49. Each parent is responsible for providing travel insurance for the Children if they are leaving the country. The parent who took the children out of the country will be solely responsible for any financial costs if medical care is not covered. Debora currently has travel insurance in place for the Children, and will maintain such at her sole discretion. If Reathel chooses to use Debora's travel insurance as coverage for the Children, he will comply with all the

insurance company's requirements for medical care to be covered and all Debora's requests in the event of making a claim, and he will be responsible for any costs not covered or reimbursed.

Other provisions

Life Insurance

50. Acknowledging the importance of shared parenting in permitting the other parent to pursue full-time work, and the potentially substantial future obligations for child support and s. 7 expenses (particularly for Griffin), each party will maintain a life insurance policy for the next 10 years of at least one million dollars, payable via an estate mechanism that makes all funds payable to a trust for the children's care. Proof of this insurance and of an appropriate estate mechanism that directs the executor of the estate to establish the appropriate trust for the children's care will be provided no later than March 31, 2015. Annual proof will be provided thereafter to confirm insurance and estate mechanism are still in effect.

Immigration

52. Reathel will provide to Debora updates as to the status of his residency application, immediate notification if he has any problem crossing the border and will provide Debora copies of any decision by the Canadian Immigration authority, including an acknowledge[ment] of receipt of completed application.

General Release

53. BY CONSENT: Except as set out in this agreement, each of the parties specifically releases the other from any and all claims at law, in equity, or by statute against the other, including, without restricting the generality of the foregoing, all claims under the Family Relations Act, the Family Law Act, the Wills Estate and Succession Act, with respect to
- a) support,
 - b) property,
 - c) succession rights, and
 - d) any other matter arising from their relationship.
54. BY CONSENT: All other claims made in this proceeding, other than the claim for a divorce, shall be dismissed.
- [35] The transfer of assets and funds and the payment of retroactive spousal support have occurred.

- [36] These reasons address the respondent's appeal of the Arbitration Award first and, given the conclusion I have reached respecting the appeal, the claimant's application to vary the award second. With respect to the respondent's application for further document production, I decline to order further production. My reasons for doing so will be addressed last.

Summary Disposition

- [37] Both parties take the position that their respective applications are capable of summary resolution. The hearing proceeded on that basis subject to the discretion of the court to find that summary resolution was not appropriate. I have concluded that both applications are capable of summary disposition.

Appeal of the Arbitration Award

Mediation/Arbitration Proceedings

- [38] As noted the parties were both represented by counsel at the mediation/arbitration. The parties were not successful in mediating a resolution of the issues in dispute. As a result, pursuant to paragraph 15 of the Agreement, the proceeding before Mr. Raponi, Q.C., became a binding arbitration. Pursuant to paragraph 16 of the Agreement, it proceeded on the basis that the Arbitrator would determine his final award based on the "last best offer" of one of the spouses in the areas of parenting, property division and child and spousal support.
- [39] The Agreement provided in paragraph 23 that the Arbitrator would make his final award in writing but would not give written reasons for his decision unless either of the spouses requested written reasons. No such request was made.
- [40] Prior to the February 16, 2015, meeting for arbitration, the parties were to exchange their "last best offers." The respondent's February 16, 2015, offer was not delivered until the beginning of the arbitration meeting on that day. The Arbitrator requested that the parties "tweak" their respective offers to come as close to the other party's offer as they could and February 23, 2015, was set as the date to consider such "amended last best offers."
- [41] The claimant's "amended last best offer" agreed with several points in the respondent's "last best offer." It also included changes that the claimant admits were more than "tweaks" but were an attempt, according to the claimant, to come closer to the respondent's February 16, 2015 "last best offer." Given those changes, the Arbitrator offered the respondent and his counsel more time to respond. They turned down that offer and proceeded.
- [42] The Arbitrator then issued the Arbitration Award, reflecting the claimant's last best offer.

Position of the Respondent on Appeal

- [43] The respondent alleges a number of errors of law or errors of mixed fact and law with respect to the Arbitration Award.

1. First, that the rules of procedural fairness were contravened when the Arbitrator, on February 23, 2015, the final day of submissions, permitted the claimant to submit an amended last best offer where the amendments materially altered the substance of the claimant's last best offer of February 16, 2015.
2. Secondly, that there was insufficient evidence led by the parties to support some terms of the arbitration award.
3. Thirdly, that the award contravenes the Federal Child Support Guidelines, SOR/97-175, by capping the income of the claimant for child support purposes at \$150,000 and permitting the claimant to retain any income greater than \$150,000 per annum in her corporation for future use.
4. Finally, that the Arbitration Award as a whole contravenes s. 37 of the Family Law Act as term 12 of the award provides for a regime of shared parenting on a week on/week off basis but provided for property division and spousal support that made shared parenting a financial impossibility for the respondent due to his immigration status and the need to maintain dual residences.

Position of the Claimant on Appeal

[44] The claimant states that the arbitration was procedurally fair, both parties were represented by counsel and that the February 23, 2015, changes to the claimant's last best offer were in response to the arbitrator's concerns respecting a proposed lump sum child support provision as such were not substantial. She opposes all grounds of appeal advanced by the respondent and seeks to have it struck.

Law and Discussion

[45] The appeal of the Arbitration Award by the respondent is brought pursuant to s. 31(3.1) of the Arbitration Act. The relevant provisions for an appeal of an arbitration award read as follows:

Appeal to the court

31.

(3.1) A party to arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Extension of time limit

43. The court may extend any time limit provided for in this Act even if the application for the extension or the order granting the extension is made after time has expired.
- [46] The parties argued the appeal on its merits. However, during the course of preparing these reasons, the issue of the effect of filing and enforcing the Arbitration Award under s. 29 of the Arbitration Act arose. In *McLaren v. Casey*, 2016 BCSC 169, Jenkins J. was faced with an appeal of a family law Arbitration Award, coincidentally by the same arbitrator as the case at bar and concerning the same mode of "last best offer" arbitration.
- [47] In *McLaren*, Jenkins J. states:
34. In my view, however, it is not necessary for this Court to consider whether these amount to breaches of natural justice. Regard must be paid to the facts surrounding the applications before this court following delivery of the award on March 25, 2015. A hearing took place before Mr. Justice Grist on May 15, 2015. That hearing was an application under s. 29 of the Arbitration Act to enforce the arbitration award "in part". Mr. Justice Grist made such an order. The parties returned to court on June 15 and August 12, 2015 on applications to further implement the "last, best offer" award. The award which the petitioner seeks to challenge has thus been at least partially enforced by the court. Other portions of the award not specifically referred to in the orders were adjourned. The court has thus exercised its jurisdiction to act under s. 29 of the Arbitration Act, in effect approving the award and giving orders enforcing the same. As the award was an award of the whole of the respondent's "last, best offer", and portions of that award have been implemented, it was necessary for the claimant, if not satisfied with the award, to seek an adjournment of the applications pending the petition, combine the appeal and enforcement proceedings (see: *Farrar v. Bojan High End Kitchens Inc.*, 2013 BCSC 1881; *On Call Internet Services Ltd. v. Telus Communications Co.*, 2013 BCCA 366; *Williston Navigation Inc. v. BCR Finav No. 3*, 2007 BCSC 190) or subsequently appeal the orders. So far as I am aware, those orders were not appealed by the claimant. If a notice of appeal has been filed in a timely manner, then the remedy for the claimant is to speak to an appeal before the Court of Appeal. Until then, Mr. Justice Grist's order stands and a collateral attack on that ruling through this Court should not proceed: see *R. v. Wilson*, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577; *R. v. Litchfield*, [1993] 4 S.C.R. 333.
- [48] By way of memorandum to counsel and the respondent, I raised the above issue and the above authority as the parties in their submissions had not addressed it. I requested their written submissions on the issue of collateral attack. Those submissions have now been received and considered.

- [49] As noted earlier, the Arbitration Award was filed with the Registry of this court. It is not clear under what authority that was done. While s. 29(2) of the Arbitration Act provides that leave is not required in order to enforce or enter a judgment in terms of the award, presumably more is required than simply filing the award. In any event, the respondent did in fact apply to this court in the divorce action to have the Arbitration Award enforced under s. 29(2). It therefore became an order of this court.
- [50] In doing so, the court has exercised its jurisdiction under s. 29 of the Arbitration Act and approved the award as an order of the court and permitted its enforcement. As a result the attempt of the respondent to appeal the order to this court is misconceived as any appeal should have been to the Court of Appeal seeking review of the decision of this court to enforce the Arbitration Award.
- [51] In *R. v. Wilson*, [1983] 2 S.C.R. 594 at 599, a collateral attack was described as:
an attack made in proceedings other than those whose specific object is reversal, variation, or nullification of the order or judgment.
- [52] Justice McIntyre then, at page 600, proceeds to quote from *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385, as follows:
To this the general answer is made that the order of a Superior Court is never a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. [Emphasis added.]
- [53] In my view, as the Arbitration Award has been filed with, enforced by, and is now an order of this Court, the respondent's appeal of the Arbitration Award to this Court amounts to a collateral attack on a decision of this Court. The place for "reversal, variation or nullification" is the Court of Appeal.
- [54] If I am incorrect and the appeal is not a collateral attack while the petition of the respondent was brought pursuant to s. 30 of the Arbitration Act, the subsequent filing of the Arbitration Award by the respondent as an order of this Court amounts to an election by the respondent to seek the award's enforcement. That was understandably so, given the Award required transfers and payments to him.
- [55] The respondent however asks the court to exercise its discretion to hear the appeal. The court may overlook the issue of a collateral attack if it would be manifestly unjust not to do so and if there is merit to the appellant's claims. (*R. v. Litchfield*, [1993] 4 S.C.R. 333.)
- [56] In *McLaren*, Jenkins J. noted:

35. Though the court may have discretion to overlook this issue in the circumstances, I would not. In my view, and considering the intention for the arbitration to have been a final determination of the issue and the substantial deference to decisions made in arbitration; the need for the orderly administration of justice; the fact that the litigation surrounds a financial dispute rather than a public law issue; and my view of the lack of merit to the proceeding, it is not appropriate for the matter to proceed.
- [57] In my view, of particular importance is the need for finality when the arbitration process is invoked. In *Boxer Capital Corporation v. JEL Investments Ltd.*, 2015 BCCA 24 at para. 6, it was noted that arbitration is intended to be an alternate dispute mechanism rather than one more layer of litigation.
- [58] In my opinion, the factors referred to in *McLaren* apply equally in this matter, along with the additional fact, as mentioned above, that in this instance it is the respondent who applied pursuant to s. 29 of the Arbitration Act to enforce the Arbitration Award in this Court. As a result, the respondent elected to make the award an order of this court and in doing so cannot seek to re-litigate the very decision he sought to enforce. Judicial economy and finality, particularly with respect to the arbitration process in family law proceedings, weigh against the relief sought by the respondent. In addition there is no merit to the appeal given the events that transpired after the Arbitration Award was made. In all of the circumstances, I am of the view that it is not manifestly unjust to decline the respondent's request to hear the appeal.
- [59] In addition, given my findings that the respondent failed to disclose at the Arbitration his intention to move to the United States, and his subsequent move abandoning equal parenting, he thereby undermined the rationale for the Arbitration Award. This militates against this court exercising its discretion to permit the respondent to appeal to this court if such discretion in fact exists. To do so would be manifestly unjust and unfair to the claimant. As a result I need not consider the grounds of the appeal further. The appeal of the respondent is dismissed.
- [60] This leaves for consideration the claimant's alternate application to vary the Arbitration Award both prospectively and retroactively.

Application to Vary Arbitration Award

- [61] The application is brought pursuant to ss. 47, 150, 152, 167 and 170 of the Family Law Act, the Federal Child Support Guidelines, Rules 11-3 and 12-1 of the Supreme Court Family Rules and ss. 2.1, 30, 31 and 43 of the Arbitration Act.
- [62] Sections 2.1(3) and (4) of the Arbitration Act provide:

- (3) An arbitration agreement respecting a family law dispute, and an award arising from a family law dispute, may be set aside or replaced by the court under the Family Law Act if the court is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress;
 - (b) a party did not understand the nature or consequences of the agreement;
 - (c) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) A court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the arbitration agreement with an order that is substantially different from the terms set out in the arbitration agreement.

Section 30 states:

Court may set aside award

30. (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
- (a) set aside the award, or
 - (b) remit the award to the arbitrator for reconsideration.
- (2) The court may refuse to set aside an award on the grounds of arbitral error if
- (a) the error consists of a defect in form or a technical irregularity, and
 - (b) the refusal would not constitute a substantial wrong or miscarriage of justice.
- (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.
- (4) Nothing in this section restricts or prevents a court from changing, suspending or terminating all or part of an award, in respect of a family law dispute, for any reason for which an order could be changed, suspended or terminated under the Family Law Act.

Also relevant is s. 23(2):

- (2) Despite any agreement of the parties to a family law dispute, a provision of an award that is inconsistent with the Family Law Act is not enforceable.
- [63] The application of the claimant for relief pursuant to s. 2.1(3) and (4) and s. 30(1) to (3) of the Arbitration Act is, for the reasons given respecting the respondent's petition, a collateral attack. As a result, the relief sought by the claimant pursuant to those provisions is dismissed.

[64] That, however, is not the end of the matter.

[65] The claimant seeks relief as well pursuant to the Family Law Act, specifically ss. 47, 150, 152, 167 and 170. Those provisions relate to issues of parenting, child support and spousal support, and in particular the variation of orders relating to those matters.

[66] Unlike an appeal of an arbitration award or a request to set it or an arbitration agreement aside, s. 30(4) of the Family Law Act permits the court to vary, suspend or terminate an award for reasons that recognize the ongoing nature of family relationships.

[67] I turn therefore to the claimant's application brought pursuant to the Family Law Act.

[68] The claimant applies to vary the terms of the Arbitration Award, as embodied in the court order, in respect of the following matters:

1. Parenting arrangements;
2. Imputation of income to the respondent;
3. Interim, permanent, retroactive and/or lump sum child support;
4. Change, suspension, or termination of spousal support.

[69] The claimant also seeks repayment of any overpayment of amounts paid to the respondent.

Position of the Claimant Respecting Her Application

[70] The basis for her application is the assertion that there has been a material change in circumstances; specifically, that evidence of a substantial nature was not disclosed during the arbitration proceedings along with the respondent's subsequent move to the United States immediately after the Arbitration Award was made. That is, the arbitration proceeded on the assumption the respondent would have a residence in Victoria in order for shared parenting to occur. However, in fact, the respondent had not applied for permanent residence in Canada and his intention throughout the mediation/arbitration process was to live in Oregon. The claimant submits that, had that been disclosed, a different award would have resulted as the mediation/arbitration proceeded on the understanding that the respondent would remain in Canada and co-parent the children.

[71] The claimant also states that had she known the respondent intended to return to the United States and would not be sharing parenting, then her final offer would have included provisions to reflect those circumstances.

Position of the Respondent Respecting the Claimant's Application

[72] The respondent submits that his move to the United States arose because of the claimant's cancellation of her immigration sponsorship of the respondent.

[73] He states it was that event that resulted in his move and is relevant to the parenting issues, imputing of income, child support and spousal support. He seeks parenting time with his children, opposes the imputing of income, opposes the variation of the lump sum spousal support and argues that child support be adjusted for access costs.

Issues

[74] The issues that require resolution are:

1. Has there been a material change in circumstances?
2. Should the Arbitration Award be varied?
3. Parenting time;
4. Parental responsibilities;
5. Imputing of income to the respondent;
6. Child support and extraordinary expenses;
7. Health insurance for the children while in the respondent's care;
8. Spousal support entitlement;
9. Quantum of spousal support; and
10. Costs.

Material Change in Circumstances

[75] I am satisfied that at the time of the arbitration the respondent represented to the claimant and the arbitrator that his intention was to share equal parenting time with the claimant. His "final best offer" makes it clear that his proposal respecting property division and spousal support was to enable him to co-parent the children. That offer was designed to enable him to have residences in both Canada and the United States, thereby enabling him to co-parent.

[76] Despite the fact that the arbitration proceeded on that assumption, I am satisfied the respondent failed to disclose that this assumption was not accurate. I find this to be the case because:

1. The respondent was ordered by the Arbitrator to produce an acknowledgement of receipt of his completed immigration application but the respondent failed to do so;
2. The respondent failed to respond to a Notice to Admit dated February 11, 2016, delivered by the claimant to the respondent's then counsel and, as a result, has now admitted that at the time of the arbitration:

That the respondent did not apply for permanent residency in Canada via expedited processing, in a different category (i.e. self employed category) and that the respondent is not in possession of any documentation, including the CIC acknowledgment of receipt letter, which is issued by CIC upon receipt of such application.

3. The respondent was having an affair with his now partner in Oregon, U.S.A., and within one month of the Arbitration Award joined her there. I am satisfied that relationship was of significant importance to the respondent.

[77] In my view, the respondent was obligated to advise the claimant and the arbitrator of his true intentions. His failure to do so undermined the arbitration process. His subsequent move to the United States was a material change from the basis for the Arbitration Award.

Should the Arbitration Award be Varied?

[78] I am satisfied that the material change in circumstances arising from the respondent's move to the United States fundamentally affects the Arbitration Award insofar as it relates to the issues of parenting and child and spousal support and ought to be varied accordingly.

Parenting Time

[79] The Arbitration Award addressed parenting time as follows:

12. The parties will share the parenting of the Children on a week-on/week-off (7/7) basis, with very minimal changes for holidays/work.
13. The parties have agreed on dates through the end of March, including plans for spring break. Those parenting days will stay as currently scheduled.
14. The new 7/7 schedule will commence on Wednesday, March 25th at 12pm, where Debora is responsible for bringing Griffin to school, and then Reathel will be the parent on duty. Reathel's first 7 day stretch will begin on April 1 at 12pm.
15. The parties will continue alternating weeks in this way through 12pm Wednesday May 13th. At that point there will be two shorter parenting stretches:
 - a) Reathel will parent from 12pm on Wednesday, May 13th to 12pm on Sunday, May 17th.
 - b) Debora will parent from 12pm on Sunday, May 17th to 12pm on Wednesday, May 20th.
 - c) The regular weekly alternating schedule will re-commence on Wednesday May 20th, with Reathel's week. Debora's week will begin on Wednesday, May 27th.
16. The parties will continue alternating weeks in this way through 12pm Wednesday October 21st. At that point there will be two shorter parenting stretches to switch out the weekly schedule to the permanent position (which puts American Thanksgiving and Christmas for the next several years on Reathel's parenting days):

- a) Reathel will parent from 12pm on Wednesday, October 21st to 12pm on Sunday, October 25th.
 - b) Debora will parent from 12pm on Sunday, October 25th to 12pm on Wednesday, October 28th.
 - c) The regular weekly alternating schedule will re-commence on Wednesday October 28th, with Reathel's week. Debora's week will begin on Wednesday, November 4th.
17. This weekly schedule that begins with Reathel's week on Wednesday, October 28th and Debora's week on Wednesday, November 4th, will be the permanent schedule. It provides the following:
- a) Reathel has the Children for American Thanksgiving for at least the next four years.
 - b) Reathel has the Children for Christmas Eve and Christmas Day for at least the next four years (Debora is content to use date time to see the Children sometime on Christmas Eve).
 - c) Shae's birthday is on Debora's parenting day in 2015, Reathel's parenting day the following three years (Debora is content to use date time to see Shae on or near her birthday).
 - d) Halloween - Reathel 2015, 2016, 2017 (likely as long as it will be relevant for Shae).
 - e) Debora is willing to have less holidays fall during her parenting time in the interests of maintaining a regular, predictable schedule for the Children.
18. The parties will ask Griffin's school and Shae's therapist to monitor the Children (and in Shae's case, actively solicit her feedback) on the parenting schedule. A period of adjustment is expected, but their job will be to indicate if there are significant signs that the Children are not adapting well to the new schedule.
19. Both parents will put forth their best efforts to enable the new schedule to succeed. The schedule may need to change if it is determined that would be in the best interests of the Children.
20. Each party will have one date of up to three hours with each child during their non-parenting week. These dates need to be arranged at least 48 hours in advance and at times convenient for the on-duty parent.
21. Each party will have up to one week of time with only Shae, in alternating calendar years, beginning with Reathel in 2015. This time is to be taken during the requesting parent's non-parenting time, and will not be counted as parenting time in the shared parenting calculations.

22. Parenting switches will happen at the beginning of Griffin's school day on Wednesday. Currently that is 12pm. One parent will drop him off at school, the other parent will pick him up from school. Due to her proximity to Griffin's school, transfer of the kids' gear and clothes will happen at the front door of Debora's suite. On non-school days (e.g. summer, holidays), the parent ending their parenting shift will drop the Children off at the other party's home or other agreed-upon location at 12pm on Wednesdays.
23. Changes to the parenting schedule will be kept to an absolute minimum, and the parties will exert every effort to accommodate their work and vacations to the existing schedule. This may include passing up some work opportunities or holiday time.
24. Neither parent will take more than two stretches of longer than a week away from the Children in any calendar year.
25. Both parents will have up to 20 "flex days" in a calendar year, where they can ask for schedule changes involving switching out up to 20 of their parenting days. These can be used for holidays, vacation time, work, or any other reason the requesting parent considers a priority. Every reasonable effort will be made to honor these requests, with the understanding that requests made well in advance have a better chance of being accommodated. Changes for summer, Christmas, or spring break will be requested and agreed to with at least 90 days' notice to allow for cost-effective travel planning.
26. Changes to the parenting schedule will not be considered valid until both parties have agreed in writing to the change. Once a change has been made, further changes will not be considered valid until both parties have agreed in writing to the change. Email is sufficient for this purpose.
27. Each party will maintain their own parenting calendar in whatever way they choose, beginning with the schedule outlined in the terms above and keeping track of any mutually agreed changes.
28. Neither party is obligated to give up any of that party's scheduled parenting days in a month to enable the other party to parent 40% of the time in that calendar month.
29. BY CONSENT: Neither parent will move the Children more than 50km away from Victoria, BC or off of Vancouver Island without written consent of the other parent or order of the Court.
- [80] The Award at paragraph 46 provided that if shared parenting ceased for longer than three months, then an application could be brought to vary parenting time, parenting responsibilities and child support. However, the last best offer of the claimant also provided for variation of spousal support. The failure of the Award to include variation of spousal support appears to have merely been an oversight by the Arbitrator.

- [81] Since the respondent returned to the United States on March 23, 2015, he has had parenting time with the children both in the United States and in Victoria. There have been issues between the parties respecting parenting time, including applications by the respondent to the court. The most significant issues have related to their son Griffin's reaction to parenting time with his father, given it has necessarily involved changes in his routine. During the summer of 2016, it was noted that their son exhibited a number of negative behaviours which took time to resolve and stabilize.
- [82] The special needs of Griffin and his vulnerability to disruptions to his routine pose particular problems in arranging parenting time given the respondent's residence in the United States. As a result, a parenting time order will require sufficient flexibility so that Griffin's needs can be properly addressed. While this inevitably leads to areas of potential disagreement between the parties, the best interests of Griffin require that both parties remain sensitive to his special needs in arranging access, in particular over the summer months when periods of access will either be longer or more frequent.
- [83] The respondent also sought an order that the claimant make 50% of the ferry trips to exchange the children for visitation.

Parental Responsibilities

- [84] The Arbitration Award resolved parental responsibility allocation as follows:
2. While the Children are in either Debora or Reathel's care, the parent with care of the Children will have the Parental Responsibilities set out in section 41 of the Family Law Act.
 3. Debora and Reathel will engage with medical professionals as needed to determine the appropriate course of care for Griffin and Shae on long-term or significant physical or mental health issues. Either parent can initiate this type of consultation, with both parties needing to agree on any course of care (not including day-to-day type medical care or emergencies).
 4. All substantive decisions about the Children's medical care must be agreed to by both parties in writing. Both parties need to reply to emails or other communications about the Children's medical care within 48 hours. Failure to reply within 7 days will be deemed to indicate agreement.
 5. All substantive changes to the Children's education and extracurricular activities must be agreed to by both parties in writing. Both parties need to reply to emails or other communications about the Children's education or extracurricular activities within 48 hours. Failure to reply within 7 days will be deemed to indicate agreement.
 6. Each party will share information as they believe appropriate about day-to-day medical, health, educational, and extracurricular activities for the Children that take place during their parenting time, but this will be a sharing of information, not a seeking of agreement.

7. The parties will share the cost of any agreed-upon extracurricular activities that take place during both of their parenting times (e.g. weekly music lessons or a week-long summer camp).
 8. Debora agrees that professional help with parenting communication would be useful. She is willing to meet with Kevin Keliher, www.kevinkeliher.com, recommended by Joan Tuttle (Shae's therapist), who is available to meet with the parties, for up to 12 total sessions. Any particular session or all remaining sessions can be terminated by either party if the therapist agrees that reasonable progress is not happening. Kevin is agreeable to playing that role. The cost will be split equally between the parties.
 9. Until such time as both parties agree to a different communication plan regarding parenting, email will be considered sufficient communication on all required issues.
 10. BY CONSENT: The parties will make the Children available for communication via phone, video and/or email every day, when the Children are with that parent, and agree to provide contact information if the Children are outside their primary residence.
 11. BY CONSENT: The parties agree that they should strive to express honest and factual information regarding the other parent, and to encourage respect for and love of the other parent. They agree to support the natural development of the parent-child relationship.
- [85] Certain of these provisions assumed shared parenting in Victoria. Others have not worked due to communication difficulties between the parties. The claimant deposes that seeking the respondent's prior written approval for medical and educational choices was tried by her for several months after the respondent returned to the U.S. but she found it unworkable due to his lack of timely replies and the particular demands of their son's day-to-day care.
- [86] She notes that she relies on the expert advice of medical professionals and that it is impractical to involve the respondent in decisions respecting medications, given they are subject to change. For example, in the 19-month period prior to October 2016, in consultation with their son's family doctor, paediatrician and child psychologist, they have tried nine different medications and countless dosing changes. Only someone present can monitor and make decisions respecting their son's responses to the medications.
- [87] The litigation and arbitration history between these parties does not bode well for future cooperation. The claimant describes their relationship as contentious with a history of ineffective communication.

Imputing Income to the Respondent

[88] The Arbitration Award imputed income to the respondent as follows:

45. Reathel will be imputed a minimum income based on the following schedule:
 - i. September 2016: \$30,000

- ii. September 2018: \$50,000
- iii. September 2021: \$75,000
- iv. September 2024: \$100,000

- [89] The claimant states that this was based upon assertions by the respondent throughout the arbitration hearing that he anticipated earning between \$100,000 and \$150,000 selling art prints once he was established. The respondent disputes making such statements. I accept that he did so based on the claimant's evidence and the fact that the Arbitrator particularized the imputing of income on the basis of evidence before him. On the other hand, the respondent was overly optimistic in suggesting that he could earn such sums.
- [90] The claimant submits that income should be imputed to the respondent because he is intentionally under employed and because, given his move to the United States, co-parenting is no longer a barrier to him being fully employed. The respondent on the other hand submits that his retraining will, in the long run, be financially rewarding and will enhance his ability to spend time with his children. He opposes the imputation of any income to him.
- [91] He submits that such training is in the best interests of the children as it will enable him to be more flexible when spending time with them. For instance, he submits, given he lives in Oregon, visits to his children or to bring his children to the U.S. involves at least 12 hours of travel each way, and therefore any visits would not be possible if he was employed five days a week for an employer.
- [92] I note, however, that his choice to move to Oregon is the reason for the more time-consuming travel required to exercise his parenting time. Given it was his choice, I am of the view that he cannot rely on the travel time involved in exercising his parenting as an excuse for working less or earning less.
- [93] The claimant submits that, based on the respondent's reasonable earning capacity having regard to his age, education, training and experience, income should be imputed to him between \$40,000 and \$60,000 per annum.
- [94] The material before me includes an official printout showing the respondent's Social Security earnings from 1987 to 2013. While that does show a reduction in income when he took 18 months off work when Shae was born in October 2003, it also shows considerable variation over the years prior to the birth of the parties' children and prior to their relationship. For example, for the years 1995 to 1997 he earned an average of about \$20,000 per annum, in 1998, only \$4,048 and in 1999, \$9,855. Then in 2000 he earned \$10,157, in 2001, \$17,003 and in 2002, \$383. In 2006, his earnings were \$27,777, in 2007, \$27,612, in 2008, \$59,034, in 2009, \$7,840, in 2010, \$2,677 and in 2011, when he embarked on a career in photography, no income was reported at all. Such information however fails to include funds deducted from the respondent's income or not included as income due to his self-employment and corporate organization. It is only useful therefore to show that he has

a pattern of not earning a substantial income.

[95] The imputing of income is governed by s. 19 of the Federal Child Support Guidelines. The relevant portion of s. 19 states:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
 - (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse

[96] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532, Martinson J. addressed the legal principles to be applied when imputing income as follows:

The Concept of Imputing Income

8. Parents have a joint and ongoing legal obligation to support their children. In order to meet this legal obligation, a parent must earn what the parent is capable of earning. Section 26.1(2) of the Divorce Act says that the Guidelines "shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation."
9. Imputing income is the way in which the court gives effect to the legal requirement that a parent must earn what the parent is capable of earning. The British Columbia Court of Appeal in *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528, pointed out that the income imputing provisions in the Guidelines are similar to pre-Guidelines tests based on capacity. That is, the court must consider not only the amount of income a spouse actually earns, but "the amount of income a spouse could earn if working to capacity." (at para. 28)

Meaning of "Intentionally" in section 19(1)(a) of the Guidelines

10. Section 19(1)(a) of the Guidelines requires that before income can be imputed, the court must find that the person is intentionally under-employed or intentionally unemployed. There has been some judicial debate about the meaning of the word "intentionally." Is bad faith required? That is, is a specific intent to evade child support obligations required?
11. No such requirement is found in s. 19 itself. The Court of Appeal's conclusion in *Van Gool* that the obligation to pay child support is based on capacity to earn, supports the view that bad faith is not required. To reach a conclusion that it is required would be to misconstrue the purpose of the Guidelines.

12. They are not designed to punish parents who try to avoid child support payments. Instead, the Guidelines are designed to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation. (s. 1(a))
13. Therefore, bad faith is not required. The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. The parent required to pay is intentionally unemployed if he or she chooses not to work when capable of earning an income.

General Principles Relating to Capacity to Earn Income

14. The following principles apply when determining capacity to earn an income. (See Dr. Julien D. Payne, *Imputing Income, "Determination of Income; Disclosure of Income"*, Child Support in Canada, Danrab Inc., August 3, 1999.).
 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30.)
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
15. Professor James G. McLeod has commented on the concept of attributing income when a parent changes jobs or a career. (See Annotation, 45 R.F.L. (4th) 2.) In his opinion, courts have been too willing to attribute income without regard to whether a parent can actually earn money within the immediate future.

16. He suggests that a court should attribute income following a career/job change only if the change was unreasonable in the circumstances or undertaken to defeat support. He argues that in attributing income, courts expose a paying parent to quasi-criminal sanctions if he or she cannot make the payments. He says that a court should not expose a person to such sanctions without some evidence that he or she has acted improperly or at least unreasonably.
17. I agree that income should not be imputed when a change was reasonable in the circumstances. Reasonableness must be assessed in light of the joint obligation of parents to maintain their children and the requirement that a parent must earn to his or her ability. The general principles relating to income earning capacity, set out above, must be applied.
18. Professor McLeod focuses on fairness to the paying parent and the detrimental consequences that the attribution of income can have for that parent. The failure of a parent to earn to the parent's ability can also operate unfairly, with significant detrimental consequences for children.

Deciding Whether a Person is Working to His or Her Capacity

19. How does the court decide whether a person is earning to his or her capacity? The court should be provided with information about the parent's capacity to earn and the parent's present income earning situation. The two can then be compared.
 20. There are two aspects to a parent's capacity to earn. The first is what the parent is capable of earning based [on] age, education, experience, skills and health. The second is the job opportunities that are realistically available.
- [97] The burden lies on the claimant to establish an evidentiary basis for such a finding as it is she who is seeking to impute income to the respondent (*Marquez v. Zapiola*, 2013 BCCA 433 at para. 36). Imputing income also requires that the court assess the efforts of the party to attain self-sufficiency, not to impose the specific employment required. In *Jendruck v. Jendruck*, 2014 BCCA 320, the court said this:
- [16] Consistently, the courts have affirmed and applied the objective in the Divorce Act of striving for economic self-sufficiency, while recognizing that attainment of full economic self-sufficiency may not be practicable. To the degree effort could be made by a party to contribute to his or her own support in the circumstances, and effort has not been made, the courts have said the consequences of that party's choice falls on them. The courts do not, and cannot, say a person must take up any particular employment. It is a free society in which people may choose how to spend their hours. However, where the effort to contribute to one's own support is deemed insufficient in all the circumstances, the court will place the consequence of the inadequate effort on the person whose choice it is, and may do so by the vehicle of imputing income for under-employment.

- [98] The claimant argues that once the respondent moved to the United States, he no longer had shared parenting obligations and, as a result, no reason for not becoming fully employed. She submits that taking two years of education to become a massage therapist for which the expected income in the United States is just over minimum wage was not reasonable.
- [99] The respondent argues that his education plan was reasonable and that employment as a massage therapist will provide to him the flexibility he requires in order to parent his children to the greatest extent possible, particularly given the travel time involved in exercising his parenting time.
- [100] While the respondent has a degree, is qualified as a financial advisor and has also worked as a pharmaceutical sales representative as well as operating his own business, his income has never been substantial. He raised the issue of depression affecting his ability to work, however, that has not been established and in any event is belied by his apparent ability to attend school without difficulty and his acknowledgment that his mental condition is improving. On the other hand, he has had a mixed employment history in a variety of occupations and he asserts that massage therapy is a vocation he likes and excels at and sees doing long into the future. He has also been out of the work force during the period he lived in B.C.
- [101] The real issue is, what employment would have been available to him in the United States when he moved back in the spring of 2015. His earnings based on his Social Security information were in the range of \$27,000 to \$28,000 in 2006 and 2007. Prior years reveal much lesser earnings. The claimant has not however provided a sufficient evidentiary basis for her assertion the respondent could and should have earned in excess of \$40,000 to \$60,000 per annum on his return to the United States. While she adverts to average incomes for university degree holders in Oregon, that fails to specifically address the circumstances of the respondent such as the area of his degree, his employment history, his city of residence and the like.
- [102] The respondent deposes that as a massage therapist, earnings of \$25,000 per annum are likely without additional training but that with additional training, which he intends to pursue, he can earn more.
- [103] The claimant seeks to have income imputed to the respondent commencing May 1, 2015. The respondent argues any imputed income should recognize that his retraining was reasonable, hence the imputing of income should not commence until after his retraining is complete.

[104] On the evidence I am not satisfied the respondent would have consistently earned even minimum wage without retraining. If he is correct respecting a career in massage therapy, it will bring greater stability to his income pattern and, while not an excuse for working less, will enable greater flexibility with respect to parenting time with his children. I therefore do not find his choice to retrain unreasonable. As a result I impute income to him of \$30,000 per annum U.S. commencing May 1, 2017.

Child Support and Extraordinary Expenses

[105] In 2016, the claimant's income was \$113,000. With an income of \$30,000 U.S. imputed to the respondent, his child support obligation is \$619.00 commencing on the first day of May 2017 and continuing on the first day of each month thereafter for so long as the children are children of the marriage. I decline to order retroactive child support given the respondent's lack of employment income while retraining.

[106] With respect to extraordinary expenses, those expenses presently consist of child care and respite care. The claimant prefers a flat monthly payment given the difficulties she has had in timely payment by the respondent. While such simplicity has its attraction, in my view the uncertainty surrounding s. 7 expenses makes a fixed amount potentially unfair either to the children or their parents. As anticipated by the Arbitration Award, once the parties were no longer in receipt of equivalent income, in my view they should pay their proportional share of the children's extraordinary expenses. Those expenses shall include the claimant's day care expenses and respite care costs net of any government funding available to her.

Spousal Support

[107] The issue of health insurance for the children was addressed in the Award as follows:

5.2(4) In making an order under subsection (1) the court shall take into consideration the condition, means, needs and other circumstances of each spouse including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[108] The objectives of the application of such criteria are found at s. 15.2(6):

An order made under subsection (1) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[109] In *Chutter v. Chutter*, 2008 BCCA 507, the court set out the applicable principles respecting compensatory support:

50. Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; Bracklow, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

51. In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse."

[Emphasis in original.]

[110] In *Lee v. Lee*, 2014 BCCA 383, the court addressed the issue of whether spousal support should be ordered solely on the basis of disparity in incomes:

60. We have not been referred to any decision of this court, however, in which spousal support was awarded solely on the basis of disparity in incomes, or even solely on the basis of the non-compensatory model. (Here I am setting aside cases such as *Hodgkinson*, *supra*, in

which one spouse is very wealthy or earns a very high income and can easily contribute to the other's support without affecting his or her standard of living in any significant way.) I do note one decision of the Ontario Court of Appeal, *Farrar v. Farrar* (2003) 63 O.R. (3d) 141, in which the husband claimed spousal support for a period of approximately 12 months between the date of separation and his wife's retirement. (See para. 55.) During that period, he was living in a one-bedroom basement apartment on pension income of \$37,000 per year while his wife was still earning approximately \$74,000 as a teaching instructor. The trial judge had ordered the wife to pay her former husband the sum of \$12,000 solely on the basis that Mr. Farrar "was in need and [the wife] had the ability to pay." The Court of Appeal, per Charron J.A., as she then was, allowed the wife's appeal from this part of the award, stating that "the differential in income alone did not provide a basis for awarding spousal support." (See para. 60.)

61. The question of equalization of incomes was addressed more fully by the Alberta Court of Appeal in *Griffiths v. Griffiths*, 2011 ABCA 359. The facts of that case had many similarities to the facts here: after a 24-year marriage without children, the husband sought spousal support in order to maintain the "comfortable lifestyle and spending habits which he had before the couple separated." (Para. 2.) Like the trial court, the Court of Appeal rejected this claim. In the analysis of the Court:

We cannot find any principled way to support his claim. Nor could the chambers judge, to whom we owe appellate deference. Equalization of incomes, or even of lifestyles, is not a basis alone for non-compensatory spousal support. Still less is equalization of incomes each year. See *Luke v. Luke* [1997] 10 W.W.R. 88, 118 Man. R. (2d) 68, paras. 19-20 (C.A.). Loss of access to the fruits of the respondent's future labour is not a recognized underpinning to entitlement to spousal support, absent other considerations.

The Court also addressed the husband's assertion of "need", stating:

To call the small and temporary drop in lifestyle now experienced by the appellant a disadvantage stemming from the breakup of the marriage, first inflates the notion of need. And then it blurs the distinction between compensatory and non-compensatory support. In some divorces, indeed many, both grounds may operate together. But not here; this is not a claim to compensatory spousal support. That some divorces feature both elements does not mean that the two elements are not distinct.

And desire to keep up the full lifestyle enjoyed before separation is not the same as enough need to justify non-compensatory support.

Why would one spouse here be entitled to support and the other not? Only because the respondent's income is bigger. If the identical arguments did not apply to each former spouse here, then in considerable part it would be because the two spouses made different choices as to how to receive and then to invest their respective shares of the matrimonial property. There should be no penalty for that. The whole point of such a property division is to end the sharing in each other's property, and let each plan for the future. [At paras. 10-12.]

62. Obviously, the question of 'equalization of lifestyles' is one on which trial and appellate courts across Canada hold differing views.
66. At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation -- hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.
67. Normally, one would refer to the SSAG to help determine an appropriate amount and duration of a transitional order.

[Emphasis in original.]

- [111] The purpose of spousal support is not to equalize the parties' disposable income, rather it is to address the economic consequences of marriage and its breakdown: see *Moge v. Moge*, [1992] 3 S.C.R. 813; and *Armstrong v. Armstrong*, 2012 BCCA 166.
- [112] The respondent argues he has suffered an economic disadvantage and that the claimant has gained an economic advantage from the marriage and its breakdown. The marital history, however, reveals that the parties had completed their respective educations prior to the marriage. Neither has foregone educational opportunities, for example, as a result of the marriage or their roles in it. While the respondent asserts his role was that of a stay-at-home father resulting in disadvantages to him on the marriage breakdown, I have not found that to be the case. Both parties worked and both took time off work as stay-at-home parents.
- [113] The earnings history of the respondent reveals a lower average income than the claimant, both prior to the births of their children and after. Other than the 18 months that he stayed home when their daughter was born in 2006 and his periods of unemployment after their

separation, although he was trying to establish a career as a photographer during that period, the evidence does not support a finding that he suffered an economic disadvantage because of his role in the marriage nor that the claimant was advantaged. The evidence does not establish that his career path was interrupted by his role in the marriage or that his income earning capacity was affected by the marriage or its breakdown.

- [114] I find that the respondent did not suffer any economic disadvantage from the marriage or its breakdown. That is, the disparity in the incomes and lifestyle post-separation arise not from their respective roles in the marriage but rather from the career choices each made and the fact that the claimant's choice to write, by good fortune, happened to result in significant success and earnings.
- [115] The respondent, on the other hand, chose to become a photographer and while he apparently achieved some critical success in his chosen career, it was not financially beneficial. That was his choice.
- [116] As found in *Galloway v. Galloway*, 2006 BCSC 1677 at para. 168, referring to *S.J. v. J.J.*, 2005 BCSC 1180, the claimant's success was due more to "good fortune and individual success" than the parties' roles in the marriage. As noted at para. 178 of *Galloway*, "[i]t is not appropriate for spousal support to serve as insurance against career outcomes less lucrative than they might have been."
- [117] I conclude the respondent has no entitlement to compensatory support. Indeed the Arbitration Award support itself was based on need, not a compensatory payment.
- [118] Turning to the issue of the respondent's alleged need, as noted earlier, the Award was premised on the respondent having responsibility for shared parenting and the complications of his immigration status. As I have found, he knowingly permitted the arbitration to proceed on that false premise. The issue then is whether the respondent was entitled to support on a needs basis in the circumstances, as they actually were, rather than as falsely presented by the respondent.
- [119] The respondent asserts that he suffers from a major depressive disorder, however the evidence in support consists of a letter dated December 7, 2016, from the Yakima Valley Farm Workers Clinic signed by Nathaniel Holt, PMHNP-BC. The letter is not an expert report as it fails to comply with the requirements of Rule 13-6 of the Supreme Court Family Rules, it contains hearsay and self-reporting, and it is unclear what the qualifications of the writer are. The respondent has not established any psychological restrictions on his ability to work.
- [120] In any event, given the appeal is dismissed, the opinion contained in it relative to his ability to make decisions at the time of the arbitration is irrelevant.

- [121] As noted in Lee above, marriage alone does not entitle a spouse to support. Nor is income disparity on its own a sufficient basis for a finding of entitlement. The marital standard of living and the post-separation standard of living of the parties are however a relevant consideration. (Chutter at paras. 57 to 61.)
- [122] This was not a long-term marriage. The effect of the decision of the respondent to move to Oregon is that the claimant bears the majority of the parenting responsibilities. Given the special needs of their son, such responsibilities have a direct impact on her ability to earn an income.
- [123] The respondent has received retroactive spousal support of \$110,985 up to and including February 2015. That is, as of that date, the parties had been separated for 1.25 years. The claimant, as a result of the Award, was required to pay and did pay the sum of \$232,600 lump sum support based on a further 8.25 years of spousal support. As a result the respondent received support for 9.5 years.
- [124] As I have indicated the respondent had a weak claim for compensatory support given the parties' roles in the marriage. That favours a spousal support award at the lower end of the Spousal Support Advisory Guidelines ("SSAG") range. In addition, the marriage was neither short nor long. The respondent's employability was affected by the move to Canada and that is a factor to recognize when considering appropriate spousal support.
- [125] In my view any compensatory claim to which the respondent was entitled was fully satisfied by the retroactive spousal support payment.
- [126] Had the respondent made known his intention to immediately return to the United States after the Award, I conclude the application of the Spousal Support Advisory Guidelines on a needs basis would have resulted in a far different lump sum spousal support award. The SSAG indicate a duration of support of 6.25 years at the low end of the range of which 1.25 years of support was paid, leaving 5 years of entitlement to spousal support ending March 1, 2020. Based on the claimant's income of \$113,000 (for 2016) and no imputed income until May 1, 2017, for the respondent, total support of \$1,242.00 per month from March 2015 to May 1, 2017, would have a lump sum value of \$32,292 and with imputed income of \$30,000 to the respondent from May 1, 2017 to the end of February 2020 (a Guidelines payment of \$883.00 per month at the low end of the range) would have a lump sum value of \$29,139.00. Had the true facts been known at the time of the award, lump sum support of \$61,431.00 would have been justified.
- [127] The respondent has been overpaid in the sum of \$170,469.00 (\$232,000.00 - \$61,431.00). As a result the respondent has received funds to which he is not entitled. In my view, where, as here, a recipient has received funds they are not entitled to, they are to be repaid. This can be done by crediting the funds towards ongoing support obligations, setting off against other property or monetary awards or ordering repayment. (P.T. v. K.T., 2016 BCSC 2367.)

Deduction of the Lump Sum Retroactive Spousal Support

[128] The claimant raises the issue of her inability to deduct the retroactive spousal support payment as it was not periodic. The amount of \$110,895 represented taxable spousal support of \$7,393.00 per month x 15 months. She claims a loss of 45.8% of the amount or \$50,789.91. The tax deductibility of the retroactive spousal support was described in the Arbitration Award as follows:

40. Reathel will acknowledge receipt of the sum of \$110,895 in prior spousal support from Debora, so that Debora may claim these amounts in her personal taxes.

He did in fact provide such an acknowledgment through counsel that stated:

Reathel will acknowledge receipt of the sum of \$110,895 in prior spousal support from Debora, so that Debora may claim these amounts in her personal taxes. We will acknowledge that Mr. Geary was seeking retroactive spousal support from December, 2013 through February, 2015, a total of 15 months.

[129] It is not clear on the material what more was required by Canada Revenue Agency, however it may relate to the fact the Award, in reliance on the last best offer of the claimant, failed to state that the payment was to satisfy retroactive period support for a specific period prior to the date of the Award. Revenue Canada updated its policy on lump-sum retroactive support payments in its Income Tax Folio S1F3-C3 as of March 5, 2015, which replaced interpretation bulletin IT-530R. It appears that a payor may deduct a lump-sum payment where it is established that the lump-sum amount is paid pursuant to a court order that establishes a clear obligation to pay retroactive periodic maintenance for a specified period prior to the date of the court order.

[130] The intent of the parties and the Award are clear. I will therefore amend the Award to provide that the sum of \$110,895 paid by the claimant to the respondent was for periodic spousal support of \$7,393.00 per month that she was obligated to pay to the respondent for the period December 1, 2013 to February 1, 2015.

Proposed Parenting Coordinator

[131] The respondent seeks to have a parenting coordinator appointed. However, it was not entirely clear from his submission if he was pursuing such an appointment. In any event I have concluded that in this case a parenting coordinator should not be appointed for the reasons that follow.

[132] The claimant opposes such an appointment on the basis such a coordinator would lack the knowledge necessary to address complex and unpredictable issues that arise with respect to their son's care. She notes as well that she doubts the involvement of a parenting coordinator would assist in light of the respondent's failure to comply with the orders of the arbitrator, both during the process and after the award.

Law on Parenting Coordinator

[133] The relevant provisions of the FLA respecting the use of a parenting coordinator are:

17. A parenting coordinator may assist the parties in the following manner:
 - (a) by building consensus between the parties, including by
 - (i) creating guidelines respecting how an agreement or order will be implemented,
 - (ii) creating guidelines respecting communications between the parties,
 - (iii) identifying, and creating strategies for resolving conflicts between the parties, and
 - (iv) providing information respecting resources available to the parties for the purposes of improving communication or parenting skills;
 - (b) by making determinations respecting the matters prescribed for the purposes of section 18 [determinations by parenting coordinators].
18. (1) A parenting coordinator
 - (a) may make determinations respecting prescribed matters only, subject to any limits or conditions set out in the regulations,
 - (b) must not make a determination respecting any matter excluded by the parenting coordination agreement or order, even if the matter is a prescribed matter, and
 - (c) must not make a determination that would affect the division or possession of property, or the division of family debt.

[134] In *Fleetwood v. Percival*, 2014 BCCA 502, the father appealed the refusal of the lower court judge to appoint a parenting coordinator under the FLA. The trial judge had declined to appoint a parenting coordinator under s. 224 because the parties had previously been able to work things out, the major structure of parenting had been agreed to and because of the cost of a parenting coordinator.

[135] The Court of Appeal at paras. 22-25 stated:

22. The Act, however, apart from invoking the fundamental principle of the best interests of the child, does not legislate the considerations that may bear upon a decision to engage a parenting coordinator. It is left to the judge, having found the facts and understanding the purpose of a parenting coordinator, to assess the merits of such an appointment. At this stage, the judge must make the decision exercising his or her discretion in the sense discussed by Lord Bingham in "The Discretion of the Judge", The Royal Bank of Scotland Lecture, Oxford University, delivered on May 17, 1990, (1990) 5 Denning L.J. 27 at 28:

... [the issue's] resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case.

23. It is axiomatic that the decision must be made judicially, that is, not arbitrarily but holding to "the ordinary principles upon which judicial discretion is exercised": *R. v. Stafford Justices*, [1940] 2 K.B. 33 at 43.
25. I do not see the error contended for and I do not read the judge's reasons for judgment as rejecting an appointment for the discrete reasons urged by Mr. Percival. Rather, I read the reasons for judgment as a comment on scale: first, of the benefits that may be achieved by an appointment in the circumstances before the court, including the nature of the issues already resolved; second, of the complaints that generated the application and which are advanced as a reason for an appointment; and third, of the expense of an appointment that will be borne by the parties. In other words, it seems to me that the judge considered whether the benefit that may reasonably derive from the appointment sought was sufficient to warrant the appointment, and she did this from the point of view of the best interests of the child. This is, in my view, a judicial approach to the question asked, and is not one with which we could interfere.
- [136] In *D.E.E. v. W.L.E.*, 2015 BCSC 612 at para. 48, Harris J. notes that the role of parenting coordinators "is not to assist the parties in coming to an agreement as to what the parenting arrangements should be."
- [137] There are three concerns respecting the appointment of a parenting coordinator in this case. The first arises from the special needs of Griffin. A parenting coordinator would not have the training or experience to appreciate the unique demands of Griffin, matters that only his parents really understand and appreciate. This would in my view limit the usefulness of a parenting coordinator. Indeed they might potentially exacerbate the child's problems.
- [138] The second is whether the use of a parenting coordinator would accomplish what is intended under the FLA. The history of this couple's litigation reveals that achieving consensus on matters in issue is unlikely. The Arbitrator was not able to do so by agreement, experienced counsel were not able to resolve matters by agreement and a Justice of this court, after a two day settlement conference, was not able to either.
- [139] The third is cost. These parties have been expending funds on their separation, divorce and issues in dispute for over four years. Those are funds better directed to the best interests of their children.
- [140] On a more general note, such an appointment is simply not warranted. A parenting coordinator does not change parenting arrangements. Their role is to implement and facilitate agreed upon or ordered arrangements. For these parties the dispute is over the arrangements, not their implementation.
- [141] As a result I am not satisfied that a parenting coordinator would be in the children's best interests.

Travel Insurance

[142] The Award stated:

49. Each parent is responsible for providing travel insurance for the Children if they are leaving the country. The parent who took the children out of the country will be solely responsible for any financial costs if medical care is not covered. Debora currently has travel insurance in place for the Children, and will maintain such at her sole discretion. If Reathel chooses to use Debora's travel insurance as coverage for the Children, he will comply with all the insurance company's requirements for medical care to be covered and all Debora's requests in the event of making a claim, and he will be responsible for any costs not covered or reimbursed.

[143] The claimant, firstly, is concerned that the travel insurance she has will not provide coverage for their son in the United States. In addition, given the issues between the parties, she has concerns that the respondent may neither cooperate in recovering any claims nor that he will be responsible for costs that may be incurred.

[144] In any event, the Award does not require that the claimant maintain such coverage.

[145] The respondent asserts that it is impossible for him to acquire travel insurance, however offers no evidence in support of that statement. As he has chosen to live in the United States, it is my view that it is his obligation to obtain such insurance and provide proof that he has done so.

[146] Given the history of this matter and the parties' lack of agreement on matters, each should be responsible for medical coverage, as to do otherwise simply invites further disputes.

Life Insurance

[147] The Arbitration Award provided for the parties to each maintain life insurance as follows:

50. Acknowledging the importance of shared parenting in permitting the other parent to pursue full-time work, and the potentially substantial future obligations for child support and s. 7 expenses (particularly for Griffin), each party will maintain a life insurance policy for the next 10 years of at least one million dollars, payable via an estate mechanism that makes all funds payable to a trust for the children's care. Proof of this insurance and of an appropriate estate mechanism that directs the executor of the estate to establish the appropriate trust for the children's care will be provided no later than March 31, 2015. Annual proof will be provided thereafter to confirm insurance and estate mechanism are still in effect.

[148] The respondent objects to having to maintain such a policy stating that he has a current \$250,000 policy naming the children as beneficiaries and, given his income, that is sufficient. The respondent argues that the life insurance relates to replacement of lost income, hence is of the view that \$250,000 is sufficient for him but that the claimant should have a policy of \$1,000,000.

[149] It does not appear that the figure was arrived at as a reflection of the parties' respective incomes but instead was to address the long-term costs relating in particular to Griffin in the event of a party's death.

[150] The respondent complains that the issue of the cost of such insurance was not considered, however, his last best offer suggested \$1,000,000 in coverage on the claimant's life, also without regard to cost. The arbitrator chose to accept the claimant's proposal that both parties carry such insurance. Unfortunately, no information was provided respecting the cost of such insurance.

[151] As a result, I see no reason to vary the arbitrator's decision respecting such insurance.

Application of Respondent for Document Production

[152] The respondent seeks the following orders:

1. The Claimant shall produce Amazon and Audible Inc. reports of royalties for all her published work from 2013 to present.
2. The reports will show royalty payments by title, by channel per month.
3. The claimant shall produce detailed expense reports for her corporation from 2013 to the latest tax filing.
4. The claimant will provide in writing if there is [sic] any agreements or discussions of agreements regarding the 13 titles which were marital property on the date of separation, December 2nd, 2013.

The claimant fully disclosed at the arbitration all royalties earned through February 2015.

[153] The documents requested are not relevant in light of my disposition of the respondent's appeal. In any event, they were previously disclosed and the fact that the respondent either does not have them or was not able to obtain them from previous counsel does not oblige the claimant to reproduce them.

[154] The application for production of the documents is dismissed with costs to the claimant.

[155] When the issue of the inadmissibility of the respondent's letter from his mental health provider arose, the respondent sought an adjournment to obtain a proper expert report. That request is denied as the respondent, despite representing himself, is required to comply with the Rules of Court and to present his claim in full on a summary trial application.

Orders

[156] The appeals of the Arbitrator's Award are dismissed.

[157] The primary residence of the children will be with the claimant, Debbie Lynne Geary.

[158] The claimant will have the following parental responsibilities assigned to her:

1. Making day-to-day decisions affecting the children and having day-to-day care, control and supervision of the children, except when the children are in the respondent's care during his parenting time.
2. Making decisions respecting the children's education and participation in extracurricular activities, including the nature, extent and location, while the children are in the claimant's care.
3. Making day-to-day decisions with respect to medical, dental and other health-related treatments for the children. The claimant will keep the respondent informed of significant medication changes.
4. Giving, refusing or withdrawing consent for the children, if consent is required, while the children are in the care of the claimant, provided however that the respondent may also give consent when the children are in his care, in the event of an emergency. Provided, however, that this paragraph is not to be interpreted to authorize the respondent to alter the children's medications or on-going health-related treatments in any way without the express consent of the claimant.
5. Applying for a passport, license, permit, benefit, privilege or other thing for the children.
6. The claimant will consult with the respondent in relation to any significant decision which has to be made with respect to the children, provided that it is not an emergency. In the event that the parties do not agree on the decision, the claimant will be entitled to make the decision and the respondent will be entitled to apply to the court for a review of the decision, in the event that he considers that the decision is not in the best interests of the child.
7. The respondent is solely responsible for any and all health care costs and health insurance costs for the two children at any time while they are in the United States of America and any other place outside British Columbia, Canada, during his parenting time with them.
8. Prior to the children travelling to the United States, the respondent shall provide written proof to the claimant from a health care insurer that health insurance is in place for the children while they are in the United States of America.

[159] Parenting time for the respondent will be as follows:

1. Christmas:
 - i. The respondent will have the children for 50% of Christmas break each year (8 days if Christmas break is 16 days, 9 days if Christmas break is 17-18 days).

- ii. The claimant and respondent will alternate who has the children for December 24th and 25th, beginning with the claimant in 2017. If that is in conflict with the order above, this one will take precedence.
- 2. Spring Break:
 - i. The respondent will have the children for 8-9 days, returning them to Victoria three full days before school starts again.
- 3. Summer:
 - i. Summer break parenting will be determined by April 15th of each year, taking the following factors into consideration:
 - (a) Griffin's behavioral and mental stability, Shae's expressed desires and preferences for her summer, the respondent's work schedule, and the claimant's writing demands. In the event the parties have not agreed to a summer parenting schedule by April 15th, either party will be able to seek court orders.
- 4. Weekends while school is in session:
 - i. The respondent may have up to 6 weekends per annum of 2-4 days on Vancouver Island, so long as a plan for these weekends can be developed that leaves Griffin reasonably stable afterward. For weekend visits of at least 48 hours in duration, the visits can be in Bellingham, Washington, U.S.A., if Griffin is reasonably stable afterward.
 - ii. The respondent, at his discretion, may choose to use one of those weekends to parent only Shae.
 - iii. The claimant can use up to three weekends during the school year to schedule plans of her own with the children on weekends the respondent has not yet selected. All other weekends will be left available until the 15th of the prior month.
- 5. Shae:
 - i. The respondent and the claimant may elect to spend up to one week every other year with Shae.
- 6. Transfer locations:
 - i. Pick up and drop off will be at the Swartz Bay ferry terminal between 8:00 a.m. and 6:00 p.m., or at the Dallas Road/Cook Street parking lot, unless otherwise agreed in writing.
 - ii. The respondent's parenting time will start at the drop-off at the Swartz Bay ferry terminal and end at the pick-up at the Swartz Bay ferry terminal.
- 7. The claimant's home:

- i. Except in the case of a clear emergency, the respondent will not attend at the claimant's house, enter her house, or park within visual distance of her house.
- [160] The respondent will be responsible for all expenses for the children while they are in his care, including but not restricted to travel costs associated with parenting time.
- [161] The respondent will sign a travel authorization/consent allowing the children to travel internationally outside Canada at any time with the claimant.
- [162] Income of \$30,000 per annum in United States dollars is imputed to the respondent effective May 1, 2017.
- [163] The lump sum spousal support is varied from \$232,000.00 to \$61,431.00, the latter representing spousal support on a needs basis for the period April 1, 2015 to March 31, 2020. The difference of \$170,569.00 is payable by the respondent to the claimant.
- [164] The \$50,000.00 of her property held by the claimant for possible adjustment of maintenance is to be released to her.
- [165] The claimant shall retain the \$28,000.00 of TIAACREF (401) funds still payable by her to the respondent under the Arbitration Award, in partial satisfaction of the varied lump sum spousal support repayment.
- [166] The \$25,000 held in trust by former solicitors for the respondent is to be released to the claimant in partial satisfaction of the varied lump sum spousal support repayment.
- [167] Child support is set at \$619.00 per month payable by the respondent to the claimant based on the claimant's income of \$113,000 CDN and the respondent's imputed income of \$30,000 USD commencing May 1, 2017, and continuing on the first day of each month thereafter for so long as the children remain children of the marriage.
- [168] The respondent will pay to the claimant his proportional share of the children's special or extraordinary expenses. The proportional share shall consist of their respective incomes with the respondent's share being calculated on his imputed income of \$30,000 USD. The following expenses will be special or extraordinary expenses:
1. day care costs for the child Griffin;
 2. net respite care costs incurred by the claimant respecting Griffin.
- [169] The claimant shall provide to the respondent every 90 days receipts for the special or extraordinary expenses incurred in the 90 days period and the respondent shall pay to the claimant his proportionate share within 30 days of receipt of the receipts from the claimant.
- [170] The Award is amended to provide that the sum of \$110,895 paid by the claimant to the respondent was for periodic spousal support of \$7,393.00 per month that she was obligated to pay to the respondent for the period December 1, 2013 to February 1, 2015.

Costs

- [171] The claimant submitted costs should follow the event unless offers to settle were made. The respondent states he did make a formal offer. As a result, the parties have liberty to make written submissions on costs. The claimant shall provide her submissions within 21 days of these reasons, the respondent, within 21 days thereafter, and the claimant's reply submissions, if any, 7 days thereafter.
- [172] The respondent objected to his signature on the form of order being dispensed with. The claimant shall prepare the order and provide it to the respondent. If the respondent objects to its form and the parties are unable to agree, the registrar shall settle the order.

"R.D. Punnett, J."

The Honourable Mr. Justice Punnett

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/17/10/2017BCSC1063.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/geary-v-geary-2017>

Prepared on 29 October 2026 · Esheria