

CANADA / JUDGMENT

Pearce v. Napier

2024 BCSC 1655

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2024 BCSC 1655 Pearce v. Napier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pearce v. Napier,

2024 BCSC 1655

Date: 20240906

Docket: S01837

Registry: Abbotsford

Between:

Jennifer Pearce

Appellant

And

Nicholas Napier

Respondent

Before: The Honourable Justice Girn

On appeal from: awards of an Arbitrator dated November 3, 2021,

December 7, 2021, and January 21, 2022

Reasons for Judgment

Counsel for the Appellant:

F.A. Nudel

A. Semke, Articling Student

The Respondent, appearing on his own behalf:

N. Napier

Place and Dates of Hearing:

Abbotsford, B.C.

August 8-10, 2023

November 6, 2023

February 7, 2024

Place and Date of Judgment:

Abbotsford, B.C.

September 6, 2024

Table of Contents

Introduction.. 4

Background.. 5

The Arbitral Awards. 7

The First Award (November 3, 2021) 7

Family Home. 7

The Second Award (December 7, 2021) 8

Findings of Fact 8

\$40,000 inheritance to the respondent is excluded property. 8

Insufficient evidence to demonstrate a loan from appellant's father, but find that \$30,000 was a gift from her father to appellant 9

Outstanding loan owed to the respondent's aunt, Betty Bettles of \$18,897 is a family debt 9

Net proceeds of sale of family home to account for the Inheritance, Gift, and Bettles Loan. 9

Child support and s. 7 expenses. 10

The respondent's parenting time to increase and eventually to equal shared parenting. 10

Further protection order not required, but parties at liberty to reapply. 10

The Correction (January 21, 2022) 12

The Costs Award (March 12, 2022) 13

Issues on Appeal. 14

Analysis. 14

Standard of Review.. 17

Issue 1: Did the arbitrator err in not giving adequate and sufficient reasons for proper appellate review?. 22

Issue 2: Did the arbitrator err in claiming that she had provided the parties with equal family property and debt division when the practical financial impact of her division was unequal?. 27

Issue 3: Did the arbitrator err by not using the correct test to award Section 7 Extraordinary Expenses?. 29

Issue 4: Did the arbitrator err by not using the correct test to award costs?. 30

Issue 5: Did the arbitrator err by not considering evidence relevant to the material issues when making her decisions?. 30

Issue 6: Did the arbitrator err by not issuing determinations on all matters brought forward by the parties?. 31

Issue 7: Did the arbitrator err by not granting full powers to the parenting coordinator, rendering the parenting coordinator unable to make many pressing decisions?. 32

Conclusion.. 34

Introduction

- [1] The parties have been involved in a high conflict family matter since December 2019.
- [2] Pursuant to s. 19.19 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the appellant, Jennifer Pearce seeks to appeal two arbitral awards dated November 3, 2021, and December 7, 2021, a correction dated January 21, 2022, and a costs award dated March 12, 2022, all issued by the same arbitrator, Georgiale Lang.
- [3] The appellant argues that the arbitrator made awards without considering all of the presented evidence and without addressing all of the presented issues. The appellant does not take issue with the orders relating to parenting time but appeals the orders regarding s. 7 extraordinary expenses, family property and debt division, and costs.

- [4] The appellant submits that this court should allow the appeal and amend what she refers to as "the four arbitration awards and clarification/interpretation." She submits that her financial circumstances are limited due to ongoing childcare costs and accrued litigation fees. She says she would be put in a financially precarious position if forced to return to arbitration or to set another trial. Recognizing this financial burden, the appellant instead asks the court to amend the arbitrator's alleged errors.
- [5] The respondent says the appeal should be dismissed because the issues are outside the court's jurisdiction. He argues that the appellant is attempting to appeal matters that are not appealable under the FLA and is trying to advance questions of fact masked as questions of mixed fact and law and questions of law. The respondent submits that the court is being asked to substitute the arbitrator's factual findings of facts with its own, which he argues is not permitted on this appeal. In the alternative, the respondent submits that the issues should be remitted to the arbitrator because the parties were at liberty to apply to the arbitrator on many of the issues under appeal. He says that the appellant should have taken that step before engaging in the appeal.

Background

- [6] The parties met in October 2011. They began living in a marriage like relationship sometime in January 2012. They separated in October 2016 and reconciled in February 2017. The relationship ended in November 2019 when they separated for a final time.
- [7] There are three children of the marriage aged 10, 8, and 3 years old. Since separation, the children have primarily resided with the appellant.
- [8] The respondent has had supervised parenting time which eventually became unsupervised in October 2021.
- [9] Both during and after the relationship, the respondent struggled with drug and alcohol addiction and has attended residential treatment. There is also a history of family violence which has precipitated protection orders in the past.
- [10] The appellant commenced the family law proceeding by filing a notice of family claim on December 6, 2019. She filed an amended notice of family claim on June 30, 2020.
- [11] The respondent filed a response to family claim and a counterclaim on January 6, 2020. A number of pre-trial applications for various orders were made before the parties finally scheduled a ten day trial commencing August 16, 2021.
- [12] In an effort to resolve their dispute without court intervention, the parties attended a one day mediation before Ms. Lang. After not being able to reach a global settlement, the parties agreed to have Ms. Lang proceed with a two day arbitration to resolve the outstanding issues.

- [13] The parties engaged in a lengthy process including several teleconferences and multiple emails before an arbitration agreement was executed on June 4, 2021, and revised on November 3, 2021. The arbitration took place by Zoom on November 2-3, 2021.
- [14] In addition to their financial statements and written submissions, the arbitrator permitted the parties to submit four affidavits each. I note that the appellant has asked me to review historical affidavits, which the appellant had intended to use for cross examination purposes during the arbitration. However, neither party conducted any cross examination during the arbitration. I agree with the respondent that the historical affidavits were not part of the record during the arbitration and I decline to rely on them for the purposes of this appeal.
- [15] On November 3, 2021, the arbitrator issued an interim decision (the "First Award") on issues agreed upon by the parties, which included the terms of sale of the family property and the appointment of a parenting coordinator and co-parenting counsellor.
- [16] On December, 7, 2021, the arbitrator issued a second decision (the "Second Award") which dealt with the remaining issues including family property and debt division, child support, s. 7 extraordinary expenses and parenting time.
- [17] Both parties sought a number of clarifications and interpretation of the Second Award. On January 21, 2022, the arbitrator issued a correction of her Second Award (the "Correction"). In addition to addressing the issues, where the arbitrator felt that there was insufficient evidence on some of the issues raised by the parties, she was prepared to deal with those issues if the parties agreed and provided her with evidence and written submissions.
- [18] In respect of costs, the arbitrator noted in the Second Award that she was inclined to order that each party pay their own costs so as "not to upset the balance between the parties". However, she was prepared to receive submissions.
- [19] The parties provided written submissions on costs. On March 12, 2022, the arbitrator issued her costs award (the "Costs Award") wherein she declined to order special or double costs but made an order for costs of \$20,000 payable forthwith to the respondent.

The Arbitral Awards

- [20] There are no transcripts of the arbitration hearing. The parties were aware that the arbitration would not be recorded and neither party raised this issue during the arbitration. On this appeal, the parties have referred to the materials that were before the arbitrator as well as emails exchanged between the parties and the arbitrator.
- [21] I now turn to summarizing each of the arbitral awards.

The First Award (November 3, 2021)

- [22] The First Award is preliminary in nature, and pertains to appointments and directions for the sale of the family home. It is not particularly relevant to the issues on appeal, besides the arbitrator's appointment of a parenting coordinator.
- [23] The parties agreed that the arbitrator appoint Laurence Scott, K.C. as parenting coordinator on a 24-month term with fees shared equally between the parties. His role was not outlined in any further detail, although in the Second Award and the Correction, the parties may make certain arrangements based on his input.
- [24] The arbitrator appointed Dr. Bolger as joint co-parenting counsellor, to start with individual sessions and then joint counselling only on her direction. The parties were made responsible for the cost of their individual sessions, and were to split the cost of any joint counselling sessions equally.

Family Home

- [25] The arbitrator directed the parties to jointly list the home with realtor Ms. Pogue no later than November 5, 2021, at a price based on her recommendation or otherwise agreed. Various directions were given as to its sale and occupancy, though these do not seem to be at issue on the appeal.
- [26] On its sale, proceeds were to be distributed in the usual course, in the following order: usual adjustments, financial encumbrances, real estate commission, conveyance legal costs, and the remaining to be paid in trust pending a further award or the parties' agreement. I note that this was affected by the arbitrator's Second Award which noted certain sums to be paid out before the split of the remaining proceeds.

The Second Award (December 7, 2021)

- [27] The Second Award sets out Findings of Fact, before a Discussion and Decision on various issues.

Findings of Fact

- [28] The arbitrator outlined her findings of fact. Relevant to this appeal are the following findings of fact:
- a) The children live with the appellant in the family home. The respondent has supervised parenting time with the children. The parties agreed to a parenting coordinator and co-parenting counsellor.
 - b) The appellant earned \$45,233 as an accountant in 2020. The respondent was previously a plumber who earned \$51,535 on disability in 2020 after a work-related injury. He pays child support \$578.48 biweekly which is garnished by Family Maintenance Agency.

- c) The parties are joint tenants in the family home which was purchased for \$550,000 in 2017. They have agreed to sell the home.
- d) The purchase price for the family home was funded in part by a \$40,000 inheritance received by the respondent and a loan that the appellant alleges remains owing to her father. The appellant initially said \$68,000 owing, but later increased that to say \$122,000 was owing.

[29] The arbitrator then dealt with the issues in dispute.

\$40,000 inheritance to the respondent is excluded property

- [30] The arbitrator found the \$40,000 inheritance received by the respondent was excluded property. The arbitrator found in the alternative that even if not excluded property, she would reapportion the proceeds from the sale of the family home to direct \$40,000 to the respondent, to recognize its origin as previously excluded property.

Insufficient evidence to demonstrate a loan from appellant's father, but find that \$30,000 was a gift from her father to appellant

- [31] The arbitrator found that the appellant had provided insufficient evidence to establish a loan owing to her father. She referred to the evidence as "scant", and included "some e-transfers, text messages, an undated handwritten ledger, and cheques": at para. 19. Her father also swore an affidavit, but the arbitrator found it did not shed any "more light on the actual amount of funds owed": at para. 19.
- [32] Despite not finding a loan, the arbitrator did find that appellant received a gift of \$30,000 from her father, based in part on the respondent acknowledging that gift. The arbitrator found that "[t]he parties appear to agree that the sum of \$30,000 was gifted": at para. 24. Like the inheritance to the respondent, the arbitrator found this \$30,000 was excluded property of the appellant.

Outstanding loan owed to the respondent's aunt, Betty Bettles of \$18,897 is a family debt

- [33] Unlike the alleged loan from appellant's father, the arbitrator found there was sufficient evidence to establish a loan from Ms. Bettles to the parties. She found that from the initial \$30,000, payments of \$11,103 had been made, leaving a balance of \$18,897 on the loan. She directed it be paid from net proceeds of sale of the family home.

Net proceeds of sale of family home to account for the Inheritance, Gift, and Bettles Loan

- [34] The arbitrator directed that the net sale proceeds be divided equally between the parties after accounting for the compensation to each party for excluded property (\$40,000 to the respondent; \$30,000 to appellant) and the family debt of \$18,897 owed to Bettles.

Child support and s. 7 expenses

- [35] The arbitrator directed the respondent to pay guideline child support based on his 2021 income. The arbitrator found that appellant had not provided the respondent with documentation for daycare expenses, and that if she provided it in the future, then those expenses would be s. 7 expenses to be contributed to by the respondent.
- [36] Otherwise, the s. 7 expenses were to include the children's ongoing activities so long as annual costs for each activity are \$100 more and thereby qualified as extraordinary extracurricular expenses. Any further activities were to be agreed by the parties with the parenting coordinator's assistance.
- [37] The arbitrator was unable to determine if any arrears of s. 7 expenses were owed by the respondent, but the parties were given the liberty to apply to revisit the issue.

The respondent's parenting time to increase and eventually to equal shared parenting

- [38] The arbitrator noted the appellant's concerns, including those in affidavit evidence, that the respondent should only have supervised parenting time with the children. She also noted the respondent's evidence of his drug treatment and repeated drug testing in 2020 and 2021. The arbitrator noted that the appellant agreed to unsupervised parenting time commencing October 2021 after the respondent's negative drug test in August 2021.

Further protection order not required, but parties at liberty to reapply

- [39] At para. 39 and 40, the arbitrator discussed the need for an ongoing protection order, but noted that she did not receive submissions of one's necessity or evidence that would otherwise support one.
- [40] However, the arbitrator noted that the parties had "liberty to apply if they believe recent events support the imposition of such an order". She noted caselaw outlining that while a protection order need not be specifically pleaded to be granted, imposing a protection order may in some cases "only lead to further tension between the parties", and that parties may instead seek an order in the future if events occur that meet the criteria for one.
- [41] On other matters, the arbitrator also determined that the parties are to retain all other property in their name, possession or control and responsible for debts in their name other than the mortgage. The respondent's claims for a contempt order and a fine against appellant were dismissed.
- [42] Finally, in relation to costs the arbitrator was inclined to order that each party pay their own costs so as not to upset the balance between them, but was prepared to receive submissions. These were evidently received based on the subsequent Costs Award.

[43] The appellant takes issue with the initial arbitrator's reasoning that she did not intend to upset the balance between the parties in ordering costs, but I note there is caselaw suggesting that this may be a permissible basis. For instance, in *K.S. v. C.W.K.*, 2024 BCSC 1459:

[94] No costs shall be payable by either party. I have reached this conclusion because the results of the trial have been mixed. The claimant substantially succeeded on the division of property issue, but the respondent succeeded on the Maher issue and to some extent on the support issues.

[95] In addition, in my view, it is important not to upset the balance achieved by this Court's award on the other issues addressed in these reasons, by an award of costs: see *M.N. v. C.G.F.*, 2020 BCSC 2071 at para. 7, citing *Gold v. Gold*, [1993] B.C.J. No. 1792 at para. 20, 1993 CanLII 1248 (C.A.).

[Emphasis added.]

[44] Likewise, in *M.N. v. C.G.F.*, 2020 BCSC 2071:

[7] When the court should "order otherwise" is a matter of discretion to be exercised judicially having regard to the Rules of Court. Some of the relevant factors to be considered are hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation and the importance of not upsetting the balance achieved by the award: *Gold* at para. 20.

[Emphasis added.]

The Correction (January 21, 2022)

[45] The parties requested clarifications on the Second Award and pointed out issues that were unaddressed.

[46] The arbitrator noted her authority to clarify, correct, or interpret an award is governed by s. 19.15 of the FLA: she could (a) correct any computation, clerical or typographical error or errors of a similar nature; and (b) provide an interpretation of a specific point in the award.

[47] Given the number of items clarified or interpreted, I will follow the Correction in summarizing each in one paragraph without individual headings.

[48] Occupational Rent: The arbitrator found that it was outside the scope of s. 19.15, but noted that she was unable to find sufficient evidence or facts to address this issue in the Second Award.

[49] Police Enforcement Clause: The arbitrator found that this was outside the scope of s. 19.15, but noted that she was unable to find sufficient evidence or facts to address this issue in the Second Award.

- [50] Mid-Week Parenting Time: In the first three months, the respondent's mid-week parenting time was eliminated by setting out the schedule in the Second Award.
- [51] Drug Test: The Second Award required a hair follicle drug test at the respondent's expense after six months of parenting time from the date of the Second Award. No other drug testing was or is ordered. The appellant was at liberty to apply for an additional drug test "based on cogent evidence of a 'slip'".
- [52] Bettles Debt: The additional \$10,000 debt was outside the scope of s. 19.15, but noted insufficient evidence to make findings of fact on this issue. Regarding the \$30,000 debt, the arbitrator found that the obligation to repay the debt falls on both parties. The respondent made payments on this debt post-separation of which the appellant was ordered to reimburse her share to the respondent.
- [53] Homework and Activities: The arbitrator found it is not necessary for the respondent to spend time on the children's homework or outside activities not initiated by him.
- [54] Division of Property and Debt: The arbitrator was unable to make findings on valuing chattels owned by the parties. She encouraged the parties to agree to value of the chattels, and was prepared to revisit the issue if she received an agreed statement of facts. Without an agreed statement of facts, the arbitrator would require valuation evidence based on each chattel's precise condition and bluebook valuations.
- [55] Wasting of Family Funds: The arbitrator reviewed the appellant's evidence of the respondent's spending but could not conclude evidence supported a finding of wasting.
- [56] Section 7 Expenses: The Second Award sets out these expenses. She found no evidence of arrears, and the arbitrator noted that "the appellant had the benefit of the respondent's payment of the Bettles loan."
- [57] Spousal Support: This issue was dismissed as it was abandoned.
- [58] Insufficient Evidence: The arbitrator noted there was insufficient evidence with respect to some of the clarification requests but she was prepared to deal with those issues if the parties agreed and provided her with evidence and written submissions.

The Costs Award (March 12, 2022)

- [59] The parties provided written submissions on costs. The respondent argued he was entitled to double costs on the basis that he made three settlement offers to the appellant (August 20, 2020; October 18, 2020; and May 28, 2021), which were not accepted but ought reasonably to have been accepted.
- [60] The arbitrator found that the May 28, 2021 offer complied with requirements in Rule 11-1(c) of the Supreme Court Family Rules, B.C. Reg. 169/2009.

[61] The arbitrator did not award special costs because the appellant's "conduct does not rise to the level required for special costs of reprehensible or outrageous conduct": at para. 16. The parties did not provide a draft double costs bill, nor any suggestion of an amount. The arbitrator awarded a lump sum amount rather than referring them to the registrar for an assessment. Based on the arbitration fees being \$29,586, she awarded costs to the respondent of \$20,000.

Issues on Appeal

[62] The appellant raises several ground for appeal. As set out in both the Written Outline of the appellant and the respondent's Response to Written Outline of the appellant, the grounds of appeal are namely whether the arbitrator erred:

- a) in not giving adequate and sufficient reasons for proper appellate review;
- b) in claiming that she had provided the parties with equal family property and debt division when the practical financial impact of her division was unequal;
- c) in not using the correct test to award section 7 extraordinary expenses;
- d) in not using the correct test to award costs;
- e) by not considering evidence relevant to the material issues when making her decisions;
- f) by not issuing determinations on all matters brought forward by the parties; and
- g) by not granting full powers to the parenting coordinator, rendering the parenting coordinator unable to make many pressing decisions.

Analysis

[63] The respondent raised a preliminary issue before the appeal was heard. He argues that the appeal should be struck because, first, he says the appellant's Notice of Appeal was in the wrong form, and, second, that the appellant did not properly appeal all of the arbitrator's awards. The appellant only specified the arbitrator's First Award in her appeal, so the respondent says that if the appeal is not struck, then the present appeal is of that award only, and does not affect the arbitrator's other awards: the Second Award, the Correction, or the Costs Award.

[64] In reasons indexed at *Pearce v. Napier*, 2023 BCSC 1295, I dismissed the respondent's application to strike the notice of appeal and to declare the appeal a nullity. Those reasons dealt with the substance of the respondent's submission that the appeal should be struck. As I found in those reasons, the FLA and Supreme Court Family Rules do not prescribe the content of a notice of appeal and do not provide stringent rules for the conduct of an appeal. This is consistent with *du Frane v. Regina*, 2015 BCSC 18, a case relied upon by the respondent in which Master McCallum commented on the "very modest statutory requirements for a notice of appeal in these circumstances": at para. 17.

- [65] As I noted in my previous reasons at para. 33: "Rule 21-5(2) effectively allows the Court to treat a failure to comply with the Rules as an irregularity, not a nullity". I found that the filing of the appeal in the wrong form was "an irregularity" which "[did] not invalidate the appeal": at para. 35.
- [66] Given my decision not to strike the appeal, in response to the respondent's arguments, I must consider which of the awards are subject to the appeal.
- [67] Section 19.15(2) of the FLA specifically notes that a correction or interpretation of an arbitration award "forms part of the arbitration award". As a result, under s. 19.19, an appeal of "an arbitration award" plainly includes both the award and any correction or interpretation.
- [68] Section 19.13 grants an arbitrator the power, subject to parties' agreement, to "make a costs award". Unlike a correction or interpretation, which s. 19.15(2) expressly includes as part of the arbitration award, there is no corresponding section stating that a costs award forms part of the arbitration award.
- [69] Section 19.19(2) sets the time limit for starting an appeal at 40 days, starting the day after the arbitration award is received by the party. With regard to appeals of a provincial court order, s. 233 of the FLA permits this Court to "extend the time limit for starting an appeal". However, there is no such extension set out under s. 19.19 for appeals from arbitration awards.
- [70] The appellant says that a costs award is "another form of a clarification/interpretation" because a correction/interpretation award under s. 19.15 is to follow the same formatting requirements under s. 19.14 of a typical arbitration award. The appellant seems to flip the logic here--saying that because costs awards follow the same format, they are considered a s. 19.15 correction.
- [71] I am unable to accede to this argument. In analogizing the court's decision on the merits and a costs order being separate, *M.K. v. British Columbia (Attorney General)*, 2020 BCCA 261 at para. 10, is instructive. In *M.K.*, the Court referred to the appellant having appealed the decision on the merits but not the costs order.
- [72] Further, in the Ontario case *Deep v. Toronto Star Newspaper Ltd.*, 2004 CanLII 7573, [2004] O.J. No. 3476 (Ont. S.C.J.), the appellant "did not appeal the cost award within the prescribed time limit" because "he did not appreciate the need to appeal the cost award separately from the orders": at paras. 52-53. He therefore sought leave to appeal the cost award. In the context of an arbitration award appeal under the FLA, however, as I note in the body of the document, there is no discretion permitted to the Court to extend the time limit like there is for a Provincial Court appeal.
- [73] Accordingly, I conclude that the appellant is precluded from appealing the Costs Award, but that the First Award, Second Award and Correction are all properly part of the appeal.

[74] I will now turn to the appeal of First Award and the Second Award, including the Correction.

Standard of Review

- [75] Division 4 (ss. 19.1 to 19.22) of the FLA, sets out detailed rules for the conduct of arbitrations in a family dispute and addresses grounds for court intervention in the process and rights of appeal.
- [76] Prior to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the standard of review on an appeal of an family law arbitration award was reasonableness, unless the question was one that would attract the correctness standard, such as constitutional questions or those questions of law that are of central importance to the legal system as a whole and outside the adjudicator's expertise: *McMillan v. McMillan*, 2015 BCSC 2177 at paras. 48, 54, *aff'd* 2016 BCCA 441; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 102-106.
- [77] In *Zemtsova v. Shevaley Estate*, 2023 BCSC 1375, Justice Stephens explained Vavilov's effect and residual questions regarding the standard of review applicable to family law arbitration awards:
- [66] In Vavilov, the Supreme Court of Canada established new governing principles to judicial review of "administrative decision[s]": para. 2. One of them is that where the legislature "has provided a statutory appeal mechanism from an administrative decision to a court", that signals "intent that appellate standards apply", which rebuts the presumption of reasonableness: para. 17. Where the legislature has provided for an appeal to a court, this indicates the legislature intends there to be "appellate oversight and that it expects the court to scrutinize such administrative decisions on an appellate basis" and that "intention should be given effect": Vavilov at para. 36. This means review for correctness on questions of law and palpable and overriding error for questions of fact and mixed law and fact: Lekakis at para. 21, citing Vavilov at para. 37.
- [67] Vavilov dealt with review of "administrative decision[s]", not arbitration awards, and did not refer to Sattva or Teal. So, it left unresolved the question of whether Vavilov principles of judicial review of administrative action extend to arbitration appeals: Lekakis at para. 22. In *Wastech*, a majority of the Supreme Court of Canada found it unnecessary to decide this question (para. 45), while a minority of the Court stated that Vavilov has displaced the reasoning in Sattva and Teal, and that appellate standards should apply on an appeal from a commercial arbitration award under s.31 of the Arbitration Act (paras. 118-121).
- [78] Post-Vavilov, in recent cases of appeals of family law arbitration awards, this Court has declined to decide the issue of standard of review because, on their given facts, the standard was unnecessary to determine: see e.g., *Lekakis v. Lekakis*, 2023 BCSC 376 at para. 31; *J.E.A. v. V.J.A.*, 2022 BCSC 171 at paras. 37-47, *aff'd* 2022 BCCA 441, leave to appeal to SCC *ref'd*, 40612 (20 July 2023); *A.E.E. v. M.T.E.*, 2022 BCSC 1534 at paras. 13-21. Our Court of Appeal did the same in *Eldridge v. Eldridge*, 2024 BCCA 21 at para. 40, and acknowledged the chambers

judge's comment "that the standard of review in an appeal from a family law arbitration award remains unsettled following the Supreme Court of Canada's decision in [Vavilov]": at para. 28.

[79] Previously, before the amendments to the FLA which added Division 4, the former Arbitration Act, R.S.B.C. 1996, c. 55 [Former Arbitration Act], governed family law arbitration appeals. Under the Former Arbitration Act, the standard of review in a family law arbitration appeal pursuant to s. 31(3.1) was "correctness for questions of law" and "palpable and overriding error for questions of mixed fact and law": Zemtsova at para. 63.

[80] The relevant portions of s. 31 of the Former Arbitration Act stated:

(3.1) A party to an 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.

[81] The provisions within Division 4 of the FLA came into force concurrently with the new Arbitration Act, S.B.C. 2020, c. 2 [Current Arbitration Act], on September 1, 2020, which provides that the Current Arbitration Act does not apply to "an arbitration of a family law dispute": s. 2(5)(b). Section 19.19 of the FLA, which governs this appeal, provides:

19.19 (1) A party to an arbitration may appeal to the Supreme Court an arbitration award on any question of law or on any question of mixed law and fact.

(3) On an appeal, the Supreme Court may do one or more of the following:

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

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

[82] In coming to his conclusion, Justice Stephens considered the guidance in Vavilov and the context of appeals of family law arbitration awards:

[76] Further, the case before me is a family law arbitration appeal. Unlike commercial arbitration appeals pursuant to s. 31(1), which (absent consent) require leave of the court and are limited to questions of law, family law dispute appeals are as of right and are permitted on both questions of law and mixed fact and law.

[77] Three post-Vavilov decisions did find that Teal and Sattva remain binding on the question of standard of review in s. 31(2) Arbitration Act (non-family) arbitration appeals: Spirit Bay SC at paras. 58-59; Goel at paras. 24-25; and Grewal at para. 12. However, the holdings in those cases about standard of review are subject to the later Court of Appeal decisions in Spirit

Bay-CA (pronounced December 7, 2022), Mann (pronounced February 27, 2023) and 1550 Alberni (pronounced March 29, 2023), which each left that question open. Those earlier Supreme Court cases also did not directly address the question before me: the standard of review in a s. 31(3.1) family law arbitration appeal.

- [78] I conclude that, applying Vavilov's comments about the significance of legislative intent when determining the standard of review, and the comments about the legislative intent signalled by a right of statutory appeal to the court, appellate standards should apply to a s. 31(3.1) family law arbitration appeal.
- [79] This conclusion is consistent with the nature of subject matter that can arise in a family law arbitration. Family law disputes can involve, among other things, child support, and can engage consideration of the best interests of the child. For example, the Final Order included the provision of child support as well as a general mechanism for arbitration of disputes, including those about support. The legislature would have intended that the standard of review on pure questions of law with respect to family law issues would be determined on a correctness standard and not be subject to judicial deference. The potential for inconsistent decisions on questions of law across arbitral proceedings was recognized in *Northland Utilities* (albeit in a non-family context). There, the Northwest Territories Court of Appeal concluded that a deferential standard of review risks creating uncertain interpretation of the rule of law in arbitration, while an appellate standard fosters predictability and reliability: *Northland Utilities* at para. 42. I find that these comments are apposite to s.31(3.1) appeals where arbitrators are adjudicating matters of importance in family law disputes.
- [80] In short, considering legislative intention--mainly the Arbitration Act's provision of a statutory appeal to the court and associated comments in Vavilov--appellate standards apply to a s. 31(3.1) family law arbitration appeal.
- [83] In *A.E.E.* at para. 16, Justice Murray noted that s. 19.19 of the FLA and s. 31(3.1) of the former Arbitration Act are "nearly identical". In *Forrest v. Aerin*, 2022 BCCA 184 at para. 48, the Court of Appeal also noted the "near identical terms" of the sections. More recently, in *Botten v. Botten*, 2024 BCSC 39 at para. 42, aff'd 2024 BCCA 284, Justice Brongers described the wording of the two sections as "for all intents and purposes identical".
- [84] Justice Brongers' comments in applying *Zemtsova* are instructive:
- [39] The *Zemtsova* decision is binding upon me in accordance with the doctrine of horizontal stare decisis: *R. v. Sullivan*, 2022 SCC 19. That doctrine provides that when an issue has been decided by a judge at the same level of court, it should be followed, except in three narrow circumstances:
- 1) the rationale of an earlier decision has been undermined by subsequent appellate decisions;

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

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

- [85] The Court of Appeal recently affirmed Brongers J.'s decision in reasons indexed at 2024 BCCA 284. Unfortunately, the Court was "content to proceed, without deciding, on the basis the appeal judge was correct to apply the more stringent appellate standard of review": at para. 35. While the Court of Appeal did not come to a binding conclusion on the issue, I am content to follow the principle of horizontal stare decisis, as Brongers J. did, and follow both his decision and the decision in *Zemtsova*.

- [86] In *Allard v. The University of British Columbia*, 2021 BCSC 60, Justice Douglas explained the difference between questions of law, fact, and mixed fact and law:
- [17] Legal questions are questions "about what the correct legal test is". Factual questions are "about what took place between the parties". Questions of mixed fact and law are about whether the facts satisfy the legal test" (i.e., the application of a legal standard to a set of facts): *Teal Cedar*, at para. 43; *Sattva*, at para. 49; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35 [Southam]; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 26-27.
- [87] Correctness is the least deferential standard. The reviewing court may choose to either uphold the determination or substitute its own view: *Vavilov* at para. 54.
- [88] The appellant relies on the following passage from *Delgamuukw v. R.* (1993), 104 D.L.R. (4th) 470 at 564-565, 1993 CanLII 4516 (B.C.C.A.), where the forms of palpable and overriding errors were described as:

A "palpable and overriding error" exists: firstly, when it can be demonstrated there was no evidence to support a material finding of fact of the trial judge; secondly, when the trial judge wrongly overlooked admissible evidence relevant and material to the issue before the court; or thirdly, where the trial judge's finding of fact cannot be supported as reasonable, regardless of what the trial judge saw or heard during the course of the trial. An assessment of palpable error should be made on the totality of the evidence.

- [89] The palpable and overriding error standard requires considerable deference to the arbitrator: *Whieldon v. British Columbia College of Nurses and Midwives*, 2021 BCSC 1648 at para. 36. An error is palpable when it is "plainly seen": *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 5-6. An error is overriding if it is so tied to the issues that it can be said to have affected the outcome: *Franklin v. Cooper*, 2016 BCCA 447 at para. 13.
- [90] On an appeal from a family law arbitration award, appeals on questions of fact are precluded: *FLA*, s. 19.19; *Anins v. Anins*, 2022 BCCA 441 at para. 13.

Issue 1: Did the arbitrator err in not giving adequate and sufficient reasons for proper appellate review?

- [91] The appellant argues the arbitrator did not give sufficient reasons and did not make the proper arrangement for a record of the arbitration.
- [92] She argues that the evidence before the arbitrator was contradictory. Relying on *R. v. R.E.M.*, 2008 SCC 51 at para. 57, the appellant argues that the arbitrator should have addressed those contradictions and her failure to do so constitutes an error of law.

- [93] The appellant says when the arbitrator decided to rely on the evidence of the respondent over the appellant on the family property and division valuations, she provided no explanation as to why she deemed the respondent's evidence to be more credible than the appellant's. She points to the respondent's past conduct in the legal proceedings as unquestionable and unprofessional. I fail to see to how this is relevant to the arbitrator's findings of fact and her decisions or to this appeal.
- [94] The appellant points to several areas where the arbitrator chose to rely on the respondent's evidence over hers. These include: the quantity of the loan from the appellant's father; the loan from the respondent's aunt, Ms. Bettles; s. 7 extraordinary expenses arrears owed by the respondent; the appellant's concerns about the respondent's ability to exercise parenting time; and the existence of family violence.
- [95] The appellant submits that the arbitrator's reasons are void of factual analysis and assessment rendering the reasons insufficient and do not adequately explain how the arbitrator arrived at her decisions.
- [96] I pause to note that the arbitrator received extensive affidavit materials and submissions on the issues she was asked to decide. The arbitrator permitted the parties to provide up to four affidavits. The appellant submits that not all written materials were considered in the awards issued by the arbitrator and that it is unclear which materials were considered or which materials were reviewed. As such, the appellant says this lack of clarity makes the arbitrator's reasons even more difficult to decipher.
- [97] The appellant acknowledges the court is not permitted to make its own findings of fact and conclusions of law based on those finding the reasons below were insufficient. Instead, that finding would result in a new legal proceeding. However, the appellant submits that her ongoing childrearing costs, the negative equity she was assigned during arbitration, and accrued litigation fees have caused her financial burden. She says she would be placed in a financially precarious position if forced to return to arbitration or to set another trial. The appellant asks the Court to amend the alleged errors of the arbitrator due to the financial burden that ongoing litigation would cause her.
- [98] The respondent says that the only possible outcome, provided the appellant is successful, is for the matter to be remitted to the arbitrator or set for trial. Since the parties had liberty to apply to the arbitrator on many of the issues under appeal, the respondent argues that the appellant should have exhausted those avenues first and applied to the arbitrator for further determination before bringing on this appeal.
- [99] The respondent submits that the arbitrator was not required to include an analysis of all of the materials and submissions for its reasons to be sufficient. He says that the Second Award and the Correction sufficiently articulate the arbitrator's reasons and explains why she reached her conclusions.

- [100] Arbitrators are "required to give comprehensible reasons, but such reasons need not recite every submission and outline why every submission was accepted or rejected": *Hotel Georgia Development Ltd. v. The Owners, Strata Plan EPS849*, 2021 BCSC 1236 at para. 70. On the central issues, there must be sufficient clarity to allow the parties and a reviewing court to understand how and why the decision was reached: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 16, 18. Sufficient reasons allow for meaningful judicial review and demonstrate "justification, transparency and intelligibility": *Newfoundland and Labrador Nurses' Union* at para. 1.
- [101] The principles of natural justice include an informed analysis such that the parties can understand how the arbitrator came to their conclusions: *0718698 B.C. Ltd. v. Ogopogo Beach Resorts Ltd.*, 2019 BCSC 1503 at paras. 21-27.
- [102] The appellant relies on the following summary from the Prince Edward Island Court of Appeal in *DCP v. J.M. and J.M.*, 2022 PECA 3:
- [72] It is not the role of appeal courts to parse the reasons for judgment in hopeful search for error. Reasons for judgment are not assessed on a standard of perfection. In reviewing reasons for judgment appellate courts take a functional approach reading reasons as a whole in the context of the evidence, the arguments and the trial. One looks to see that there is a logical connection between the decision and the basis of the decision (*R. v. Sheppard*, 2002 SCC 26, at para. 55; and *R. v. R.E.M.*, 2008 SCC 51, at para. 35).
- [73] As stated by the Supreme Court of Canada in *Sheppard*, at para. 55(8), the trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e. "a decision which, having regard to the particular circumstances of the case is reasonably intelligible to the parties and provides a basis for meaningful appellate review of the correctness of the trial judge's decision."
- [74] *Sheppard* continued, at para. 55(10), to say that where a trial judge's decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient.
- [75] This requires that the appeal court examine the evidence and determine whether the reasons are in fact patent on the record (*R. v. Dinardo*, 2008 SCC 24, at para. 32). In this case, patent means obvious.
- [76] The parents argue that the reasons are insufficient in two respects: first, the trial judge failed to provide reasons on issues of credibility and reliability on conflicting evidence; and second, he failed to consider both the positive direction of Mom's mental health treatment and alternative dispositions short of placing the children in the permanent care of the Director.

- [103] The respondent argues that the Court should consider the context of an arbitration being a method of alternative dispute resolution in the analysis, relying on *Nolin v. Ramirez*, 2019 BCSC 934 at paras. 22-24, rev'd in part 2020 BCCA 274.
- [104] The respondent also relies upon *Petersoo v. Petersoo*, 2019 ONCA 624, in which the Court of Appeal held at paras. 46-47, that "the father was not entitled to stay silent, participate in the proceedings without objection, wait to see what the ruling was and then claim procedural unfairness when the decision was against him". On the facts of that case, the father appealed a family law arbitration award because a relocation application was brought during the arbitration by the mother, and the father argued he was not given sufficient notice. In the result, the appeal was denied because the father had not raised an objection at any point during the arbitration process before the award was rendered.
- [105] It must be remembered that the parties chose arbitration to avoid costly and lengthy litigation in the courts and that an arbitrator's reasons are not required for members of the public to satisfy themselves that justice has been done, nor are they required to stand as precedent, as is the case with decisions emanating from the courts: *Kroupis-Yanovski v. Yanovski*, 2012 ONSC 5312 at paras.114-115.
- [106] While the arbitrator does not need to review all of the evidence, the conclusions should be understandably related to the evidence and the reasons must be sufficient to explain why the arbitrator reached her conclusion: *Nolin* at para. 23.
- [107] This was echoed in *Newfoundland and Labrador Nurses' Union*, wherein the Court noted that the arbitrator's reasons must be reasonable in that they support the conclusion reached and even if the reasons do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them: at para. 12.
- [108] I will briefly comment on the issue of the absence of a transcript from the arbitration. I agree with the respondent that the appellant cannot now complain that the arbitrator did not record the arbitration when the appellant did not object to this in the first instance. The parties were both aware that the arbitration would not be recorded and therefore no transcript would be made available. As well, both had counsel present. Accordingly, I do not see the absence of a recording of the arbitration as a successful ground for appeal. As such, in this appeal, I have only considered the affidavit materials that were before the arbitrator and the arbitrator's decisions.
- [109] As noted above, the appellant submitted historical affidavits to cross examine the respondent, much to the objection of the respondent. The appellant chose not to cross examine the respondent, but now seeks to rely on them at the appeal. Given these historical affidavits were not relied on by the arbitrator and part of the record, I am unable to consider them in this appeal. For the purposes of this appeal, I have reviewed the following affidavits submitted to the arbitrator by the parties:
- a) Submitted by the respondent:

- i. Affidavit #15 of Nicholas Napier, sworn October 25, 2021;
 - ii. Affidavit #1 of Tammy Mumford, sworn October 20, 2021;
 - iii. Affidavit #1 of Barbara Bettles, sworn October 23, 2021; and
 - iv. Affidavit #1 of Michelle Bettles, sworn October 23, 2021.
- b) Submitted by the appellant:
- i. Affidavit #17 of Jennifer Pearce, sworn October 24, 2021;
 - ii. Affidavit #1 of Faith Agnew, sworn October 21, 2021; and
 - iii. Affidavit #1 of Herbert Pearce, sworn October 22, 2021.

[110] Overall, I find that the arbitrator considered each parties' positions, weighed the evidence and provided the relevant authority to show how she reached her conclusions. Where the arbitrator was unable to conclusively determine an issue or the evidence was insufficient, she allowed the parties to provide more information and apply for a final determination: see the Second Award at paras. 30, 40 and the Correction at paras. 10 and 14.

[111] As well, in the Correction, the arbitrator specifically writes: "I indicated that there was insufficient evidence in respect of some of the issues raised by the parties in their clarification requests. I am prepared to deal with these issues if the parties agree and provide me with evidence and written submissions."

[112] I will now move to address the specific issues the appellant argues in which the arbitrator erred.

Issue 2: Did the arbitrator err in claiming that she had provided the parties with equal family property and debt division when the practical financial impact of her division was unequal?

[113] The appellant argues that the arbitrator awarded the respondent the vehicles that were paid for in full, household tools, and valuable guns, while the appellant was awarded a vehicle with an outstanding loan. As such, she says the property division was unjust and left the appellant with negative equity while the respondent received valuable assets.

[114] The appellant argues that the arbitrator failed to address the original financial positions of the parties when entering their relationship, the financial positions of the parties when entering the arbitration, the legal positions of the parties when entering arbitration, and the overall practical financial effects of the property and debt division issued.

[115] The appellant and respondent both provided the arbitrator with financial statements in which they each provided highly different values of the property and debt owned during the relationship.

[116] The respondent submits that this is a question of fact because the arbitrator was unable to provide a valuation of the family property and debt to be divided based on the evidence before her. As such, a finding of fact cannot be appealed.

[117] On this issue, the arbitrator concluded at para. 27:

The net sale proceeds of the family home shall be divided equally between the parties after taking into account the compensation owed to each party, namely, the sum of \$40,000 to Mr. Napier, the sum of \$30,000 to Ms. Pearce, and the family debt of \$18,897 payable to Ms. Bettles. In reviewing section 95 of the Family Law Act it would not be significantly unfair to divide the proceeds of sale equally between the parties.

[118] The appellant sought clarification on the division of property and debt and provided a memorandum for consideration by the arbitrator, among other issues.

[119] In her Correction, the arbitrator wrote at para. 10 that she was unable to make findings of fact on valuation based on the evidence submitted with respect to chattels owned by the parties. She encouraged the parties to agree on the value of the chattels and was prepared to revisit this issue if there was an agreed statement of facts. In the event that the parties were unable to reach an agreement, the arbitrator wrote that she would "require valuation evidence based on the precise condition of each chattel and bluebook valuations based on those precise details regarding age, condition, etc." It does not appear that this occurred.

[120] I agree with the respondent that it was open for the arbitrator to conclude that she was unable to make a finding of fact on the valuation of the chattels, including the vehicles, given the widely different amounts submitted by each party. Once again, I note that the arbitrator provided an opportunity for the parties to provide further evidence, which was not taken up on by either party. In my view, this is a question of fact--there is no error of law or error of mixed law and fact. Accordingly, this ground of appeal must be dismissed.

Issue 3: Did the arbitrator err by not using the correct test to award Section 7 Extraordinary Expenses?

[121] In her decision on the amount of child support payable by the respondent, the arbitrator ordered that the parties shall share, commensurate with their annual incomes in 2021, the children's s. 7 expenses as provided in the categories set out in s. 7 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines].

[122] The arbitrator noted that there was some indication that the appellant had not provided the respondent with evidence of third party daycare expenses for the children and the respondent had deposed that he believed the appellant's father and niece were providing childcare for the children. The arbitrator noted that if the appellant were to provide the documentation, the childcare expenses are proper s. 7 expenses. In the absence of documentation, the arbitrator held that the respondent had no obligation to contribute to the alleged daycare expenses.

- [123] The appellant says that the s. 7 expenses were to include daycare costs (if the appellant provided evidence of such costs), and soccer and baseball costs (if more than \$100 annually). The appellant argues that the arbitrator did not address her claim for medical and dental expenses for the children, as outlined in the appellant's affidavits.
- [124] In my view, the arbitrator was not required to expressly state that medical and dental expenses for the children are included in the s. 7 expenses. This is plainly stipulated in s. 7 of the Guidelines. Section 7 enumerates the special or extraordinary expenses that a parent may be required to contribute towards in addition to the table amount. Sections 7(1) (a), (b) and (c) specifically includes child care expenses, that portion of the medical and dental insurance premiums attributable to the children and health-related expenses that exceed insurance reimbursement by at least \$100 annually.
- [125] In regards to s. 7 arrears, the appellant argues that the arbitrator erred when she determined that she was unable to determine whether there were in fact arrears of s. 7 expenses, which was complicated by the fact that the respondent had not received documents to confirm same. The arbitrator gave leave for parties to apply to revisit this issue.
- [126] The appellant says the documentation was provided for in her affidavits and her financial statements. She refers to affidavits, #5, #15 and #17. However, as I have noted historical affidavits were not before the arbitrator as neither party chose to conduct cross examinations. Affidavit #17 was the only affidavit that was on the arbitrator's list of affidavits submitted by the appellant for the arbitration. Having reviewed documentation contained in the appellant's affidavit #17, there is indeed evidence to support s. 7 arrears in relation to daycare expenses and extracurricular activities and dental and medical expenses.
- [127] I find that the arbitrator committed a palpable and overriding error by not considering documentation that clearly supports s. 7 arrears.
- [128] Accordingly, this issue is remitted back to the arbitrator for reconsideration.

Issue 4: Did the arbitrator err by not using the correct test to award costs?

- [129] Given my conclusion that the costs awards is not properly part of the appeal, this ground of appeal must be dismissed.

Issue 5: Did the arbitrator err by not considering evidence relevant to the material issues when making her decisions?

[130] The appellant argues that 17 affidavits, financial statements and written submissions were before the arbitrator. As I have noted earlier, the parties were permitted to provide four affidavits each, and some affidavits were not before the arbitrator as they were only to be used for the purposes of cross examination which was not conducted. As such, I am unable to agree that the arbitrator erred by not considering these additional affidavits when making her decision on the material issues.

[131] The appellant also takes issue with the arbitrator not having reviewed the relevant documentation regarding s. 7 arrears. I have already determined that arbitrator made a palpable and overriding error in that respect under Issue 3.

Issue 6: Did the arbitrator err by not issuing determinations on all matters brought forward by the parties?

[132] The appellant argues that the arbitrator did not determine all matters brought forward by the parties as agreed in their arbitration agreement.

[133] She points to several issues including occupational rent, police enforcement, chattel division, stipulations for travelling with the children, changes in residence, introducing romantic partners to the children and the respondent's disposal of family property.

[134] The appellant sought clarification on these issues and they were addressed in the Correction, as outlined above.

[135] Pursuant to s.19.15 of the FLA, the arbitrator was asked to correct errors or give an interpretation of a specific point or part of the arbitration. She did that in her Correction.

[136] The arbitrator determined that some of the issues did not fail within the criteria of s. 19.5 and with others, she was unable to find sufficient evidence or facts to address the issues.

[137] As well, at para. 14 of the Correction, the arbitrator was once again prepared to deal with these issues if the parties agree and provide her with evidence and written submissions.

[138] In my view, the appellant essentially asks me to reweigh the evidence and substitute my own views for those of the arbitrator, which is not permitted. The arbitrator identified concerns raised by the parties in her Correction, she reviewed their submissions and made findings of fact. No error of law or mixed law and fact arises. Nor can I say that there was any deficiency in the reasons.

[139] As for the division of chattels, I earlier determined that the arbitrator was entitled to make a finding of fact on this issue and it is therefore not appealable. While the arbitrator could have chosen one side's valuation over the other's or even averaged the prices, her decision to have the parties try to reach a settlement on the valuation or provide further submissions was not unreasonable.

Issue 7: Did the arbitrator err by not granting full powers to the parenting coordinator, rendering the parenting coordinator unable to make many pressing decisions?

- [140] The parties agreed to the appointment of a parenting coordinator in the First Award. The appellant argues that the arbitrator did not provide any reasons supporting her decision to not fully empower the parenting coordinator.
- [141] By not providing the parenting coordinator with full decision-making abilities, the appellant argues that the arbitrator demonstrated a lack of understanding for the impact of family violence on the parties and did not fully consider the power dynamics at play in such a relationship, as is required under s. 8 of the FLA.
- [142] The appellant further argues that the arbitrator demonstrated a lack of understanding of family violence when speaking to the terms that would increase the likelihood of renewing the protection order between the parties. The appellant says that the affidavit materials provided by her described a long history of multiple forms of family violence.
- [143] She points to s. 184(1)(a) of the FLA, which states that a repetitive pattern of behaviour should be considered when contemplating a protection order. Yet, the arbitrator only gave the parties the ability to apply for a protection order in the event that "recent events support the impositions of such an order."
- [144] The respondent submits that the arbitrator gave the parenting coordinator the ability to assist the parties with matters as set out in para. 38 of the Second Award. The respondent says that the issues relating to a protection order and the assignment and duties of a parenting coordinator were not plainly before the arbitrator. He says that the appellant's submissions are a misguided effort to frame the arbitrator as denying a parenting coordinator of their duties.
- [145] In my view, when the parties agreed to the appointment of the parenting coordinator on November 3, 2021, it was open to the appellant to address the extent of the powers afforded to the parenting coordinator. This did not occur, nor was it addressed during the arbitration or when she sought a correction and interpretation of the Second Award.
- [146] I agree with the respondent that the parenting coordinator's powers were only limited insofar as required for the awards to comply with the FLA and to ensure the children's best interests. I am unable to find the arbitrator acted unreasonably as it relates to the appointment and powers of the parenting coordinator.
- [147] It is unclear how the issue of a protection order is relevant to this ground of appeal. Nonetheless, I will address it. The respondent submits that the arbitrator did consider the allegations of family violence made by the appellant, the need for a continuance of a protection order and the alleged power imbalance between the parties.
- [148] I note that the arbitrator was aware of the presence of past family violence but in my view, there was no basis for her to make a further protection order.
- [149] At paras. 39-40, the arbitrator addresses whether a further protection order is required:

39. I understand that a protection order was made pursuant to section 183 of the Family Law Act on April 17, 2020 and was extended on May 7, 2020 until further order of the court, with liberty to apply to Mr. Napier to vary the order. The order restrained Mr. Napier from any direct or indirect contact with Ms. Pearce and the children of the marriage, except during his supervised parenting time or electronic parenting time. He was also restrained from attending at the family home.
40. I did not receive submissions on the necessity of an ongoing protection order or evidence that would support a protection order. The exchange of the children is not at the Family Home and each of the parties will be relocating because the home will be sold and Mr. Napier will likely require accommodation more suitable for housing three children. The parties have liberty to apply if they believe recent events support the imposition of such an order

[Emphasis added.]

[150] Relying *Schiebel v. Lumb*, 2021 BCSC 2359, and *B.S.D. v. S.K.D.*, 2021 BCSC 2327, the arbitrator did not make a further protection order.

[151] The arbitrator made findings of fact including the history of violence and the parties' current situation. Further, the arbitrator provided the parties leave to apply for a protection order in the future, if necessary. Accordingly, I cannot find that the arbitrator acted unreasonably as it relates to the issue of a protection order.

Conclusion

[152] The appellant has asked me to review the record and conclude that the arbitrator improperly decided the issues on the merits and to substitute my own conclusions. However, that is not the function of an appellate court.

[153] As I noted previously, inadequate reasons do not enable the appellate court to make its own findings of fact and conclusions of law based on those findings: *Bedwell v. McGill*, 2008 BCCA 6 at para. 21.

[154] The role of an appellate court was discussed in *Housen v. Nikolaisen*, 2002 SCC 33:

[3] The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 1987 CanLII 2733 (BC CA), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

[4] While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write

better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

[155] Similarly, in *R.E.M.*, Chief Justice McLachlin stated:

56 Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14, "[a]n appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence... . Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

[156] I have concluded that, other than her failure to review all the documentary evidence of the arrears of s. 7 expenses, the arbitrator committed no reviewable errors by issuing the awards. As mentioned above, I remit the matter of s. 7 arrears to the arbitrator for reconsideration, based on documentation in the record.

[157] Otherwise, I will exercise my authority pursuant to s. 19.19(3) of the FLA to confirm all of the other terms of the awards. If there are issues on which the parties were given leave to go back to the arbitrator, I urge them to do so.

[158] The respondent has been substantially successful in this proceeding. As such, he will be awarded his costs of responding to the appellant's appeal, to be assessed at the scale of ordinary difficulty.

[159] On a final note, the arbitration and now this appeal has been extremely difficult for both parties. I urge them to put their differences aside and focus on moving forward as parents of three young children.

"Girn J."

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