Court of King's Bench of Alberta

Citation: Schafer v Schafer, 2023 ABKB 448

Date:
Docket: 2201 11772
Registry: Calgary

Between:

Glen Andrew Schafer

Applicant

- and -

Gail Colleen Schafer

Respondent

Decision on Application for Leave to Appeal
Final Arbitral Award
Honourable Justice N.E. Devlin

Overview

[1] The parties' separation has been litigious and engulfed in acrimony. In August 2019, they retained Krysta Ostwald, KC ["the Arbitrator"], to assist in the resolution of their disputes. After numerous interlocutory decisions and a lengthy hearing process, the Arbitrator issued a comprehensive Final Award on September 26, 2022 ["the Award"].

[2] This decision awarded Ms. Schafer the right to relocate to Calgary from Olds, primary parenting, and final decision-making authority, subject to a process of consultation and potential judicial review. Mr. Schafer seeks leave to appeal the Award. For the following reasons, his application is dismissed.

Key facts

[3] The parties separated in 2019, after nine years of marriage during which they lived primarily in and around Olds, Alberta. They have one child, now 11 years old. In their Arbitration Agreement, they referred the following matters to the Arbitrator, "for the determination of temporary relief, if appropriate, and for final determination": custody, parenting, child support, spousal support, property, and costs.

[4] The parties also subsequently consented to the Arbitrator acting as their Parenting Coordinator. They proceeded through a lengthy series of interim applications on a number of contentious matters, in particular parenting. The Arbitrator had issued at least six substantive awards prior to the impugned final Award. The Arbitrator also issued a number of rulings affirming her ongoing arbitral jurisdiction after this was challenged by the father. None of those awards have been successfully appealed.[1]

[5] At the time of the Award, the parties had a shared parenting and decision-making regime in place, on an interim basis. In late 2021, the father applied for a final award of primary parenting. The parties agreed that there be no oral hearing in that matter. Prior to the father's application being determined, the mother applied for relocation to Calgary, primary parenting, and sole decision-making, including over health and education.

[6] On June 9, 2022, the Arbitrator issued an award determining that she had jurisdiction to hear the relocation application and outlining the process that it would follow. The parties again agreed that no oral hearing would take place. In her procedural ruling, the Arbitrator noted that the matter was urgent, stating: "I find that the timing of this is essential to allow the arbitrator time to decide and draft an award to release prior to the commencement of [the child]'s school year."

[7] The Arbitrator further held that an adverse inference was available to be drawn against any individual whose materials were deficient.

[8] Subsequently, the Arbitrator issued an award dismissing the father's application for primary parenting. The mother's mobility application continued apace. Perhaps predictably, the litigation over that issue grew to encompass the entire parental relationship and the ostensible sins and virtues of both parents in this by now extremely high conflict relationship. To wit, questioning of the mother ran to a total of 505 pages and 23 undertakings over several days. This included questioning on undertaking responses that took place on September 16, in the presence of the Arbitrator to facilitate her rapid completion of the reasons, given that the matter had extended into the school year by that point.

[9] Despite the original agreement to proceed by way of written submissions only, the parties were afforded further oral submissions before the Arbitrator on September 16, following the completion of evidence. She released the Award a week later.

[1] The parties' previous attempts to appeal from an interlocutory award resulted in the decision of the Court of Appeal defining the parties' appeal rights under their Arbitration Agreement, discussed below.

The Arbitrator's decision

[10] Despite her initial indication that she would proceed by way of a summary award, the Arbitrator chose to issue a comprehensive final award, which she explained on the following basis:

a) The Custody, Support and Property Agreement executed between the parties in June 2020 has only one paragraph dealing with parenting which states:

> *"Gail and Glenn agree that they shall have joint custody and equal shared parenting of the child, on a without prejudice basis, till further written agreement or Arbitration Order."*

Since then, there have been six (6) interim parenting awards/PC parenting awards issued by this arbitrator in the approximately two years since the parties entering their agreement. It is important for both parties and [the child] that the process eventually come to a final parenting hearing and jurisdiction closes.

b) Mr. Schafer's Spring 2022 application for primary parenting was made on a final basis;

c) given the sheer length of time of my involvement; and

d) my finding that the process has run its course such that it requires a final parenting determination.

[11] The Arbitrator then noted that the matter was ripe for a final decision, in that the issues argued by the parents included terminal questions, such as "what parenting arrangement is in the child's best interests?" and "Is it in the child's best interests that one parent has final decision-making instead of both parents having joint decision-making?"

[12] The Arbitrator provided a detailed history of the case and noted the materials she was relying on, which included "prior parenting related affidavits and arbitration awards released on this matter", as well as all of the affidavits, examinations, and arguments (both oral and written) that had been received over the course of the prolonged arbitration process. The Arbitrator noted that she had offered, but the parties had declined, to have a full day oral hearing in July 2022.

[13] The Arbitrator reviewed the parties' positions in detail, including their submissions on residence and decision-making, before proceeding to her assessment. Her substantive decision began with a consideration of credibility. She noted that the parties' evidence conflicted on many factual points. She concluded that Mrs. Shafer's evidence was, overall, more reliable, and she preferred it where the parents' evidence conflicted. The Arbitrator proceeded to give a three-page explanation for her conclusion on credibility, with detailed examples.

[14] The Arbitrator then turned her consideration to the question of whether the mother had established a material change in circumstances, as was her onus to do before mobility could be considered. First, she rejected the father's argument that the distance between Olds and Calgary was not too great to maintain shared parenting if the mother moved. Second, she accepted the factual basis for the relocation, accepting the mother's evidence on why she needed to move.

[15] The Arbitrator then turned to a comprehensive consideration of the child's best interests, noting that the mother bore the burden of proving that the balance favoured relocation. She cited

extensively from the applicable legal principles before turning to an itemized consideration of the applicable factors. The Arbitrator painstakingly reviewed every factor relevant to parenting, relocation, and the best interests of the child. She found that certain factors favoured relocation, whereas others did not.

[16] The Arbitrator recognized both parties' role in the scale and intensity of the conflict between them, but concluded that the mother had a higher degree of insight into this and a higher probability for self-improvement. Even more importantly, she found that the mother was more aware of, attuned to, and positioned to respond to the needs of the child, who has been diagnosed with various special needs. She specifically found as a fact that:

a) the child's physical, emotional, and psychological needs were slightly better served by relocating with the mother to Calgary;

b) the child was equally bonded to both parents and their extended families, and that the nature of his existing familial relationships was a neutral factor;

c) the history of childcare was a neutral factor;

d) the absence of evidence on the child's views and preferences weighed against the mother's application given that she bore the onus to show that the proposed change was beneficial;

e) the child's cultural and religious upbringing, including his rural roots, was a neutral factor on relocation;

f) after a very lengthy assessment of the evidence, the mother's proposed educational path, being registration at Menno Simons school, better met the child's educational needs, favouring the move to Calgary;

g) the father had a lesser ability to provide for the child's educational needs, in particular given his resistance to the child's diagnoses of learning disabilities, and failure to provide timely dental and medical care, making it both in the child's interests to have the mother lead in decisions over these issues and favouring his relocation with her;

h) the father has consistently been unable to communicate with the mother to facilitate parental cooperation and is unable to prioritize the child's interests above the parental conflict or to make decisions jointly;

i) the father engages in instances of extremely negative behaviour aimed at undermining the ability to co-parent;

j) the parties cannot make joint decisions and that the mother was more suited to make final decisions in the child's interests;

k) that the mother's superior decision-making ability favoured the move to Calgary;

l) that there was insufficient and contradictory evidence on issues of domestic violence and that factor played no role in the determination;

m) the mother was more likely to comply with future orders; and

n) the mother made better efforts to de-escalate the conflict, was the "friendlier" parent, and had the better ability to make decisions meeting the child's needs.

[17] Consequent to these findings, the Arbitrator concluded that it was in the child's best interests that he relocate with the mother to Calgary. She set out a parenting timetable giving the father significant out of school time to compensate for the move.

[18] The Arbitrator rejected mother's request for sole decision-making and instead formulated a process by which the mother was to consult with the father over major decisions, through specified means and within specific timelines. In the event of an intransigent disagreement, the mother was given final authority to decide, subject to the father being able to challenge any major decision he disagreed with in Court.

[19] The father was displeased with this result and launched the present appeal process.

Proposed Grounds of appeal

[20] The father's originating Application for Leave to Appeal advanced 17 grounds of appeal alleging 22 errors of law. In his brief, and through colloquy with the Court, these were consolidated into the following eight areas of alleged error. Specifically, the father wishes to argue that the Arbitrator:

(i) exceeded her jurisdiction by

a. varying parenting in a manner not requested by the parties and;

b. by specifying the child's school;

(ii) misapplied the law on material change of circumstance by:

a. finding that the threshold distance of move for seeking a change of parenting based on mobility had been established; and

b. making a palpable and overriding error in finding that the mother needed to relocate for work.

(iii) failed to consider relevant and mandatory factors in evaluating the best interests of the child;

(iv) failed to require voice of the child evidence;

(v) erred by making credibility findings against the father unnecessarily;

(vi) conducted an unfair hearing by;

a. failing to hold an oral hearing;

b. considering evidence from the entire arbitration process;

c. closing the evidentiary phase while answers to undertakings were outstanding;

(vii) failing to admit child welfare records; and

(viii) exhibiting bias against him.

Scope of the right to appeal

[21] The scope of either party's right of appeal from an arbitration is defined by their contract. In keeping with the tenor of this relationship, the parties have already litigated the nature their appeal rights to the Court of Appeal. It held that the language of their Arbitration Agreement – specifying that "any award may be subject to remedies under the arbitration act… In accordance with subsection 44 and/or 45 of the *Arbitration Act*" – provides them with "an appeal with permission of the court on a question of law only": ***Schafer v Schafer***, 2023 ABCA 117 at para 65.

[22] Therefore, the father is presently before the court seeking permission to proceed with his proposed appeal.

Test for leave to appeal

[23] The test for determination of leave to appeal on questions of law alone is laid out in section 44(1) of the *Arbitration Act*, RSA 2000, c A-43 and reads as follows:

> Appeal of award
>
> 44(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law.
>
> (2.1) The court shall grant the permission referred to in subsection (2) only if it is satisfied that
>
> > (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
> >
> > (b) the determination of the question of law at issue will significantly affect the rights of the parties

[24] As noted by Chief Justice Wittmann in ***Capital Power Corporation v Lehigh Hanson Materials Limited***, 2013 ABQB 413 at para 38, these provisions are "difficult and unfortunately worded". Alberta litigants who resort to arbitration would be well served by a clearer and more functional articulation of the standard for appeals being permitted.

[25] Notwithstanding the unhelpful language of this section, the proper approach for determining leave to appeal from arbitral awards been discussed by this court in ***Driscoll v Hautz***, 2017 ABQB 168 at paras 16-23 and ***Myren v Myren***, 2023 ABKB 424 at paras 11-21. I adopt and apply both of my colleagues' analyses.

[26] While an evaluation of the strength of the appeal is not expressly included as a consideration in section 44(2), assessing the potential impact on the parties' rights necessarily comprises a consideration of whether the proposed appeal has a reasonable prospect of success: ***Myren*** at para 20; ***Alberta Medical Association v Alberta Health Services***, 2019 ABQB 82 at para 14.

[27] Thus, at the leave stage, "some preliminary consideration of the question of law is necessary to determine whether an appeal has the potential to succeed": ***Creston Moly Corp v Sattva Corp***, 2014 SCC 53 at para 72. The standard applied is variously described as whether the proposed appeal has "arguable merit" or raises a "serious, arguable point": ***Creston Moly*** at

paras 74-75; ***Blair v Alberta (Utilities Commission)***, 2018 ABCA 438 at para 11. Each of these articulations express the same standard and concept, namely that the proposed appeal has a reasonable chance of success.

[28] Interpreting s. 44(2.1)(b) in this manner is consistent with the principles underlying the permission to appeal process in every field. The court determining leave exercises a meaningful gatekeeping function to enhance the finality of first-instance proceedings and to avoid the unnecessary and unproductive imposition of further expense: ***Rusnak v Canyon Spring Master Builder Inc***, 2018 ABCA 2 at paras 41-42.

[29] Omitting a screening of an appeal's potential merits would result in leave being granted almost automatically in a case such as this, on the bare assertion of a legal question. That is not the intention of the section, nor the interpretation the courts have given it. Rather, our courts have repeatedly held that: "the proper interpretation of s. 44(2) incorporates high standards to the listed requirements": ***Capital Power*** at para 35. Indeed, our courts have described that the "impact on the parties' rights" component of s. 44(2) imposes a "very high" standard "that most cases will not meet": ***Driscoll*** at para 20; ***Contract Policy*** at para 70. This signals that, as a matter of legislative policy, the leave stage requires a robust analysis as to whether the proposed grounds of appeal are indeed questions of law (where that requirement applies), whether they will materially affect the parties in a way that matters proportionally to the overall dispute, and whether they have a real prospect of success. The leave court must be careful, however, not to determine the appeal on its merits at this stage: ***Myren*** at para 20.

[30] In the arbitration context, s. 44(2)(a) further screens out grounds of appeal that might succeed but make little difference to the ultimate outcome or situation between the parties. There is, however, no public interest component in the leave to appeal determination in the arbitration context, unlike in fields involving public decision makers: ***Clark v Unterschultz***, 2020 ABQB 338, at paras 48-52.

[31] In summary, when parties contract for appeal rights in accordance with the *Arbitration Act*, and do not expand or limit those rights by express agreement, when seeking leave to appeal and arbitral award they must satisfy the Court that:

i. the appeal is on a question of law (s. 44(2);

ii. the issue at stake is of sufficient importance to warrant an appeal (s. 44(2.1)(a);

iii. the grounds specified have a reasonable chance of success (s. 44(2.1)(b); and

iv. a successful appeal will materially impact the rights/situation of the parties (s. 44(2.1)(b).

(i) <u>What is a question of law?</u>

[32] The issue of a complaint raises a "question of law" is notoriously fraught. I find Justice Nation's articulation of the distinction between the operative categories of error in ***Metcalfe v. Metcalfe***, 2006 ABQB 798 at para 22 to be succinct and helpful:

> [g]enerally stated, an incorrect statement of the legal standard, or test, or an application of incorrect factors in applying the law to the facts is clearly an error of law. The law must not only be stated correctly, but that correct interpretation of the law applied to the facts, when engaging in applying the law to the facts.

> Where there is a discretion involved in applying the law to the facts, the application of the discretion is not a question of law, but a question of mixed law and fact. However, if a wrong legal principle is used in the application of the law to the facts, or in the exercise of the discretion, there is an error of law.

[33] In the arbitration context, where parties are limited to appeals on questions of law, it will often be useful to ask whether the point at issue is one on which the arbitrator could only reach one conclusion, or one of which their conclusion would be afforded deference as falling within a range of reasonable outcomes. Matters in the first category often have the character of legal questions, whereas those in the latter are almost always questions of fact or mixed questions of fact and law on which the parties gave the arbitrator the last word.

(ii) Leave on specific questions or at large

[34] Finally, where leave is granted, it may be 'at large' or on specific questions of law. However, the legislative pre-conditions for leave in the *Arbitration Act*, together with the policy concerns identified in the interpretive jurisprudence, dictate that the Court must be mindful of constraining post-arbitral litigation to matters that meet the test in s. 44: ***Boxer Capital Corporation v JEL Investments Ltd***., 2015 BCCA 24 at para 11. Therefore, leave will most often be granted on specific, defined questions. This assists in preventing generalized complaints about the outcome, masquerading as questions of law, resulting in appellate re-trials on the core arbitrated issues.

Analysis

[35] I begin by observing the obvious, namely that a significant change in parenting, whereby one parent moves to another city and the other loses a significant amount of their parenting time, is necessarily of significant impact and importance. Therefore, to the extent that a ground of appeal has direct bearing on the Arbitrator's decision on relocation and parenting time, the requirement of importance to the parties under s. 44(2.1)(a) is met. The impacts of the accompanying change in decision-making do, however, require closer scrutiny under this branch of the test for leave.

(i) Exceeding arbitral jurisdiction

[36] The Applicant complains that the Arbitrator lacked jurisdiction to grant the mother final decision-making authority over all matters, beyond education and health. His proposed argument is that having been asked to make a change in decision-making over "health and education", the Arbitrator was constrained to ruling on those issues.

[37] The Award was the culmination of the mother's application for mobility which, *inter alia*, sought "decision-making regarding the child, including but not limited to medical and educational-related decisions" [emphasis added]. This plainly put all decision-making in play. This ground of appeal hinges, therefore, on a subsequent oral amendment of the requested remedy by the mother's counsel in the latter stages of final closing arguments at the September 16, 2022, hearing.

[38] Counsel for the father had clearly been operating on the assumption that full sole decision-making authority was at issue, which led to the following exchange:

Applicant's counsel:	Her application is for sole decision-making carte blanche. And, as we've pointed out several times…
Arbitrator:	Sorry, I want to check in. That's not my understanding. My understanding of the application is that she is seeking sole decision-making on education and medical, and that's what I heard in your friend's closing. So maybe you should clarify that right out of the gate.
Respondent's Counsel:	The application does expand it, but it's sole decision-making on education and medical.
Applicant's Counsel:	Yeah, that, but the application itself says sole decision-making.
Respondent's Counsel:	And in her brain[?] it's education and medical.
Arbitrator:	Are okay, are you amending your application?
Respondent's counsel:	Yes.
Arbitrator:	Okay.

[39] In the Award, the Arbitrator varied the entire decision-making scheme, denying the mother sole authority over any matters, instead maintaining joint decision-making with the mother having the final say and the father a corollary right to challenge her 'last word' on a decision by application to the Court.

[40] In support of his argument that the Arbitrator exceeded her jurisdiction by altering the decision-making *status quo* beyond the confines of health and education, the father relies on ***Canada (Minister of Human Resources Development) v Néron***, 2004 FC 101, ***Shinder v Shinder***, 2022 ONSC 181, and ***Lague v Rosenberg***, [1996] NBJ 458 for the proposition that an arbitrator's jurisdiction is limited to that conferred by the parties, and that awards purporting to alter the parties' rights outside of those bounds are improper and reviewable errors of law.

[41] While the broad principle advanced is sound, neither it, nor the authorities cited, afford the father an arguable appeal on the facts of this case. As a starting point, at paragraph 4.1 of the Arbitration Agreement, the parties expressly vested the Arbitrator with jurisdiction over "parenting". Parental decision-making is a necessary and indivisible component of parenting. Therefore, the question of who would make decisions over the important facets of the child's life was entirely within the Arbitrator's jurisdictional remit.

[42] As a result, the father refined his proposed argument to assert that the Arbitrator was limited at any point in time to granting remedies sought by the parties on specific applications within the arbitration. While this raises a question of law, I find that it has no prospect of success on the facts of this case for three reasons.

[43] First, it confuses jurisdiction with the fair exercise of jurisdiction. There is no question that the Arbitrator had jurisdiction over parental decision-making, just as a judge has jurisdiction over it when a family matter comes before the court. The operative question is rather whether the decision to exercise that power in a particular way was something the parties knew was at issue and had an opportunity to be heard on. The problem, if there is one, is not jurisdictional.

[44] Second, a change of the magnitude implied in a mobility application necessarily puts the question of how parental decisions will be made going forward into play. An argument that these intimately inter-related facets of parenting are cordoned-off by the pleadings so as to put one off-limits to a tribunal dealing with the other has a vanishingly small prospect of success.

[45] Third, I have further considered whether the Arbitrator granting different relief than sought could raise procedural fairness issues potentially amounting to an error of law. In this case, the hearing proceeded to its final moments with the father operating on the understanding that he was responding to an application to remove all decision-making from him. The parties' parental merits and shortcomings, together with the decision-making dysfunctions of their dynamic, had been exhaustively litigated. There is no viable ground of appeal against this part of the Award on procedural fairness grounds.

[46] Furthermore, I find that the impugned modification to the decision-making regime does not alter the parties' rights significantly enough to warrant an appeal. The father went from having shared decision-making authority with resort to the Arbitrator in the event of a deadlock, to having full consultative rights with resort to a Court application in the event of an impasse with the mother. While the change altered the father's position in the decision-making process, the net change to the father's effective decision-making power is ultimately minimal. Both before and after the Award, where the opposing parental authorities clash irremediably, neutral third-party adjudication is the resolution mechanism.

[47] I find that this situation is exactly the species of grievance that s. 44(2.1) is meant to screen out from the appellate stream. If the parties behave reasonably and cooperate as parents should in the best interests of their child, the complained-of ruling will have zero impact on their rights. If the mother acts unreasonably, the father has a defined opportunity to advance his alternative approach and record his opposition, with a legal enforcement process available at the end. As the Arbitrator wrote in the Award: "this strives to ensure Mr. Schafer is proactive in asserting his legitimate beliefs on best interests in a problem-solving manner." His real effective loss is one of abstract status – the mother being given the presumptive, though not legally definitive, final say. This 'loss' to the father, while no doubt strongly felt, is exactly the sort of difference over which parties in a protracted family dispute should not be permitted to promulgate further litigation for no substantive net gain.

[48] Accordingly, leave to appeal on this ground is denied.

a. Choice of School Issue

[49] The father advances a similar argument against the Arbitrator specifying the mother's preferred school. The mother expressly sought authority over educational decisions. Thus, the jurisdictional complaint has no reasonable prospect of success. The fact that this choice implicates religious convictions does not alter that state of affairs. This was an educational parenting decision and the Arbitrator had both the authority and an express invitation, if one was needed, to deal with it. Additionally, she considered the alleged religious dimension and made factual findings in that regard. Leave is denied on this ground.

(ii) Material change in circumstance

[50] The Applicant seeks to argue that the Arbitrator erred in law by granting a mobility application where there was no material change in circumstances on two bases.

a. Failure to meet the threshold requirements for seeking a mobility ruling

[51] First, the father wishes to argue that a move from Olds to Calgary is not of sufficient distance to qualify as a change in circumstances warranting an interference in the existing parenting arrangement. This submission fails the test for leave for two reasons. First, while the proper criteria to be considered in determining whether a material change in circumstances has occurred is a question of law, ***NER v JDM***, 2011 NBCA 57, applying those criteria to the specific facts of any given case is a mixed question of fact and law: ***Droit de la famille — 172050***, 2017 QCCA 1325 at para 24. This necessarily includes the decision as to whether a move is of sufficient distance to make a commuter co-parenting arrangement unworkable in the family dynamic being considered.

[52] Second, the father's contention that one parent moving from a rural acreage outside Olds to Calgary is *per se* incapable of ever constituting a material change in circumstances as a matter of law is unarguable. His reliance on ***RLF v STF***, 2022 ABQB 492 as a precedent in this regard is misplaced. That case did not purport to determine what magnitude of move falls short of constituting a change in circumstances as a matter of law. Rather, it explored the discretionary question of whether shared parenting at a distance was an option in the specific facts of that case, which factually differed from the present case.

[53] This component of the proposed appeal reveals no arguable question of law.

b. Error in finding the mother had to move

[54] The father also argues that the Arbitrator's conclusion that the mother needed to move is a palpable and overriding error. He contends that the mother did not have to move to Calgary for her new job and that this was proven by the documentary evidence, including her employment offer which, under the heading "Place of Employment", stated that "You will work from your home office located in Olds, Alberta."

[55] Unfortunately for the father, the Arbitrator accepted the mother's explanation of this document in cross-examination, where she testified as follows:

> Q: Is it fair to say that your employer has no idea that you're relocating to Calgary?
>
> A: It is not fair to say that at all.
>
> Q: okay. Let's - -
>
> A: Because part of our conversations right from the beginning, they indicated the -- the position that I work in now was posted for Calgary. My conversations with my future manager, who is now my manager, Sheldon Haynes (phonetic), he's the district director, were that I was intending to move to Calgary to comply with the requirement which was that it was based in Calgary. And I indicated to him that I was working through a legal process to make that workable and that I would let him know soon as possible what the outcome of that was. At the time that I was hired by this company, I was resident in Olds which is why the contract -- the contract says Olds.

[56] The Arbitrator dealt with this controversy in her reasons at some length:

> I accept Ms. Schaefer's evidence that, in order to meet her new employment duties, she needs to reside in a location far enough away to make the current shared parenting schedule logistically difficult such that a change to the parenting plan is necessary. I find this despite my serious consideration of the evidence and argument put forward by Mr. Schafer's counsel suggesting that Ms. Schafer's new employment report does not require her to reside in Calgary for her position and that the position is only part time. Mr. Schafer's counsel argued that her employment contract and non-compete agreement reference her residence in Olds and the company she works for does not have a head office in Calgary therefore that employer does not require her to reside in Calgary. I accept Ms. Schafer's evidence that it has always been a full-time position and that the part-time note on Linked-In was an inadvertent error. I accept Ms. Schafer's evidence that her new employment position was advertised for an in-Calgary position and her temporarily continued residence in Olds is the reason for Olds being referenced in her employment contract and non-compete agreement. I accept her evidence that she has conditionally sold her residence in the town of Olds and is moving into the property she already owns in South Calgary. [Original emphasis]

[57] The father has no reasonable prospect of convincing a court that this conclusion was the product of palpable and overriding error, as opposed to a core finding of fact and credibility, quintessentially within the Arbitrator's purview as the trier of fact. Appellate courts will not second-guess the trier's assessment of facts and credibility merely because it takes a different view of the evidence: ***Housen v Nikolaisen***, 2002 SCC 33 at para 23. Disagreement over the Arbitrator's belief of a witness, and her explanation of potentially inconsistent documents, is not a question of law and leave to appeal is not available on this issue.

(iii) Consideration of best interest factors

[58] These grounds focus on the Arbitrator's purported failure to consider two factors on relocation arguably made mandatory by s. 16(6) of the *Divorce Act*, RSC 1985, c 3. Specifically, these are the impact of the child's lessened contact with his father if the relocation is allowed and the impact of moving the child away from his rural culture and heritage, which the father attempted to and analogized to Métis heritage by reference to ***AMCL v BDC***, 2022 ABKB 179.

[59] While the line between a discretionary weighing of factors and the legally erroneous over or under emphasis of factor is a subtle one, appellate guidance in the treatment of sentencing factors is instructive by analogy. As the Court of Appeal noted in ***R v Upright***, 2020 ABCA 329 at para 8, "the weighing of factors is within the trial judge's discretion and will only amount to an error in principle if that discretion has been exercised unreasonably".

[60] This approach applies more broadly, as noted by Kerans and Wylie in *Standards of Review Employed by Appellate Courts*, 2nd ed. (Edmonton: Juriliber, 2006) at p. 188:

> [t]he existence of a multi-factorial rule is a solid indicator that the appropriate standard [overview] is unreasonableness, not correctness, because it recognizes decisions turn on relatively small and unique variations of fact. No good comes from re-trying efforts in such a case.

[61] The Supreme Court expressly applied this principle to parenting matters in ***Van de Perre v Edwards***, 2001 SCC 60 at para 12, where it stated that:

> ...an appellate court may only intervene in the decision of a trial judge if he or she erred in law or made a material error in the appreciation of the facts. Custody and access decisions are inherently exercises in discretion. Case-by-case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.

[62] Therefore, in order to show that a question of law arises, the father would have to demonstrate that the Arbitrator either totally failed to turn her mind to relevant factors or weighed them unreasonably. It would be insufficient for him to argue that a different outcome was preferable or more in keeping with the evidence.

[63] The Award on its face forecloses the success of such a challenge. The Arbitrator expressly acknowledged her obligation to consider these factors and gave significant weight to the importance of the child "having consistent and regular time in Mr. Schafer's care…Given his strong level of parental involvement" and the child's strong bonding to his father. She held that maintaining this relationship was a vital interest for the child. Indeed, her conclusion that relocation would better serve the child's interests was informed by her factual finding that the mother was more likely to facilitate the father's ongoing parenting time and parental relationship than vice versa. This forecloses any viable argument that the Arbitrator failed to consider and weigh the decrease in the father's parenting time that relocation entailed.

[64] To quote the decision of the Supreme Court in ***Canada (Director of Investigation and Research, Competition Act) v Southam Inc***, [1997] 1 SCR 748 at para 42:

> even a cursory reading of the Tribunal's reasons discloses that the Tribunal did not fail to consider relevant items of evidence...A great part...of the Tribunal's decision is taken up with an examination of the very factors that the respondent says it ignored. Therefore, the Tribunal did not err in law by failing to consider relevant factors.

[65] The same is true for the second branch of this argument, concerning the child's farming heritage. At paragraph 103, the Arbitrator expressly considered the father's position that it was in the child's best interest to stay with him and "experience these religious and farming traditions and values; including but not limited to farming, rural Alberta life and attending the Christian church of Mr. Schafer's choice and tradition with his Canadian-born farmer father."

[66] Her analysis weighed these factors and noted their importance. Whether she weighed them correctly is not an appealable question of law.

[67] That said, the argument that these considerations should be elevated to the same level as consideration of indigenous heritage also does not have any real likelihood of success.

[68] Finally, it was also suggested that the Arbitrator applied the wrong test for best interests in mobility by comparing the proposed move to the *status quo*. Her articulation of the test at paragraph 51 of the Award outlines the correct framework of analysis, which is then carried out in great detail. Again, no arguable error of law has been shown.

(iv) Failure to seek evidence on the voice of the child

[69] The father further argues that the Arbitrator erred in law by failing to order a Voice of the Child Report or otherwise garner the child's views on the issues before her. This ground fails to meet the test for leave for several reasons. First and foremost, neither party sought such a report. The argument that the Arbitrator should have unilaterally exercised her jurisdiction to order the production of this evidence sits in obvious tension with the father's main argument that the Arbitrator overreached her authority by acting beyond the confines of the parties' exact requests.

[70] Second, the decision whether or not to order such a report is discretionary. In ***McCauley v McCauley***, 2021 ABCA 31 at para 19, the Court of Appeal said the following:

> [w]e do not agree the *Divorce Act* amendments narrow the discretion afforded to judges to refuse to order expert reports to ensure the child's views and preferences are before the court. The amendments simply codify a list of factors that a court must consider when deciding the best interests of the child. How to do that is within the judge's discretion and the exercise of that discretion is entitled to deference. Appellate intervention is not warranted in the result. [emphasis added]

[71] The Arbitrator's decision to proceed on an evidentiary record formed in accordance with the parties' litigation choices and not, of her own motion, order a further discretionary expert report, does not raise an extricable question of law.

(v) Credibility

[72] The father proposes to argue that the Arbitrator improperly, and unnecessarily, made adverse credibility findings against him. He argues that she then misused these credibility findings as a justification to disagree with Mr. Schafer's opinion on parenting matters.

[73] This framing of the dispute between the parents as "better characterized as a difference of opinion rather than direct conflict on the facts" is directly contrary to the Arbitrator's finding that "the evidence of the parties directly conflicts on many factual points throughout and therefore my assessment of credibility of each witness is a fundamental factor in this decision." A review of the affidavits, cross-examination transcripts, and submissions makes it obvious that credibility was, indeed, at issue because the parties did not agree on many core facts.

[74] Almost three pages of the Award are dedicated to explaining the Arbitrator's credibility findings. When grounded in the evidence, credibility findings are granted the highest level of appellate deference: ***R v REM***, 2008 SCC 51 at paras 56-57. No discrete question of law relating to the credibility assessment was advanced, beyond the unsustainable argument that it was unnecessary. As such, the test for leave is not met on this issue. The potential import of the credibility findings on the father's bias argument will be considered under that ground of appeal.

(vi) Breaches of procedural fairness

[75] The father contends that the changing, and at times unusual, procedures employed to complete this matter in a timely fashion resulted in breaches of fairness amounting to an error in law.

[76] An arbitration must be fair. In the arbitral context, fairness requires that the party know the case against it, and be heard on the relevant issues: ***PHS Community Services Society v Swait***, 2018 BCSC 824 at para 12. The applicant struggled to explain how the unfolding of this

case compromised his right to a fair hearing and his ability to put forward his case on the issues being decided.

[77] Both the *Arbitration Act* (ss. 19-20) and the Arbitration Agreement in this case (s. 9) afford a very broad range of procedural options for how the parties will be heard and leave these to the arbitrator's discretion.

[78] The Arbitrator gave detailed reasons on September 2, 2022, and further on September 12, 2022, for the modifications she was making to the previously prescribed hearing procedure, and for denying an adjournment request by the father. Her reasons of September 2, 2022, state:

> [i]t is of utmost importance that efforts are made to facilitate the best interests of [the child] while also ensuring procedural fairness and due process pursuant to the *Arbitration Act*. I find that it is in [the child's] best interests for a determination of the relocation application to occur on a rush urgent basis. Ideally a determination should have been made for [the child's] stability and best interests prior to the commencement of the school year. However, due process and procedural fairness necessitate that I have all the evidence and argument before me prior to a determination of the relocation issue. There have been delayed matters such that all the evidence could not be put before me prior to the commencement of [the child's] school year. I find that it is essential for us to find a balance between timing urgencies and procedural fairness under the current circumstances and I weigh these conflicting priorities carefully in my determination of these interim applications herein.

[79] With the exception of the narrow issues discussed below, the father was unable to articulate how the process employed, and the balance between timeliness and procedural fairness struck by the Arbitrator, was unfair to him. Mere departures from a previous litigation process plan, along with pragmatic steps to foreshorten timelines, are not in-and-of themselves unfair, and provide no arguable legal error.

a. Failure to hold an oral hearing

[80] The Applicant specifically alleges that the Arbitrator erred in law by not holding an oral hearing. The problem with this proposed ground is twofold. First of all, the parties *agreed* not to have a full oral hearing. Second, there *was* orally tested evidence and oral closing submissions. The parties were extensively cross-examined on their affidavit evidence, at times in the Arbitrator's presence given time constraints. This situation bears no resemblance to the authorities cited by the Applicant on this point, such as ***JM v EM***, 2022 ABCA 49, which involved a chambers application without any testing of evidence.

[81] The choice of mode of hearing is within the Court or Arbitrator's discretion: ***Simons v Simons***, 2014 BCCA 132 at para 18-19. Other than the adverse result, the father was unable to point to any substantive deficit in the case he was able to present. In fact, even a cursory examination of the record demonstrates that the salient issues were intensely and exhaustively litigated.

[82] The Arbitrator's presence for the final stage of the mother's questioning on her undertakings was the result of the compressed timeline and her inability to wait for transcripts. The Applicant offers no concrete basis for his assertion that this was unfair, beyond the fact that

this was a different procedure than what occurred with his questioning. A difference in procedure does not present an arguable case of unfairness rising to an error of law in the abstract.

b. Use of other material from the arbitration

[83] The father asserts that the Arbitrator should not have referenced materials and evidence admitted at earlier stages in the arbitration. Respectfully, this misconstrues the nature of a parenting arbitration. Unless the parties so contract, the phases of an arbitration are not siloed into watertight compartments, wherefrom evidence in an interlocutory phase cannot be considered by the arbitrator on formulating the final award. This is consistent with the arbitration being a single process, contractually unbound from the strict laws of evidence, and focused on the efficient, substantive determination of the issues on their merits.

[84] The Applicant offered no authorities for the proposition that the Arbitrator's approach was procedurally unfair or an error in law. The test for leave is not satisfied on this basis.

c. Outstanding undertakings

[85] Some of Ms. Schafer's undertakings remained outstanding, or in contested states of completion, when the arbitration concluded. Counsel for Mr. Schafer had difficulty giving examples of any that could have exerted a material influence on the outcome of the hearing. A successful review of the Arbitrator's decision to give precedence to the interests of the child in a timely ruling over the completion of marginalia would require showing what facts she missed out on that could have made a difference. Nothing was offered on this application that could satisfy s. 44(2.1)(b) in this regard.

[86] The test for leave is not made out on the proposed procedural fairness complaints.

(vii) Failure to admit CFS records

[87] The father had Child and Family Services records relating to the family that he wished admitted into evidence. The Arbitrator was provided with these and ruled them inadmissible. Specifically, in her September 12, 2022, award, the Arbitrator held that:

> ...based on the interplay between the two [relevant] sections in the *CYFDA*, I find that Mr. Schafer has not provided sufficient information or evidence to show why the material is relevant, material and likely necessary for the determination of the child's best interests in these proceedings.

[88] The father's counsel agrees that these records are presumptively inadmissible. While the admissibility of documents is a question of law, I have not been shown a viable argument impugning the Arbitrator's decision beyond disagreement with it. The proposed ground of appeal suffers the same shortcoming as the argument for admission before the Arbitrator, namely a failure to show the requisite materiality of the documents.

[89] I would also refuse leave because the allegations of family violence to which the CFS records were potentially relevant played no role in the Arbitrator's decision. As such, the Applicant has failed to show that appellate determination of the admissibility of these documents in his favour would have any impact on the ultimate outcome. Leave on this issue is denied.

(viii) Closed mind/bias

[90] The father alleges that the Arbitrator "was of a closed mind and decided the case without giving due consideration to Mr. Schafer's evidence." He frames this argument principally around

the fact that the Arbitrator refused an adjournment to complete Ms. Schaefer's outstanding undertakings, her making of adverse credibility findings, and her decision that an accelerated process favoured the child's best interest, together with other procedural complaints. These include that the Arbitrator issued her procedural ruling for how the mother's application would proceed while the father's parenting application was still pending.

[91] There is a high test to be met when alleging bias: ***Wewaykum Indian Band v. Canada***, 2003 SCC at para. 76. Judicial officers are presumed to be impartial and to act with integrity. A cogent showing on the record is required to successfully advance a claim of bias: ***R v RDS***, [1997] 3 SCR 484 at para 142. Arbitrators, such as the senior and respected member of the bar who acted as the adjudicator in this case, are also presumed to perform their duties impartially: ***Canadian Union of Postal Workers v Canada Post Corp***, 2012 FC 975 at para 22.

[92] Certain facets of the bias claim, such as those relating to unanswered undertakings, the hybrid nature of the hearing, and denial of the father's adjournment request are, in substance, procedural fairness complaints and were disposed of under that rubric.

[93] The balance of the complaints fall so far short of an apprehension of bias, even when taken on their face, that this proposed ground of appeal has no prospect of success. All of the Arbitrator's procedural decisions were thoroughly explained and the Award was balanced in a nuanced fashion. The mother was far from universally successful and the father's continued role in the child's life, together with his continued role in decision making, were vindicated.

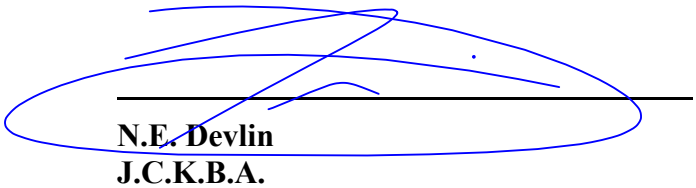
[94] The fact that Mr. Schafer's position, views on parenting, and history of conduct did not find ultimate favour with the Arbitrator does not assist him. Unsuccessful parties are often aggrieved at the outcome. Disagreement with one party's position, and making a ruling adverse to them, does not constitute bias: ***Piikani Nation v McMullen***, 2020 ABCA 366 at para 55.

[95] Arguments alleging bias, whether actual or apprehended, should be reserved for those cases in which they actually arise on the record, and not be presented as catch-all expressions of litigatory disappointment. Leave on this ground is denied.

Conclusion

[96] The application for leave to appeal is dismissed. The Respondent may submit a request for costs in writing, if she desires, within 30 days. This may be done by way of a letter, no longer than two pages. The Applicant will have 30 days thereafter to respond, in similar format.

Heard on the 20th day of July, 2023.
Dated at the City of Calgary, Alberta this 28th day of July, 2023.



N.E. Devlin
J.C.K.B.A.

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Gail Schafer
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