

CANADA / JUDGMENT

J.P. v. K.S.

2023 BCCA 419

COURT

British Columbia Court of Appeal

DECIDED

6 November 2023

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2023 BCCA 419 J.P. v. K.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

J.P. v. K.S.,

2023 BCCA 419

Date: 20231106

Docket: CA49210

Between:

J.P.

Appellant

(Respondent)

And

K.S.

Respondent

(Claimant)

Before:

The Honourable Mr. Justice Butler

(In Chambers)

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

July 11, 2023 and August 4, 2023 (K.S.P. v. J.T.P., 2023 BCSC 1188 and

2023 BCSC 1365, Vancouver Docket E162647).

Oral Reasons for Judgment

The Appellant, appearing in person:

J.P.

Counsel for the Respondent:

A.M. Ouellet

Place and Date of Hearing:

Vancouver, British Columbia

November 6, 2023

Place and Date of Judgment:

Vancouver, British Columbia

November 6, 2023

Summary:

The appellant applies for a stay of execution of multiple orders of the family trial judge: an order, pursuant to s. 221 of the Family Law Act, prohibiting the appellant from bringing further applications without leave of the trial judge; post-trial orders dismissing the appellant's subsequent applications for leave to bring such further applications; an order dismissing his application for a stay of the sale of his residence; and an order granting trial costs to the respondent. Held: Applications dismissed. All the applications, except for the application to stay the costs award, fail on a jurisdictional analysis. Section 234 of the Family Law Act precludes this Court from granting a stay of the orders made under the Act. Even if this Court retains a limited jurisdiction in extraordinary circumstances to stay orders made under the Family Law Act, they do not exist on this application. While a justice of this Court may have jurisdiction to grant a stay of an order for costs in a family law proceeding, the appellant does not satisfy any stage of the applicable test. The appeal lacks merit, the appellant is unable to demonstrate irreparable harm if the stay was not granted, and the balance of convenience favours the respondent.

[1] BUTLER J.A.: This application arises from highly contentious family proceedings. On July 10, 2023, following a 40-day trial, Justice MacNaughton issued reasons for judgment, indexed at 2023 BCSC 1188 (the "Family Judgment"). The Family Judgment included an order made pursuant to s. 221 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], prohibiting the applicant, J.P., from bringing further applications in the family proceeding for two years without obtaining leave from the trial judge. On July 31, 2023, J.P. applied to Justice MacNaughton to stay some of the trial orders and for leave to bring additional applications before her. On August 4, 2023, in reasons indexed at 2023 BCSC 1365 (the "Post-Trial Judgment"), the judge denied his stay applications and dismissed his applications for leave. He now applies to stay

those orders and two other orders from the Family Judgment.

Background

- [2] This application is one of many in this lengthy dispute. J.P. and K.S. have been engaged in civil, criminal, and family litigation for more than five years. The procedural history between the parties is complex. The relevant background is set out in the Family Judgment, which is under appeal. The facts are complex and detailed and the following summary is necessarily incomplete.
- [3] The parties were married for just over eight years and have two children. On September 16, 2018, they had a violent altercation in front of their children, which forms the subject matter of the criminal and civil proceedings.
- [4] In the criminal proceeding, J.P. pleaded guilty to assault. Following a lengthy trial in the civil proceeding, the judge found J.P. liable in battery and awarded K.S. almost \$800,000 in damages: 2021 BCSC 2209 (the "Fleming Judgment"). This Court dismissed J.P.'s appeal of that decision on August 15, 2023, in reasons indexed at 2023 BCCA 334.

The Post-Trial Judgment

- [5] In addition to the s. 221 order, the orders in the Family Judgment permitted K.S. to relocate to Germany with the children, established parenting responsibilities, determined child support, divided property, and awarded costs to K.S.
- [6] In the Post-Trial Judgment, Justice MacNaughton began her reasons with a summary of the events that occurred following the Family Judgment:
 - [4] Since the release of the Family Judgment, the following events have occurred. On July 13, 2023, [J.P.] filed an appeal and, before the Court of Appeal, sought a stay of execution of my orders in the Family Judgment. In the Court of Appeal, [J.P.] also filed an application for a stay of execution of the Fleming Judgment and the Fleming Costs Reasons, pending the resolution of his Fleming Judgment appeal, and "in support of" his related application for a stay of the Family Judgment.
- [5] The parties appeared in the Court of Appeal on three occasions: twice on preliminary matters, and the third for argument.
- [6] Justice Hunter determined that the stay application of the Fleming Judgment and the Fleming Costs Reasons was not urgent and adjourned it to be heard on August 16, 2023. Due to the timing of his stay application, his arguments on that application did not form part of the argument on the appeal of the merits of the Fleming Judgment, which was heard on November 3, 2022.
- [7] The stay of the Family Judgment orders was determined to be urgent and was argued in the Court of Appeal on July 21, 2023.

- [8] In reasons released on July 25, 2023, Hunter J.A. determined that, absent an "extraordinary" case or one demonstrating an "egregious error", the Court of Appeal did not have jurisdiction to stay the execution of orders made under the Family Law Act, S.B.C. 2011, c. 25 [FLA], and that this was not one such case: [J.P.] v. K.S., 2023 BCCA 303 at paras. 15, 17-18 and 21-22 ("Hunter Stay Reasons").
- [9] Justice Hunter concluded that the Court of Appeal did have jurisdiction to consider a stay of the order I made permitting K.S. to relocate the Children to Germany ("Relocation Order"), made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [10] The Court of Appeal declined to stay the Relocation Order. Applying the three-part test discussed below, Hunter J.A. determined that, based on the low threshold for assessing the merits of the appeal, and in light of the uncertainty as to the outcome of the Fleming Judgment appeal, [J.P.] met the merits part of the test for a stay: Hunter Stay Reasons at para. 43.
- [11] Justice Hunter was not, however, satisfied that refusing a stay would lead to irreparable harm to the Children, as that term applies to matters involving parenting and children: para. 44. He wrote:
- [50] [J.P.] has pointed out that relocation will remove the children from the community they know and friends they have made, which is undoubtedly true. But this is the case whenever families move, a common occurrence in life. I accept that the most significant negative effect of the relocation on the children will be the interference with their ongoing relationship with their father, who the trial judge accepted had a close and loving relationship with the children. But I am not satisfied, in light of the extensive examples from the evidence provided by the trial judge and her reasoned conclusions, that the relocation will result in irreparable harm to the children.
- [12] With respect to the balance of convenience, whether the stay was granted or refused, Hunter J.A. relied on my findings that relocation is in the Children's best interests and his conclusion that the Children would not suffer irreparable harm if they relocate to Germany. Justice Hunter concluded that:
- [55] If the appeal of the Family Judgment is successful, the children could be returned to British Columbia in the summer of 2024 to resume their lives here. If it is unsuccessful, they will presumably continue their life in Germany. In either case, they will have experienced a year abroad, supported by their mother and extended family.
- [56] [T]he balance of convenience favours the dismissal of the stay application of the relocation order. I am also satisfied that considering all the factors that have been brought to my attention, it is in the interests of justice and in the best interests of the children that the stay be denied.

- [13] Shortly after [J.P.] filed his notice of appeal, I set aside a full day on July 31, 2023, to deal with [J.P.]'s application for a stay of certain of my orders under the FLA and K.S.'s applications for orders or directions arising from the Family Judgment. I heard both parties' applications that day.
- [7] After hearing both parties' applications, Justice MacNaughton dismissed J.P.'s applications for leave to bring applications seeking the following orders: (1) legal counsel for the children; (2) a Hear the Child Report; (3) disclosure of K.S.'s income tax return; and (4) that British Columbia will remain the jurisdiction for family matters (collectively, the "Leave Applications").
- [8] Next, despite finding that J.P. met the low threshold of the merits part of the test, Justice MacNaughton dismissed his application for a stay of the following orders: (1) the sale of O.P., a family property, to a third party; (2) the distribution of funds from net sale proceeds of A.M.W., another family property; and (3) various parenting orders. On the sale of O.P., Justice MacNaughton determined that the balance of convenience favours K.S. and the children who need the financial support. She found it is not in the best interests to deprive K.S. of those funds. Finally, Justice MacNaughton settled the terms of the trial order and entered it on August 1, 2023 (the "Final Order").

The Stay Application

- [9] For clarity, in this application, J.P. seeks a stay of the order dismissing the Leave Applications, a stay of the s. 221 order, a stay of the order dismissing his application for a stay of the order to sell O.P., and a stay of the trial costs order. His notice of application describes the orders he is seeking in the following terms:

A stay pending appeal on the August 4, 2023 order that:

- 1) dismissed a stay application for the sale of the residence of the Appellant to a third party
- 2) dismissed applications for leave:
 - i) to apply for a reassessment of guideline income in 2023 and 2024;
 - ii) for legal counsel for the children; and
 - iii) for a Hear the Child Report.
- 3) dismissed an application that the jurisdiction for matters of the children will remain the province of British Columbia.

That the Trial Judge is functus officio of the proceedings and not seized for granting leave in the court below.

A stay on the Family Trial Order that the Appellant is not permitted to bring any applications in the court below without first obtaining leave from the Trial Judge for a period of two years.

A stay of the costs awarded in the Family Trial Order in the court below pending appeal.

Legal Test

[10] J.P.'s application seeks a stay of orders made in the family proceedings. Accordingly, his applications require consideration of s. 234 of the FLA, which governs the jurisdiction of this Court to stay a family order made under the Act when an appeal is brought:

234 Despite any other enactment, if an order made under this Act is appealed, the order remains in effect until the determination of the appeal unless the court that made it orders otherwise.

[11] Justice Hunter succinctly stated the effect of this provision in his reasons (the "Hunter Stay Reasons"), indexed as 2023 BCCA 303 (Chambers):

[15] The effect of this provision is that a justice of this Court exercising the general jurisdiction of s. 33 does not have the jurisdiction to stay any order issued under the Family Law Act. Only the judge who issued the order may grant a stay of it: *Xu v. Chu*, 2021 BCCA 323 at para. 17 (Chambers).

[12] In those reasons, Justice Hunter noted that earlier decisions, including *Stasiewski v. Stasiewski*, 2006 BCCA 53 (Chambers) and *Bennett v. Bennett*, 2002 BCCA 580 (Chambers), had observed that there may be a "sliver of jurisdiction" in this Court to issue a stay of family orders. He also considered the decision in *Kapoor v. Makkar*, 2020 BCCA 223, which suggests there is no such jurisdiction. He concluded:

[20] I conclude from this Court's judgment in *Kapoor* that either the residual jurisdiction does not exist, or if it exists, the circumstances in which it may be exercised are very limited. At its highest, jurisdiction may exist where it is plain that the trial judge has committed an obvious or egregious error of law, such as making an order not authorized by the Family Law Act or without any consideration of a mandatory requirement of that Act.

[13] Rule 22-1(7) of the Supreme Court Family Rules is also relevant to jurisdiction. It provides that where an order respecting parenting arrangements is appealed, such an order "remains in force until the determination of the appeal, unless the court that made the order otherwise directs." As an order for costs in a family proceeding is not such an order, this Court has jurisdiction to grant a stay "when the only order sought to be stayed is one of costs": *T.K. v. R.J.H.A.*, 2014 BCCA 445 at para. 26 (Chambers) (emphasis in original).

[14] An applicant for the stay of a costs order must meet the three-step test: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at para. 7, 1996 CanLII 883 (B.C.C.A. Chambers), citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, 337, 340-42, 1994 CanLII 117 (SCC):

a) that there is some merit to the appeal in the sense that there is a serious question to be determined;

- b) that irreparable harm would be occasioned to the applicant if the stay was refused; and
- c) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

Analysis

[15] As J.P. seeks a stay of many orders, I find it practical to consider the applications to stay the Leave Applications and the s. 221 order together. I will consider the applications to stay the orders for the sale of O.P. and for costs separately.

The Leave Applications and the s. 221 order

The parties' positions

- [16] Dealing first with the s. 221 order, J.P. submits that Justice MacNaughton erred in making that order. He says she misconstrued the evidence of the history of the litigation between the parties. Specifically, that she erred in finding that J.P. brought applications without merit and used the litigation process to control and harass K.S.: Family Judgment at para. 695. J.P. also argues that all of the terms in the Final Order flowed from the relocation order, and so that the orders take statutory authority from the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), not the FLA.
- [17] With respect to the Leave Applications, J.P. argues that Justice MacNaughton lacked jurisdiction to dismiss those applications after entering the Final Order, which was done despite his objection at the hearing. He argues the judge "made an egregious error after entering the [Final] Order as she had immediately become Functus Officio and did not have the jurisdiction to make the August 4, 2023 orders dismissing the application for leave." He states that this was contrary to the legal principles on which the doctrine, functus officio, was founded upon: promoting finality for the purpose of appeals. J.P. submits that the Leave Applications were all standard post-trial applications brought in family proceedings and Justice MacNaughton improperly blocked his access to bring these applications.
- [18] With regard to the specific leave applications, J.P. sought leave to apply for disclosure of K.S.'s 2022 income tax return so that he could seek a reassessment of guideline income for 2023 and 2024. He argues that Justice MacNaughton erred:
- a) in misconstruing the facts when she found that K.S.'s 2022 income tax return was evidence that was available to him through reasonable diligence and that no request had been made for a disclosure order; and
 - b) in using a guideline income set for the cost of living in Vancouver when the children are residing in a town in Germany with a lower cost of living.

- [19] With regard to his applications for leave to appoint legal counsel for the children and to order a Hear the Child report, J.P. submits that "the children will suffer the lost time and a strained bond from the distance to their father if they cannot speak and have their interests protected by legal counsel."
- [20] J.P. also submits that the judge erred in dismissing his application for leave to apply for an order declaring that the jurisdiction for family matters respecting the children will remain in British Columbia. He echoes his argument above that Justice MacNaughton was functus officio and did not have jurisdiction to dismiss the leave application when she made the orders on August 4, 2023. He says that he will suffer irreparable harm if the stay is not granted given his active appeals in the British Columbia courts, and the fact that it will be difficult for him as a self-represented litigant to litigate in a foreign jurisdiction.
- [21] In reply, K.S. takes the position that this Court does not have the jurisdiction to stay the s. 221 order as that was clearly made pursuant to the FLA. However, if jurisdiction is found, K.S. submits that ordering a stay of that order would be harmful to her psychologically and financially. Also, it would be contrary to public policy to allow J.P. to continue to misuse the court system.
- [22] K.S. submits that J.P.'s argument for a stay of the dismissal of his Leave Applications reflects a misunderstanding of the nature of his applications to this Court. His purported stay applications are really an attempt to appeal the dismissal of his applications in the court below. K.S. argues that it is not possible for this Court to stay the dismissal of an application for leave in the court below as such an order would have no effect. She says that J.P. is really asking this Court to grant him leave to bring the applications in the trial court, which it could only do after disposing of the appeal.
- [23] Further, K.S. submits that J.P.'s argument reflects a misunderstanding of the principle of functus officio which has no application in these circumstances. Justice MacNaughton did not revisit the Final Order when she dismissed J.P.'s applications for leave to make applications in the court below. Rather, she acted upon the authority of the s. 221 order that was a term of the Final Order. The Final Order remains in place, unchanged as pronounced. As these orders were made under the authority of the s. 221 order, K.S. submits that s. 234 of the FLA applies, and this Court had no jurisdiction to hear the stay applications.
- [24] In response to the application respecting J.P.'s application for a declaration that British Columbia retains jurisdiction over the children, K.S. submits that the provisions of ss. 72(2), (3), 73 and 74 of the FLA and 6.3 of the Divorce Act, grant limited authority to the courts of British Columbia to exercise jurisdiction over children who are no longer resident in this province. Further, she submits that Justice MacNaughton correctly concluded that the question of the habitual residence of the children was not before the court and that it would be inappropriate to pre-emptively deal with that issue. She says the judge was correct to conclude that "jurisdiction of matters relating to the Children will be determined if and when they arise."

Ruling

- [25] I note first that J.P. has filed an amended notice of appeal seeking that the August 4, 2023 orders be set aside. The notice of appeal does not set out the grounds of appeal, but I assume for the purpose of this application that he is asking, at the very least, that the orders referred to in this stay application be set aside.
- [26] I am of the view that there is no merit to these stay applications. I find it unnecessary to undertake the analysis as set out in RJR-MacDonald as they all fail on the jurisdictional analysis. As I have indicated above, a justice of this Court does not have jurisdiction to stay any order issued under the FLA. Each of the Leave Applications was sought pursuant to the s. 221 order that was a term of the Final Order. It provides:
55. Pursuant to s. 221 of the Family Law Act, [J.P.] is not permitted to bring on any applications in this proceeding without first obtaining leave from the Honourable Justice MacNaughton for a period for two years from the date of this order.
- [27] Despite J.P.'s claim that all of the terms of the Final Order flowed from the relocation order, and so take statutory authority from the Divorce Act, it is immediately apparent that both the s. 221 order and the orders dismissing the Leave Applications were orders made under the FLA. These orders have been appealed. Pursuant to s. 234 of the FLA, this Court has no jurisdiction to entertain a stay of these orders as they are to "remain in effect until the determination of the appeal unless the court that made it orders otherwise."
- [28] J.P. raises two arguments that he says brings his application for stay orders within the "sliver of jurisdiction" that may remain in this Court: 1) the judge was functus officio when she made the orders on August 4, 2023; and 2) the judge made obvious or egregious errors in making the s. 221 order and in considering his applications for leave to apply. These arguments are entirely lacking in merit.

Functus officio

- [29] I accept J.P.'s submission that if Justice MacNaughton made the s. 221 order and dismissed the leave applications when she was functus, that might be a basis to raise an argument for a stay based on the "sliver of jurisdiction." In other words, if a judge made an order without jurisdiction, that could amount to an egregious error of law that might be the basis for granting of a stay. However, this argument does not raise a serious issue for consideration as to the Court's jurisdiction.
- [30] The doctrine of functus officio means that once a formal judgment has been entered, a court loses jurisdiction and only has the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error, or where the matter has not been heard on its merits: *Main Acquisitions Consultants Inc. v. Prior Properties Inc.*, 2022 BCCA 102 at para. 20, citing *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 33.

[31] The doctrine has no application in this case. The s. 221 order was a term of the Final Order that was made at trial. After entering the Final Order on August 1, 2023, Justice MacNaughton never purported to reconsider it. The Final Order remains unchanged as pronounced. The fact that she exercised authority granted to her by the terms of the s. 221 order cannot raise an issue as to her jurisdiction, even if this Court were to decide on appeal that the order should not have been granted. There is no basis for application of the doctrine of *functus officio* to these circumstances.

Egregious errors

[32] Turning to J.P.'s argument that the judge made egregious errors in making the s. 221 order, the jurisdiction to make this order is provided in that section:

221 (1) A court may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court if satisfied that the party

- (a) has made an application that is trivial,
 - (b) is conducting a proceeding in a manner that is a misuse of the court process, or
 - (c) is otherwise acting in a manner that frustrates or misuses the court process.
- (2) If an order is made under subsection (1), the court may do one or more of the following:
- (a) make the order apply
 - (i) for a specified period of time, or
 - (ii) until the party has complied with an order made under this Act;
 - (b) impose any terms and conditions respecting the granting of leave to make further applications or to continue a proceeding; []

[33] There is no basis for asserting that Justice MacNaughton made an obvious or egregious error such that this Court should take jurisdiction and grant a stay. The trial judge heard evidence from many witnesses over a 40-day trial and set out the procedural history at great length in the Family Judgment. It is on this well-informed basis that she made the factual finding that the "applications brought by J.P. were unrelenting. The sheer number of them and their frequency is remarkable. J.P. used the litigation process as a way of controlling and harassing K.S., who was particularly vulnerable as a result of injuries he had caused": Family Judgment at para. 695. I would echo the comments of Justice Hunter at para. 21 in the Hunter Stay Reasons: if there is a sliver of jurisdiction in extraordinary circumstances, it does not exist in this application.

[34] There is an additional difficulty with the purported stay application of the dismissal of the Leave Applications. As K.S. has argued, a stay of the dismissal of the Leave Applications would have no effect. It would not mean that J.P. could proceed with those applications. At best, it would mean that he could apply again to Justice MacNaughton for leave to make the

applications. What J.P. is seeking to do is overturn those orders and have them substituted with an order granting leave to bring those applications. Such an order can only be made at the disposition of the appeal of the August 4, 2023 orders dismissing the Leave Applications. As K.S. argues, a stay of the dismissal of those applications would serve no purpose.

[35] There is a further difficulty with J.P.'s application for an order declaring that British Columbia remain the jurisdiction for dealing with family matters relating to the children. I agree with Justice MacNaughton that it would be inappropriate to make a "pre-emptive" order to deal with an issue that has yet to arise: Post-Trial Reasons at paras. 39-41.

[36] Accordingly, I dismiss J.P.'s application for a stay of the s. 221 order and for a stay of the orders dismissing the Leave Applications.

The order to stay the sale of O.P.

The parties' positions

[37] J.P. submits that a stay should be granted because the judge made "obvious egregious errors." He argues the judge erred in:

- a) failing to properly consider irreparable harm to K.S. and the children from the sale of O.P.;
- b) misconstruing the evidence and drawing factual inferences regarding J.P.'s financial ability to either purchase O.P. or purchase K.S.'s interest in O.P.;
- c) not allowing evidence of the value of the property;
- d) making a factual inference regarding the parties' ability to qualify for financing;
- e) misconstruing the evidence of J.P.'s attachment to O.P.;
- f) finding that any financial harm could be cured with a compensation award; and
- g) failing to consider the realities of selling in the current real estate market.

[38] J.P. submits that these errors give this Court jurisdiction to stay the dismissal of a stay of this order even though it was made under the FLA. In other words, he says that he has demonstrated the existence of extraordinary circumstances. He argues that the balance of convenience favours granting a stay. He says that if the stay is not granted, he would be homeless with no means to pay rent, and there would be nowhere for the children to live when they are with him. However, K.S. would suffer little prejudice as the money from the sale of O.P. is to be held in trust, and there is no prejudice to K.S. whether the house remains unsold as the money either remains in O.P. or in trust.

[39] K.S. takes the position that this Court does not have jurisdiction to issue the stay as it was made under Part 5 of the FLA. She argues that J.P. is, in effect, improperly using this stay application to attempt to appeal the dismissal of his stay and misusing court process in doing so.

Ruling

- [40] This is the second time J.P. has sought a stay of this order in this Court. In the Hunter Stay Reasons, Justice Hunter concluded that this Court did not have jurisdiction to stay the order for the sale of the family properties, including the sale of O.P.: at para. 26. Pursuant to s. 234 of the FLA, J.P. was required to bring his application for a stay before the trial judge. The fact that J.P. was unsuccessful with that application does not give this Court jurisdiction to reconsider that issue having brought an appeal from Justice MacNaughton's order dismissing that application for a stay. The underlying order has not changed; it was made pursuant to Part 5 of the FLA. As provided in s. 234, an order made under the FLA "remains in effect until the determination of the appeal unless the court that made it orders otherwise" (emphasis added). This Court has jurisdiction to set aside or vary such an order when it determines the matter on appeal, but it does not have jurisdiction to stay the order.
- [41] Although this is a complete answer to the application to stay the order for sale of O.P., I will consider J.P.'s argument that the circumstances of this case are such that this Court should exercise the residual jurisdiction referred to in the Hunter Stay Reasons. In those reasons, Justice Hunter was not prepared to find that Justice MacNaughton had committed an obvious or egregious error or had made an order not authorized by the FLA. He concluded:
- [21] Whatever may be the ultimate result of this appeal, there is no basis for asserting that Justice MacNaughton made an obvious error in her orders under the Family Law Act that could meet the standard of extraordinary circumstances. If there is a "sliver of jurisdiction" to stay orders made under the Family Law Act in extraordinary circumstances, that jurisdiction does not exist in the application at bar.
- [22] Thus, I am satisfied that I do not have the jurisdiction to issue a stay of any of the orders made by Justice MacNaughton pursuant to the Family Law Act. Most of the orders in the Family Judgment took their statutory authority from the Family Law Act. Accordingly, I do not have the broad jurisdiction to issue a stay of execution of the Family Judgment, as requested by the appellant.
- [42] There is no merit to this argument. J.P.'s arguments are similar to those raised previously in this Court. He alleges errors of fact or mixed fact and law. He now says that the judge repeated those errors in denying the application for a stay. However, he has not identified anything approaching extraordinary circumstances or an obvious error of law. Contrary to his submission, Justice MacNaughton applied the correct legal test in considering his application to stay the order for the sale of O.P. She also considered the best interests of the children and the possibility of irreparable harm to them in deciding to dismiss the stay application: Post-Trial Reasons at paras. 56-58, 60-61.
- [43] The application for a stay of the order for the sale of O.P. is dismissed.

The order awarding costs from the Family Judgment

- [44] I will assume for the purpose of the application to stay the costs order that this Court has jurisdiction to grant a stay of an order for costs in a family law proceeding: T.K. at para. 26. Applying the three-stage test from British Columbia (Milk Marketing Board), I would not exercise my discretion to stay the costs order. It is my view that J.P. has not satisfied any stage of the test.
- [45] While the merits test threshold is low, I do not see any merit to the appeal of the costs order. There is no question that K.S. was substantially successful in the Family Judgment: at para. 701. Costs orders are discretionary and are afforded a high degree of deference: *AM Gold Inc. v. Kaizen Discovery Inc.*, 2022 BCCA 284 at para. 63, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. J.P. has not established that the trial judge misdirected herself or made any error in making her award.
- [46] The suggestion that J.P. or the children will suffer irreparable harm if the stay is refused also lacks merit. J.P. relies on *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 (Chambers) and *Zylstra v. Hughes*, 2000 BCCA 8 (Chambers) for the proposition that: "If the appellant establishes that the respondent's modest means presents a real risk that the appellant would, if successful on appeal, be unable to recover a large portion of the funds paid to the respondent as damages, the appellant may have established that she could face irreparable harm in that sense": *Bancroft-Wilson* at para. 12. There is no evidence that K.S.'s financial means present a real risk to his potential recovery. In fact, J.P. notes that K.S. has already received \$1.8 million for the relocation and "received the vast majority of the net proceeds of the sale of the home at AMW." J.P. says that he would have difficulty in recovering funds from Germany if he is successful on appeal; however, he presents no evidence in support of that proposition.
- [47] In addition, J.P.'s argument on irreparable harm cannot stand as there is substantial equity in the O.P. property, the net proceeds of sale from which will be available to satisfy costs claims of both parties. The Final Order makes provision for those funds to be held in trust until the costs of the civil trial have been resolved. That has not occurred. Similarly, it will be some time before the cost issues arising from the Final Order will be resolved. The costs have not been taxed, and the parties have yet to appear before Justice MacNaughton to resolve remaining questions regarding the scale of costs.
- [48] Finally, I would conclude that the balance of convenience favours K.S. and the children. K.S. has relocated to Germany, and has incurred substantial legal fees in navigating her complex relationship with J.P. Given the extensive costs that K.S. has incurred, for which, in the trial judge's view, J.P. was disproportionately responsible (at para. 61 of the Post-Trial Judgment), there is little reason to deprive her of the fruits of the cost award.

Disposition

[49] J.P.'s applications for stays are dismissed.

"The Honourable Mr. Justice Butler"

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