

CANADA / JUDGMENT

J.P. v. K.S.

2024 BCCA 78

COURT

British Columbia Court of Appeal

DECIDED

4 March 2024

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2024 BCCA 78 J.P. v. K.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

J.P. v. K.S.,

2024 BCCA 78

Date: 20240304

Docket: CA49210

Between:

J.P.

Appellant

And

K.S.

Respondent

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fisher

The Honourable Justice Winteringham

On an application to vary: An order of the Court of Appeal for British Columbia, dated December 13, 2023 (J.P. v. K.S., Vancouver Docket CA49210).

The Appellant, acting on their own behalf:

J.P.

Written Submissions Received from the Appellant:

February 7, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 4, 2024

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fisher

Summary:

This is an application to vary the order of a single justice in chambers. The justice dismissed an application to extend the time for filing an application to vary an order of a single justice in chambers, refusing to stay orders made by the trial judge in a family proceeding. Held: Application dismissed. The applicant has not demonstrated any reversible error in the justice's exercise of discretion.

Reasons for Judgment of the Honourable Justice Winteringham:

- [1] The appellant applies to vary an order of Justice Fenlon made in chambers. On December 13, 2023, Justice Fenlon dismissed the appellant's application to extend the time for filing an application to vary an order of Justice Butler. On November 6, 2023, Justice Butler dismissed the appellant's application to stay orders made by the trial judge in a contentious family proceeding, now under appeal.
- [2] In accordance with this Court's order arising from its reasons in *J.P. v. K.S.*, 2024 BCCA 26 at para. 47, the Court directed the application to proceed in writing. The Court also granted an extension of time to file an application book because the appellant had missed the 4:00 p.m. deadline. The Court did not require any material from the respondent on the application to vary the order of Justice Fenlon.

Background and Procedural History

- [3] The background to this application was set out in detail in the reasons of Justice Butler indexed at 2023 BCCA 419. The background has also been set out in the decisions of Justice Skolrood (indexed at 2024 BCCA 26) and Justice Harris (in chambers, indexed at 2023 BCCA 408) issued within this appeal proceeding.

- [4] Given the detailed sets of reasons set out above, I find it unnecessary to set out a complete factual history for the purpose of this application to vary. Very briefly, the parties were married for eight years and have two children together. In September 2018, there was a violent altercation which lead to separate criminal and civil proceedings. In the criminal proceeding, the appellant pleaded guilty to assault. In the civil proceeding, following a lengthy trial, the trial judge found the appellant liable for battery and the respondent was awarded almost \$800,000 in damages. On August 15, 2023, this Court dismissed J.P.'s appeal in the civil proceeding.
- [5] The appeal in the family proceeding is from two orders made by the trial judge.
- [6] The first order was pronounced on July 10, 2023 following a 40-day trial (the "Trial Order"). Among other things, the Trial Order permitted the respondent to relocate with the children to Germany, allocated parenting responsibilities, determined child support, and divided family property. The Trial Order also prohibited the appellant from bringing further applications in the family proceeding without first obtaining leave from the trial judge. The reasons for the Trial Order are indexed at 2023 BCSC 1188.
- [7] The second order was pronounced on August 4, 2023 (the "Post-Trial Order"). In the Post-Trial Order, the judge dismissed the appellant's application to stay portions of the Trial Order, including parenting orders and orders relating to the division of family property. The trial judge concluded that granting the stays would not be in the best interests of the children. The judge also dismissed the appellant's applications for leave to apply for additional orders. The reasons for the Post-Trial Order are indexed at 2023 BCSC 1365.
- [8] In the appeal proceeding, the appellant has brought numerous applications in chambers. Included here for context, a summary of this procedural history was set out by Justice Skolrood in his reasons indexed at 2024 BCCA 26:
- [5] Before turning to the specific decision under review, it is useful to canvass a history of this appeal and the various applications brought by the appellant in this Court. The appeal was commenced by way of a notice of appeal filed July 13, 2023. An amended notice of appeal was filed on September 5, 2023 to address orders made in the Post-Trial Order. Since the filing of the initial notice of appeal, the appellant has brought the following applications.
- 1) July 21, 2023-Urgent Stay Application-Hunter J.A. in Chambers-J.T.P. v. K.S., 2023 BCCA 303
- [6] The appellant made an urgent application seeking a stay of execution of the family trial judge's order relating to (1) relocation of the children to Germany from Canada; (2) parenting arrangements; and (3) sale of the family residence occupied by the appellant. The appellant also sought to stay the timelines for filing a factum appeal book, transcripts, and appeal record.
- [7] On July 25, 2023, in reasons for judgment indexed at J.T.P. v. K.S., 2023 BCCA 303, Justice Hunter determined that he lacked jurisdiction to grant a stay of execution of the family trial orders relating to parenting arrangements and the sale of the residence. Justice Hunter also

dismissed the application to stay the relocation order. He did grant extensions of the timelines for filing the appeal record, appeal books, transcripts, and factum, with the time beginning to run the day following the decision in CA49741, i.e., the civil appeal. The decision in that appeal was rendered on August 15, 2023 (2023 BCCA 334)

- 2) September 15, 2023-No Fee Application-Griffin J.A. in Chambers
- [8] On September 15, 2023, Justice Griffin heard the appellant's application for a no fee order in this appeal. Justice Griffin dismissed his application, noting that she was not persuaded that the appellant lacked the financial means to pay fees given that he has investments, real property and the ability to earn a significant income as a chartered accountant.
- 3) October 4, 2023-Settle Transcript-Registrar T.R. Outerbridge-J.P. v. K.S., 2023 BCCA 374
- [9] On October 4, 2023, Registrar Outerbridge heard and dismissed the appellant's application to proceed on the family law appeal with limited transcripts.
- 4) November 1, 2023-Review Registrar Decision Transcript-Harris J.A. in Chambers-J.P. v. K.S., 2023 BCCA 408
- [10] On November 1, 2023, Harris J.A. heard the appellant's application to review Registrar Outerbridge's decision concerning the transcripts. On November 10, 2023, Harris J.A. dismissed the application; this decision is again the subject of the present review application
- 5) November 6, 2023-Stay Application-Butler J.A. in Chambers-J.P. v. K.S., 2023 BCCA 419
- [11] On November 6, 2023, Justice Butler heard the appellant's application to stay the Post-Trial Order and two additional orders from the Family Judgment. Justice Butler dismissed the appellant's stay applications in reasons for judgment indexed at J.P. v. K.S., 2023 BCCA 419, largely on jurisdictional grounds.
- 6) December 13, 2023-Extension of Time to File Application to Vary Order of Butler J.A.-Fenlon J.A. in Chambers
- [12] On December 13, 2023, Justice Fenlon heard and dismissed the appellant's application for an extension of time to file an application to vary the order of Butler J.A.
- [13] Justice Fenlon was of the view that it was not in the interests of justice to allow the application given its clear lack of merit and the already protracted nature of the litigation. The appellant has since indicated an intention to apply to a division of the Court to review Fenlon J.A.'s decision.
- [9] In his reasons, Justice Skolrood, on behalf of this Court, dismissed the appellant's application to review the previous order of Justice Harris, referred to above, which in turn dismissed the appellant's review of the decision of Registrar Outerbridge.

- [10] This decision is the review of Justice Fenlon's decision dismissing the appellant's application for an extension of time to vary the order of Justice Butler. This is the eighth set of reasons issued in this appeal proceeding. The date for the hearing of the underlying appeal has not yet been scheduled.

Review Application

- [11] The authority to apply to vary an order of a justice is found in s. 29 of the Court of Appeal Act, S.B.C. 2021, c. 6. However, a review application is not a re-hearing of the original application. Rather, it is a review of what the chambers judge did with the applicable test. This is a highly deferential standard of review. The Court will ask whether the judge was wrong in law, wrong in principle, or if they misconceived the facts. Absent any of these errors, a division will not change the order: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7; see also: *Gill v. Gill Estate*, 2023 BCCA 427 at para. 13.
- [12] In other words, on a review application, the applicant cannot simply argue that the justice should have reached a different result or exercised her discretion differently. There must be a legal error: *Ashraf v. Jazz Aviation LP*, 2024 BCCA 45 at para. 3.
- [13] These principles have also been affirmed by this Court in two other judgments denying review applications brought by the appellant, including *J.P. v. K.S.*, 2024 BCCA 26 at paras. 18-19 and in the appeal of the civil proceeding.

Decision Under Review

- [14] Justice Fenlon began by noting that R. 62(2) of the Court of Appeal Rules, B.C. Reg. 120/2022 required the appellant to file his application to vary the order of Justice Butler by no later than November 13, 2023. This is correct. Rule 62(2) requires a person intending to apply to vary an order of a justice to file and serve their notice of application not more than seven days after the order is made. Justice Butler dismissed the appellant's application on November 6, 2023. The appellant was present in court when he did so. The appellant did not submit his application until November 17, four days past the deadline. He was therefore required to apply for an extension of time.
- [15] In her reasons, the Judge correctly identified the test she had to apply. She cited the well-known criteria for extensions of time to bring an appeal, as set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 (C.A.), 1987 CanLII 2608. She noted that these criteria are also applied, with modifications, in the context of applications for an extension of time to file an application. This is also correct. The modified test was set out by this Court in *First Majestic Silver Corp. v. Santos*, 2014 BCCA 214 at paras. 56-57:
- a) Was there a bona fide intention to seek a review?
 - b) When were the respondents informed of the intention?

- c) Would the respondents be unduly prejudiced by an extension of time?
- d) Is there merit in the review?
- e) Is it in the interest of justice that an extension be granted?

The interests of justice are the "decisive" question in these applications.

- [16] Justice Fenlon clearly set out the correct legal test and there is no merit to the appellant's submission she erred in law or principle. She applied the test and concluded that the interests of justice did not support granting an extension.
- [17] First, Justice Fenlon noted that there was no merit to the appellant's application to vary the order of Justice Butler, citing the jurisdictional issues identified by Justice Butler and in an earlier application, by Justice Hunter. The power to stay an order made under the Family Law Act, S.B.C. 2011, c. 25, s. 234 [FLA], lies with the court that made the original order. Even before the appellant appeared before Justice Butler, this should have been evident to him following the July 25, 2023 decision of Justice Hunter in chambers denying his previous application for a stay of proceedings.
- [18] Next, in assessing the merits of the application, Justice Fenlon rejected the appellant's submission that Justice Butler failed to comprehend his argument that the trial judge was *functus officio*. While she did not go into detail on why this argument was unsound, she made no error. Justice Fenlon clearly indicated that her reasons were to be read in conjunction with those of Justice Butler.
- [19] In his reasons, Justice Butler quoted the appellant's own written materials which set out his argument on the doctrine of *functus officio* and determined it lacked merit. The appellant's submission was that the trial judge did not have jurisdiction to make the Post-Trial Order dismissing his applications for leave to apply for new orders in the trial court because she became *functus officio* once the Trial Order was pronounced.
- [20] The doctrine of *functus officio* means that once a formal judgment has been entered, the court loses jurisdiction, and is thus said to be *functus officio*. After the final order is entered, however, the court has jurisdiction to amend the order in very limited circumstances: *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 32.
- [21] As noted by Justice Butler, the doctrine does not apply to the Post-Trial Order. This is because the Trial Order included an order made pursuant to s. 221 of the FLA, prohibiting the appellant from bringing further applications in the family proceeding without first obtaining leave from the trial judge. Therefore, in making the Post-Trial Orders denying leave, the trial judge did not reconsider or amend the Trial Order itself--she merely exercised her jurisdiction under it.

- [22] Based on this court's lack of jurisdiction to grant the relief sought by the appellant and his misunderstanding of the doctrine of *functus officio*, Justice Fenlon concluded that the application to vary the order of Justice Butler was bound to fail. I agree.
- [23] Justice Fenlon also considered the history of the appellant's misuse of the court's process in the court below to support her conclusion that it was not in the interests of justice to grant an extension of time. It was entirely open to her to do so. As noted by this Court in *First Majestic*, in considering the interests of justice this Court is entitled to consider "all that has transpired" in a proceeding, including a party's conduct or failure to comply with court orders: at para. 59.
- [24] In his written application, the appellant also submits that Justice Fenlon erred in her assessment of the balance of convenience, ignoring the needs of the children and the impact of the Post-Trial Order (particularly, the order refusing to stay the costs order) on them. I disagree. Justice Fenlon concluded there was no merit to the many issues raised by the appellant. Justice Fenlon stated that many of the errors the appellant says were made by Justice Butler were not made out in the reasons and that Justice Butler's refusal of the stays sought was largely based on the lack of jurisdiction of this Court to make the orders. This was a conclusion open to Justice Fenlon to make, based on the record.
- [25] Finally, the appellant submits that Justice Fenlon over-emphasised the importance of finality in family proceedings, which he says has the "dangerous" effect of denying him a right of appeal by "stifling my steps in my appeal." I disagree. The Supreme Court has long promoted the principle of finality in family litigation, even where it would limit the availability of an appeal. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, the Court held:

12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[Emphasis added.]

- [26] Justice Fenlon cited *Mead v. Mead*, 2021 BCCA 66, at para. 39 in support of the proposition that the court may, in long and ongoing family law matters, consider the need for family litigation to come to an end at some point in the consideration of the interests of justice. She was correct in her consideration of finality and this family proceeding.

[27] In his written materials in support of this review application, the appellant also submits that Justice Fenlon erred by failing to exercise the requisite level of "latitude" for a self-represented litigant. I would not accede to this argument. The record demonstrates otherwise. Justice Fenlon recognized that there is precedent for allowing some relaxation of the filing deadlines, "particularly with self-represented litigants." Her reasons made clear that she recognized the fact the appellant was self-represented. However, she went on and stated the application did not turn on the delay in filing but rather, applying the Davies factors, she concluded "it [was] not in the interests of justice to grant an extension of time to apply to vary the orders of Justice Butler because there is no merit to the application", at para. 11. She made no error in concluding that this application to vary Justice Butler's order is bound to fail.

[28] It therefore follows that Justice Fenlon applied the correct principles and made no errors of law. It has not been demonstrated that she misapprehended the facts. I would dismiss the application.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fisher"

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