

CANADA / JUDGMENT

J.P. v. K.S.

2024 BCCA 26

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 26 J.P. v. K.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

J.P. v. K.S.,

2024 BCCA 26

Date: 20240112

Docket: CA49210

Between:

J.P.

Appellant

(Respondent)

And

K.S.

Respondent

(Claimant)

Before:

The Honourable Justice Griffin

The Honourable Mr. Justice Voith

The Honourable Justice Skolrood

On an application to vary: An order of the Court of Appeal for British Columbia,

dated November 10, 2023 (J.P. v. K.S., 2023 BCCA 408,
Vancouver Docket CA49210).

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

January 10, 2024

Place and Date of Judgment:

Vancouver, British Columbia

January 12, 2024

Summary:

Application by the appellant to vary the order of Justice Harris in chambers. Justice Harris dismissed the appellant's application to vary the order of the Registrar of the Court of Appeal denying the appellant permission to file limited transcripts of the underlying family law trial. The appellant argues that Justice Harris erred in determining that the trial transcripts were necessary to the proper resolution of this appeal.

Held: Application dismissed. The appellant's grounds of appeal raise issues of mixed fact and law, discretionary decisions that required the judge's credibility analysis to resolve, or challenged the judge's weighing of evidence. The appellant submits that he will limit his argument on appeal to the allegation that the judge erred in law by relying on the evidence from the civil trial, which is a pure question of law for which no transcript is necessary. However, a division of this Court trying to determine if the judge erred in this way cannot do so without knowing what other evidence the judge relied on--information only discernible from the trial transcripts. In the circumstances, the appellant is granted an extension of time, on terms, to order and pay for the transcripts in 30 days.

- [1] SKOLROOD J.A.: This is an application by the appellant "J.P." to vary the order of Justice Harris in Chambers. On November 10, 2023, in reasons for judgment indexed at J.P. v. K.S., 2023 BCCA 408, Harris J.A. declined to vary an order of the Registrar of the Court of Appeal denying the appellant's application for permission to file limited transcripts of the oral evidence from the underlying family law trial. The Registrar's reasons for judgment are indexed at J.P. v. K.S., 2023 BCCA 374.

Background

- [2] The background facts are set out in various decisions of this Court and the Supreme Court, issued in the context of long-standing and highly contentious family litigation and related civil litigation. This appeal is from two orders issued by the Supreme Court in the family litigation, with reasons for judgment indexed at K.S.P. v. J.T.P., 2023 BCSC 1188 (the "Family Judgment") and K.S.P. v. J.T.P., 2023 BCSC 1365 (the "Post-Trial Order").
- [3] In his reasons, Harris J.A. summarized the issues that were before him on the appellant's application to vary the Registrar's decision:
- [2] J.P. and the respondent, K.S., were formerly married and share two children. The circumstances of their separation leave a long trail of criminal, civil, and family proceedings. From J.P.'s perspective, the main issue on appeal is whether Justice MacNaughton erred in law by adopting certain facts and credibility findings from the civil proceedings in the Family Judgment without allowing him to adduce opposing evidence. The registrar was of the view that the issues on appeal were broader and more numerous than those contended for. On this review application, J.P. submitted that the registrar erred in principle by finding that the issues on appeal require full transcripts in order for the division to properly evaluate the merits of the appeal.
- [4] The same issues arise on this review.

Procedural History

- [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 of 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.

The Decision Under Review

- [14] Against this background, I turn to the decision under review.
- [15] In his reasons dismissing the appellant's review application, Harris J.A. cited *Salloum v. Smith*, 2023 BCCA 175, where this Court summarized the principles governing the Registrar's powers to order transcripts and the high degree of deference owed to such decisions:
- [7] The registrar is charged with a number of administrative functions essential to the proper and efficient running of the court: *Lac La Ronge Indian Band v. British Columbia*, 2023 BCCA 117 at para. 27 (Chambers).
- [8] The Court of Appeal Rules, B.C. Reg 120/2022 [Rules] give the registrar a wide discretion to direct parties to organize documents for purposes of an appeal. Rule 28 allows the registrar to settle the contents of an appeal record, transcript, and appeal book. The registrar is permitted to settle or limit the contents of the document, direct parties to add or remove materials, direct that certain documents not be used in the appeal, and provide any other directions that may be required to settle the contents of a document. The registrar has considerable experience in these matters.
- [9] The Rules state that materials must be prepared in accordance with the applicable completion instructions. These instructions indicate that the appeal book must contain only as much evidence as is necessary to resolve the issues on appeal (emphasis added). The instructions for the appeal record make it clear that it is an even more narrowly circumscribed document, focusing on key pleadings, the order and reasons for judgment under appeal, and the notice of appeal or order granting leave to appeal.
- [10] A review of the registrar's orders is governed by s. 35(2) of the Court of Appeal Act, R.S.B.C. 2021, c. 6 and Rule 63(2). These are substantially similar to predecessor provisions, namely, s. 10(3) of the previous Act and Rule 35 of the previous Rules.
- [11] The registrar's exercise of discretion in settling appeal books is fact specific and discretionary, and as such, entitled to a high degree of deference, analogous to the deference shown to many other functions of the registrar, including the assessment of costs: *Lac La Ronge Indian Band* at para. 27.
- [16] Justice Harris noted that discretionary decisions of the Registrar are to be overturned only where the Registrar erred in principle, misapprehended the facts, or was clearly wrong (at para. 17). See also *Worthington v. Webber*, 2023 BCCA 278 at paras. 19-22. Justice Harris also underscored the point that a review application is not a hearing de novo (at para. 17).

- [17] Justice Harris addressed the arguments advanced by the appellant as to why the Registrar allegedly erred. His analysis is succinct and worth setting out in full:
- [18] J.P. contends that the registrar erred in not accepting that the issues advanced on the appeal were errors of law, not requiring the evidence at trial. During the argument, I invited J.P. to consider abandoning certain grounds of appeal to ensure that only issues of legal principle were advanced. He declined to do so, but, in any event, it is not clear to me that even if he were to do so, the error he advances would be sufficient to resolve the appeal without the Court having access to the evidence.
- [19] In my view, then, the registrar did not err in concluding that, even if a division on appeal were to find that the trial judge erred in law by adopting the credibility findings of the civil proceedings, J.P. "must still overcome the possibility the court could reasonably have formed the view it did based on the testimony in the family trial alone" (see Registrar's Reasons at para. 14). In reaching this determination, the division would need to review all transcripts before the trial judge, particularly given that Justice MacNaughton specifically stated that she relied on the complete family proceedings' record to reach her credibility findings (see Family Judgment at para. 4).
- [20] The full oral transcripts would also be required to consider further issues advanced by J.P. These issues are ones of mixed fact and law or discretionary decisions and require a full factual context for the consideration of their merits on appeal. Again, the registrar did not err in principle.
- [21] J.P. did not advance any arguments or point to any issues that, in my view, constitute an error in principle. The registrar in this case properly evaluated the relationship between the evidence and the alleged grounds of appeal. This matter has a complex litigation history and issues on appeal arise in a fact rich context. It cannot be said that the registrar erred in reaching his decision.

The Review Application

- [18] In *Gong v. Zhang*, 2023 BCCA 462, this Court recently summarized the principles governing an application to review an order of a single justice. Speaking for the Court, Justice MacKenzie said:
- [49] An application under s. 29 of the Act to review an order of a single justice of this Court sitting in chambers is not a rehearing of the application made in chambers. It is well-established that a person applying for a cancellation or variation of such an order must satisfy a division that the justice was wrong in law or in principle, or misconceived the facts: *Yang v. Shi*, 2023 BCCA 146 at para. 10. As held in *Haldorson v. Coquitlam (City)*, 2000 BCCA 672:

- [7] It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.
- [50] Evidently, this is a deferential exercise premised on the identification of an error warranting intervention.
- [19] I note that these principles were also affirmed and applied by this Court in denying another review application brought by the appellant concerning anonymization in the related civil proceedings: see *Pyper v. Schuetze*, 2023 BCCA 394.
- [20] As I understand the appellant's position, as set out in his written submission, he advances the following arguments in support his application to review Harris J.A.'s order:
1. There are grounds of appeal that raise pure questions of law for which no transcript of evidence is required;
 2. Justice Harris sat on the division that dismissed his appeal in the civil proceedings and on the division that denied his review application relating to anonymization in the civil proceedings. As such, Harris J.A. was either "functus officio" in respect of this matter or had a conflict and should have recused himself;
 3. Justice Harris erred in principle in finding that all three members of the division hearing the appeal would need to read the entire transcript of evidence to resolve the issues raised on appeal, particularly since the issues again are limited to "purely legal issues"; and
 4. Justice Harris erred in failing to give an adequate explanation as to which issues he believed were issues of mixed fact and law.
- [21] The appellant also argues that Harris J.A. erred in declining to order that the parties engage in case management.
- [22] With respect to the appellant's first ground, the Registrar dealt with a similar argument. In his reasons, he said:
- [14] I appreciate that the appellant has tried to frame the judge's adoption of the civil evidence as a legal error, but even if that were established, the testimony in the family trial is still needed to determine whether the credibility analysis was ultimately correct. In other words, he must still overcome the possibility the court could reasonably have formed the view it did based on the testimony in the family trial alone.

- [23] The Registrar also observed that it was difficult to discern any stand-alone legal errors being advanced by the appellant. Rather, the alleged errors concern mixed fact and law, discretionary decisions that required the judge's credibility analysis to resolve, or challenged the judge's weighing of evidence (at para. 15).
- [24] The issue before Harris J.A. was whether the Registrar erred in this characterization of the issues on appeal. Justice Harris found no such error. Of particular note is Harris J.A.'s statement at para. 18:
- [18] During the argument, I invited J.P. to consider abandoning certain grounds of appeal to ensure that only issues of legal principle were advanced. He declined to do so, but in any event, it is not clear to me that even if he were to do so, the error he advances would be sufficient to resolve the appeal without the Court having access to the evidence.
- [25] At the hearing before us, the appellant again said that he intends to limit his appeal to the narrow legal question of whether the judge in the family proceeding erred in adopting the findings of fact from the civil proceeding. However, Harris J.A.'s concern that a division of this Court is unlikely to be able to resolve the appeal without having access to the full transcripts remains.
- [26] Justice Harris also noted that the judge in the family proceeding specifically stated that she relied on the complete family proceedings record in order to reach her credibility findings. Thus, it was not the case, as the appellant contends, that the family proceeding judge simply adopted the evidence from the civil proceeding in making her credibility findings.
- [27] Finally, on this ground, in support of his finding that the Registrar did not err, Harris J.A. said:
- [21] The Registrar in this case properly evaluated the relationship between the evidence and the alleged grounds of appeal. This matter has a complex litigation history and issues on appeal arise in a fact rich context. It cannot be said that the registrar erred in reaching his decision.
- [28] I agree with Harris J.A.'s analysis of the Registrar's decision. It therefore follows that I am not satisfied that Harris J.A. erred in declining to come to a different conclusion.
- [29] The second ground advanced by the appellant was not pressed in his oral submissions, but I will address it nonetheless. Respectfully, the doctrine of *functus officio* has no application. Under the *functus* doctrine, once a judge has decided a matter and the judgment has been entered, they have discharged their office and cannot return to and correct the decision: *Esteghamat-Ardakani v. Taherkhani*, 2023 BCCA 290 at para. 81. The doctrine is one of several aimed at promoting finality and stability for the purposes of further appeals: *Esteghamat-Ardakani* at para. 81. Once a decision-maker has rendered a final decision, that decision cannot be revisited because the decision-maker changed their mind or because in their view the circumstances have changed: *Golden Valley Golf Course Ltd. v British Columbia (Minister of Transportation and Highways)*, 2001 BCCA 392 at para. 36.

- [30] The two previous hearings that Harris J.A. sat on, while related, were discrete matters and his involvement in them did not disqualify him from hearing the appellant's variation application relating to a separate order in a different proceeding. The *functus doctrine* is simply not engaged.
- [31] Similarly, a judge's prior involvement in related matters does not, in and of itself, give rise to a conflict requiring recusal. Judges must recuse themselves "if they are biased or if there is a reasonable apprehension that they are biased": *Pereira v. Dexterra Group Inc.*, 2023 BCCA 201 at para. 10. Absent facts that might give rise to a finding of actual or apprehended bias, or that constitute an actual conflict of interest, a judge need not recuse themselves simply because they have prior involvement in or knowledge of a proceeding. There is a strong presumption of judicial impartiality that is difficult to displace: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 25. As this Court explained in *Pereira*, "[t]he mere fact that a judge has heard another proceeding involving the same party does not displace the presumption of judicial impartiality" (at para. 14).
- [32] Finally, I note the appellant did not formally apply to have Harris J.A. recuse himself in the variation application before him.
- [33] The third and fourth grounds advanced by the appellant are largely encompassed within the first ground. I note again Harris J.A.'s reference to the "complex history" and "fact rich context" underlying the appeal. As I have already explained, I am of the view that the Registrar did not err in his decision requiring the full transcript nor did Harris J.A. err in declining to vary that decision.
- [34] In addition to the grounds of review advanced by the appellant, he also raises a concern about the prohibitive cost of transcripts and the danger of those costs rendering the right of appeal illusory, citing *Dhillon v. Dhillon*, 2005 BCCA 529 at para. 9. The Registrar acknowledged this concern but noted that it had to be balanced with the need to ensure that the Court is not deprived of the evidence required to decide the appeal, particularly in a fact intensive appeal such as this. While Harris J.A. did not specifically address the cost issue, he again found that the Registrar did not err in ordering that the full transcripts be filed. For the reasons that I have given, I am not persuaded that there are grounds to interfere with that conclusion.
- [35] Finally, Harris's J.A. decision declining to order case management is a discretionary decision which, again, attracts a high degree of deference. I am not satisfied that the appellant has demonstrated any error in principle in coming to that decision. I note that Harris J.A. left open the possibility of either party making a further request in the future if issues arise that would benefit from case management. That opportunity continues to exist.

Conclusion

- [36] For these reasons, I would dismiss the application.
- [37] This brings me to the appellant's request that, if his application is dismissed, he be granted a further extension of time to file the transcripts. The Registrar ordered that the transcripts be filed by January 15, 2024, and Harris J.A. declined to extend that deadline. In considering this request, I am mindful that this Court is generally reluctant to dismiss appeals other than on the merits and that a more flexible approach to extensions of time is often taken where the appeal was originally commenced on time: *Emond v. British Columbia (Attorney General)*, 2023 BCCA 143 at para. 26 (Chambers), *Hydro Fuels Inc. v. Moran* (1993), 25 B.C.A.C. 139 at para. 9 (Chambers).
- [38] That said, I am also alive to the history of this matter in this Court, specifically the numerous applications brought by the appellant which I have canvassed above, and his failure to act with any diligence in ordering the transcripts and moving the appeal forward.
- [39] In light of that history, while I am prepared to grant the appellant a further extension of time to file the transcripts, it is, in my view, both necessary and appropriate to do so on terms.
- [40] Before setting out those terms, I will address the respondent's submission that the appellant should be prohibited from filing any further applications until this appeal is heard and resolved. Such an order is open to the Court under s. 22 of the Court of Appeal Act, S.B.C. 2021, c. 6 as part of a vexatious litigant order. However, no such order has been made in this case nor has a vexatious litigant application been brought. Section 22 does contemplate that an order may be made on the Court's own motion (see s. 22(2)(a)), but only where the person subject to the order has had an opportunity to be heard. Given the lack of advance notice and full submissions on this point, we are not in a position to make a vexatious litigant order, nor can we make an order under s. 22(1) prohibiting the appellant from bringing further applications without leave of the Court. I will however address how any further applications may proceed as part of the terms that I am about to outline. I would add however that if the appellant continues on his present path of bringing meritless applications before the Court, he may well be faced with a vexatious litigant application.
- [41] I would grant the appellant an extension of time to file the transcripts of oral evidence from the trial on the following terms:
1. The appellant will file and serve the Appeal Record by no later than January 26, 2024;
 2. The appellant will order and pay for the transcripts as soon as he is financially able to do so, but in any event by no later than February 9, 2024, which is four weeks from today's date;

3. The appellant will provide the respondent and the Court with written confirmation that the transcripts have been ordered within 24 hours of doing so. The appellant will also notify the respondent and the Court when the transcripts have been completed within 24 hours of receiving confirmation from the transcription company;
 4. The appellant will file the transcripts forthwith upon receipt;
 5. The transcripts will include all oral testimony from the trial as well as all Voir Dire proceedings. The transcripts will also include the parties' closing submissions, but need not include the opening statements;
 6. The appellant will strictly comply with all applicable time lines set out in the Rules following the filing of the transcripts;
 7. If the appellant wishes to bring further applications, he will advise the Registrar in writing of the relief he seeks, copied to the respondent's counsel, and the Registrar will determine whether he can deal with the issue, whether it is appropriate for case management, or whether it should be the subject of a formal application.
- [42] The appellant raised two additional matters. First, he asked that this Court order what I take to be a Views of the Child report under the Family Law Act, S.B.C. 2011, c. 25. I would decline to make that order as there is no proper application before us.
- [43] Second, as I understand the appellant's position, he would like an order permitting him to file two factums or a single factum of over 30 pages to address his appeals from both the Family Judgment and the Post-Trial Order. Rule 17 of the Court of Appeal Rules, B.C. Reg. 120/2022, provides that where a party seeks to appeal a subsequent related order, they may do so by filing an amended notice of appeal. The appellant has done that here. The Rule also provides that the subsequent order should be addressed in the party's factum, but it does not provide for the filing of a factum of greater than normal length. On the material before us, I would not grant an order permitting a factum of greater than normal length, however the issue was not fully canvassed before us. Thus, if the appellant seeks such an order, he can raise this with the Registrar using the procedure that I have outlined.
- [44] Finally, I turn to the issue of costs of this application. In my view, the application was ill-conceived and bound to fail. It reflects a pattern of the appellant advancing meritless applications before the Court, to the prejudice of the respondent. In the circumstances, I find that this is an appropriate case in which to order costs payable by the appellant to the respondent forthwith and in any event of the cause. I set those costs at \$1,100.00 based on 10 units at Scale A under the Tariff.
- [45] GRIFFIN J.A.: I agree.
- [46] VOITH J.A.: I agree.
- [Discussion with parties: appellant's filing of further applications]

[47] GRIFFIN J.A.: First, I will confirm the judgment of this Court dismissing the review application by the appellant on the terms addressed in Justice Skolrood's ruling and on the costs. After the ruling, counsel for K.S. raised a concern that she was served by email this morning by the appellant with a further application, prior to the ruling we have just given. We agree that the appellant's application should be subject to the terms set out in the ruling. That is, he should direct his application to the Registrar. The reason we imposed those terms was to try to gain efficiencies in the litigation and the appeal proceeding. It is possible, for example, that the Registrar could look at an application brought by the appellant and determine that it should be referred to a division but to be dealt with in writing only and not on a hearing, which might provide efficiencies to the parties. Or to seek a division's ruling as to whether it is even necessary to hear from the respondent. I am not saying that is what a Registrar will do, but the Registrar might do that and so we are going to impose those same terms on the application you just brought. Thank you.

"The Honourable Justice Skolrood"

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