

CANADA / JUDGMENT

J.T.P. v. K.S.

2023 BCCA 303

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 303 J.T.P. v. K.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

J.T.P. v. K.S.,

2023 BCCA 303

Date: 20230725

Docket: CA49210

Between:

J.T.P.

Appellant

(Respondent)

And

K.S.

Respondent

(Claimant)

Before:

The Honourable Mr. Justice Hunter

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated July 11, 2023 (K.S.P. v. J.T.P., 2023 BCSC 1188, Vancouver Docket E162647).

Oral Reasons for Judgment

The Appellant, appearing in person:

J.T.P.

Counsel for the Respondent:

A.M. Ouellet

Place and Date of Hearing:

Vancouver, British Columbia

July 21, 2023

Place and Date of Judgment:

Vancouver, British Columbia

July 25, 2023

Summary:

The appellant applies for a stay of execution of the orders of the family law trial judge, most significantly an order permitting the relocation of the parties' children to Germany prior to school starting there in August 2023. The relocation order was made pursuant to the Divorce Act, and other orders with respect to parenting arrangements were made under the Family Law Act. Held: Application dismissed. The granting of a stay of the orders made under the Family Law Act is precluded by s. 234 of that Act. If there is a sliver of jurisdiction for a justice of this Court to stay orders made under the Family Law Act in extraordinary circumstances, that jurisdiction does not exist in the application at bar. While a justice of this Court does have the jurisdiction to issue a stay of a relocation order under the Divorce Act, the test for a stay, appropriately modified for orders regarding parenting and children, is not met in this case. It is not in the interests of justice for a stay of the relocation order to be granted.

- [1] HUNTER J.A.: The appellant applies for a stay of execution of orders made, though not yet entered, in a family judgment released two weeks ago, *K.S.P. v. J.T.P.*, indexed at 2023 BCSC 1188 (the "Family Judgment"). The principal order sought to be stayed is an order permitting the children of the parties to be relocated with their mother to Germany. The respondent's intention is to take the children to Germany on August 6, 2023, in time to begin the school year. Accordingly, the stay application has been heard on short leave, and a decision is required with some urgency.
- [2] The application raises difficult questions of the jurisdiction of a justice of this Court to stay a relocation order pending appeal or other specified events, and if jurisdiction exists, the basis on which such an application should be considered.

Background

- [3] By way of background, the parties were married on May 3, 2008 and separated on September 16, 2016. They have two children, whom I will refer to as M. and W., or simply the children, born in 2012 and 2013 respectively. On September 15, 2016, the respondent K.S. filed a Notice of Family Claim in which she sought a divorce under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [Divorce Act or DA], an order respecting arrangements for parenting for their children pursuant to ss. 40 and 41 of the Family Law Act, S.B.C. 2011, c. 25 [Family Law Act or FLA], an order that the children relocate with her to Germany, citing both the Divorce Act and the Family Law Act, a determination and distribution of family property pursuant to the Family Law Act, and the sale of two properties pursuant to the Family Law Act, among other orders.
- [4] On September 16, 2018, there was a physical altercation between the parties in the presence of their children. This incident has been referred to as the "Violent Incident" and I will adopt that terminology. The Violent Incident led to a civil action (the "Civil Action") brought by K.S. against J.T.P. The Civil Action went to trial in the spring of 2021. On November 12, 2021, the trial judge, Justice Fleming, released reasons for judgment in favour of K.S., awarding her damages in the amount of \$795,019.68 (the "Civil Judgment").
- [5] J.T.P. has appealed the Civil Judgment (Appeal No. CA47941). The appeal has been heard and judgment reserved. In the meantime, one of the properties has been sold and the amount of the Civil Judgment secured in a solicitor's trust account pending further order. J.T.P. did not seek a stay of execution of the Civil Judgment at the time, but has since filed an application for a stay of execution of the Civil Judgment pending the decision of this Court in the appeal of the Civil Action. That stay application is scheduled to be heard on August 16, 2023.
- [6] This sequence of events is material to this application because the appellant views his appeal of the Family Judgment to be integrally tied to the result in the appeal of the Civil Judgment. He seeks a stay of the orders in the Family Judgment pending the result of the appeal of the Civil Judgment. If he is successful in the appeal of the Civil Judgment, he wishes to extend the stay pending the disposition of the Family Judgment. If he is unsuccessful in his appeal of the Civil Judgment, he advises that he will need to reassess his position on this appeal.
- [7] While the Civil Action was progressing, the Family Action was delayed by a number of procedural matters that are referred to in the Family Judgment. The Family Action finally went to trial in the fall of 2021 before Justice MacNaughton. The trial occupied 40 days of hearing and was highly contentious. Justice MacNaughton delivered reasons for the Family Judgment on July 10, 2023. Her reasons occupied 177 pages and are very thorough. I will discuss her findings by reference to the orders sought to be stayed, but most significantly, she ordered that the children were to be relocated to the Celle/Hannover region of Germany with their mother K.S., who would exercise all parenting responsibilities. This is the principal order the appellant seeks to stay on this application.

The Stay Application

[8] On this application, J.T.P. seeks a stay in the following terms:

Pending the disposition of the civil appeal CA47941, the appellant requests an order granting:

- a. a stay of execution of the Family Trial Judge's order;
- b. Alternatively, a partial stay of execution of the Family Trial orders related to:
 - i. Relocation of the children to Germany from Canada,
 - ii. Parenting arrangements with a return to the status quo on August 5, 2023, and
 - iii. the sale of the family residence of the appellant located at [O.P.].
- c. A stay of the timelines for filing Factum, Appeal Record, Book of Transcripts, and Appeal Book.

If successful in the civil appeal, the orders sought above pending the disposition of the family appeal file no 49210.

[9] K.S. takes the position that I do not have jurisdiction to stay any of these orders, citing s. 234 of the Family Law Act and Rule 22-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009.

[10] If I conclude that I do have jurisdiction to stay any of these orders, K.S. submits that I should decline to do so by consideration of the usual test for stay of proceedings, with due consideration to the deference this Court exercises in respect of trial judgments on family law matters.

[11] The last order sought, a stay of the timelines for filings in this appeal, is based on the desire of the appellant to review the judgment of this Court in the appeal of the Civil Judgment before incurring the significant expense of transcripts and appeal books for this appeal. K.S. submits that if a stay of any of these orders is granted, the appeal, at least in respect of the relocation order, should be expedited, relying on the importance of finality in family law matters.

[12] Thus, the issues before me are as follows:

- (i) Do I, as a justice of the Court exercising the statutory jurisdiction conferred by s. 33(1) of the Court of Appeal Act, S.B.C. 2021, c. 6, have the jurisdiction to stay any or all of the orders made in the Family Judgment? If not, the stay application must be dismissed.
- (ii) If I have the jurisdiction to stay any of the orders made in the Family Judgment, what are the appropriate considerations for the exercise of that jurisdiction?
- (iii) If I have the jurisdiction to stay any of the orders made in the Family Judgment, is it in the interests of justice to issue the stay?

(iv) Should the timelines for filing the factum, appeal record, book of transcripts, and appeal book in this appeal be stayed pending determination of the appeal of the Civil Judgment? Alternatively, should the appeal, at least in respect of the relocation order, be expedited?

Jurisdiction

[13] This stay application is brought pursuant to s. 33(1) of the Court of Appeal Act, which reads as follows:

33(1) After an appeal or application for leave to appeal is brought, a justice may, on terms and conditions the justice considers appropriate, order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought.

[14] Stay applications on family law matters, however, are subject to s. 234 of the Family Law Act, which provides as follows:

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.

[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).

[16] The appellant has submitted that there is a limited residual jurisdiction for a justice of this Court to issue a stay of a Family Law Act order in extraordinary circumstances, citing *Bennett v. Bennett*, 2002 BCCA 580 (Chambers), and that the interrelationship between the Civil Judgment and the Family Judgment represents an appropriate circumstance to exercise such jurisdiction.

[17] In *Bennett*, a trial judge had ordered equal division of assets under the Family Law Act, and had declined to stay the order. An appeal of the refusal to stay the original order was filed, and a stay pending the appeal was sought. Justice Donald dismissed the application on its merits. In the course of doing so, he made the following comment:

[12] I do not rest my decision on jurisdiction because there may arise a case in which this Court will have to act on an obviously wrong exercise of the Supreme Court's stay jurisdiction. This is not such a case. Here Mr. Justice Wilson gave careful consideration to the matter and concluded that he should not interfere with the liquidation of the assets. With the benefit of hearing eight days of trial he was well placed to decide that the parties could not afford to hold on to the assets pending the appeal because their creditors were closing in. Since the Act gives exclusive jurisdiction to the Supreme Court in this area, I do not think the legislature's intention should be finessed by means of an appeal of this kind. No extraordinary circumstances or egregious error have been shown to override the trial judge's decision to refuse a stay.

- [18] This circumstance was referred to as a "sliver of jurisdiction" by Justice Saunders in *Stasiewski v. Stasiewski*, 2006 BCCA 53 (Chambers). In *Stasiewski*, Justice Saunders held at para. 11 that the application before her was not "one of those cases described by Mr. Justice Donald as extraordinary, or demonstrating egregious error."
- [19] The dicta in *Bennett* and *Stasiewski* were referred to more recently in *Kapoor v. Makkar*, 2020 BCCA 132 (Chambers), where Justice Abrioux considered that the reasons for judgment of the family law judge under the Family Law Act raised a real issue as to whether extraordinary circumstances existed, and issued a stay of the order pending the appeal. A division of this Court set aside the stay order on review: 2020 BCCA 223. After referring to Justice Donald's comments in *Bennett*, Justice Saunders, speaking for the Court, focussed on the statutory authority for the order, concluding as follows:
- [37] In my view, the order for sale of the property took its statutory authority from the Family Law Act, as did the order for vacant possession that had the effect of negating the exclusive occupancy order made November 3, 2017. I conclude that s. 234 therefore precluded the stay of execution that issued from this court.
- [Emphasis added.]
- [20] The judgment of this Court in *Kapoor* does not expressly state that there is no "sliver of jurisdiction" to depart from the mandatory language of s. 234, although the conclusion of the Court is consistent with that interpretation. I conclude from this Court's judgment in *Kapoor* that either the residual jurisdiction referred to by Justice Donald and Justice Abrioux 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.
- [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.
- [23] As to the application to stay "(p)arenting arrangements with a return to the status quo on August 5, 2023", Justice MacNaughton addressed parenting arrangements at para. 444 of her judgment, beginning in these terms:

1. Pursuant to s. 39(1) of the FLA, K.S. and J.T.P. are guardians of the Children. In the event of the death of either party, the remaining party will be the sole guardian of the Children.
 2. K.S. shall have all of the s. 41 parental responsibilities for the Children under s. 40(2) of the FLA.
- [24] The judgment continues with detailed directions as to how the parenting responsibilities are to be exercised. These orders were clearly made under the Family Law Act. Pursuant to s. 234, I do not have jurisdiction to stay the orders relating to parenting responsibilities.
- [25] The order respecting the sale of the two residences owned by the parties is addressed at paras. 445-473 of the Family Judgment. The property referred to as A.M.W. has been sold. J.T.P. wishes to stay the order for sale of the residence where he currently lives, referred to as O.P.
- [26] The trial judge does not specifically address the statutory authority for these orders, but it is clear from the context that they were made pursuant to the division of property provisions of the Family Law Act. Thus, I have no jurisdiction to stay this order.
- [27] For these reasons, the applications to stay execution of the Family Trial Judge's order or alternatively, grant a partial stay of execution of the Family Trial orders related to parenting arrangements and the sale of the residence at O.P. are dismissed for lack of jurisdiction.
- [28] This leaves the question of relocation of the children to Germany. That order was not made pursuant to the Family Law Act, but rather the Divorce Act. The trial judge makes this clear at para. 282 of her judgment:
- [282] In her notice of family claim, K.S. seeks the relocation and parenting orders under both the FLA and the DA. As the parties are legally married, I must apply the doctrine of paramountcy. I will primarily focus on the relevant provisions of the DA, that is, ss. 16, 16.1, 16.2, 16.3, 16.8, and 16.9, including ss. 16.91-16.95: T.T. v. S.Z.T., 2020 BCSC 1628 at para. 9, citing Hejzlar v. Mitchell-Hejzlar, 2011 BCCA 230 at para. 20. If the issues were to be decided under the FLA, the applicable sections for relocation would have been ss. 65-71, and the relevant sections for parenting and contact orders would have been ss. 37-38. The primary difference between the analyses under the two statutes is the party who bears the burden of proof.
- [29] The trial judge then refers to parenting orders and cites the provisions of s. 16 of the Divorce Act to the effect that "the only consideration for a court in making a parenting order is the best interests of the child". She then addresses relocation, refers to s. 16.93(3) of the Divorce Act for the burden of proof, and observes that "if the analysis proceeded under the FLA", different considerations would arise. The judge then lists the factors to be considered for relocation under s. 16.92 of the Divorce Act, and after providing her comments on the s. 211 report, gives detailed consideration to each of the s. 16.92 factors. I am satisfied that the relocation order was not made under the Family Law Act. Accordingly, s. 234 does not remove my jurisdiction to consider the stay application of that order.

- [30] K.S. also relies upon Rule 22-1(7) of the Supreme Court Family Rules, which reads as follows:
- (7) If a parenting order, a contact order, a guardianship order, an order respecting parenting arrangements or contact with a child or a support order is appealed, the order remains in force until the determination of the appeal, unless the court that made the order otherwise directs.
- [31] I do not consider it necessary to decide whether a specific rule of one statute can oust the more general statutory jurisdiction provided by another statute, although if it were necessary to determine that issue, I would need some authority to give effect to that proposition. I recognize that there have been chambers judgments that have stated that Rule 22-1(7) does preclude the exercise of this Court's statutory jurisdiction (see e.g., *Xu v. Chu*, 2021 BCCA 323 (Chambers), citing *Boleak v. Boleak*, 1999 BCCA 776 (Chambers)), but I am not bound by chambers decisions made by a single justice of this Court (see *T.K. v. R.J.H.A.*, 2014 BCCA 445 at para. 25 (Chambers)), and no judgment to this effect made by a division of this Court, to which I would be bound, has been brought to my attention.
- [32] In any event, I do not consider it necessary to resolve this issue because it is clear that the Rule, to the extent it applies outside the Family Law Act, only applies to the orders specified in the Rule, which do not include relocation orders.
- [33] K.S. submits that a relocation order is a form of parenting order and thus is caught by Rule 22-1(7). I do not agree. The Rule is quite specific as to the orders it affects. Although they are necessarily related, the trial judge properly distinguishes between them by using the general heading of "Relocation and Parenting Orders" preceding para. 276, and the more specific headings of "Parenting Orders" preceding para. 284, the discussion under the heading "Relocation" from paras. 286 to 290, and the extensive discussion of the relocation provisions of the Divorce Act from paras. 354 to 438 of the Family Judgment.
- [34] I am satisfied that neither s. 234 of the Family Law Act nor Rule 22-1(7) of the Supreme Court Family Rules precludes my exercise of jurisdiction under s. 33(1) of the Court of Appeal Act to entertain an application for a stay of the relocation order.

Test for Ordering a Stay

- [35] The onus lies on the applicant to establish the right to a stay. The ultimate consideration is whether granting a stay is in the interests of justice: *Equustek Solutions Inc. v. Jack*, 2022 BCCA 453 at para. 11 (Chambers).
- [36] The traditional test for ordering a stay of a trial judgment pending appeal was summarized recently in *Skookum Creek Power Partnership v. JVD Installations Inc.*, 2022 BCCA 267 (Chambers) in these terms:

- [101] The applicant must satisfy the three-part test for granting a stay: *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 314-315; see also *Milk Marketing Board v. Grisnich* (1996), 70 B.C.A.C. 142, 50 C.P.C. (3d) 249 at para. 7 (Chambers). The applicant must establish:
- 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.
- [37] The normal test for granting a stay is based on the premise that the contest is between the interests of the contending parties, so that the judge must weigh the effect of the stay on the appellant and respondent. A relocation order, however, is not based on the interests of the contending parties, but rather on the best interests of the children who are the subject of the relocation order. For this reason, some modification in the application of the *RJR-Macdonald* test is appropriate for consideration of a stay of a relocation order.

"Some Merit to the Appeal"

- [38] The merit threshold is low. A court must be satisfied that the issues being raised on appeal are neither frivolous nor vexatious: *RJR-MacDonald* at 341. In applying this test to family law appeals, an appellate court must be mindful of the narrow scope of appellate review in family law cases. In the leading judgment on relocation, *Barendregt v. Grebliunas*, 2022 SCC 22, the Supreme Court of Canada reinforced the general deferential approach to family law decisions:
- [100] The scope of appellate review in family law cases is narrow: *Van de Perre*, at para. 11. Determining a child's best interests is always a fact-specific and highly discretionary determination: *Van de Perre*, at para. 9. And as Gonthier J. observed, "Courts of Appeal should be highly reluctant to interfere with the exercise of a trial judge's discretion": *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1374.
- [101] The trial judge is the fact finder and has the benefit of the intangible impact of conducting the trial: *R. v. G.F.*, 2021 SCC 20, at para. 81. After hearing from the parties directly, weighing the evidence, and making factual determinations, the trial court is best positioned to determine the best parenting arrangement.
- [102] An appellate court's role, as noted, is instead generally one of error correction; it is not to retry a case. Permitting appellate courts to become venues for dissatisfied parties to relitigate issues already resolved at trial erodes the public's confidence in the judicial process and the rule of law. The proper functioning of our judicial system requires each level of court to remain moored to its respective role in the administration of justice.

- [103] Therefore, an appellate court may only intervene where there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12; *Van de Perre*, at para. 11.
- [104] Absent an error of law or a palpable and overriding error of fact, deference is vital: *Housen*, at paras. 8, 10, 36 and 39. Appellate courts must review a trial judge's reasons generously and as a whole, bearing in mind the presumption that trial judges know the law: *G.F.*, at para. 79. As I have explained, an appeal is not a litigant's opportunity for a "second kick at the can", especially in parenting cases where finality is of paramount importance: *Van de Perre*, at para. 13.

"Irreparable Harm would be Occasioned to the Applicant if the Stay was Refused"

- [39] It is the irreparable harm test that requires the most significant modification when the issue relates to a relocation order, because the irreparable harm must relate to the children, not the contending parties. I note that the Alberta Court of Appeal has adopted a modified test for stays in matters involving parenting and children, as described in *YM v. DT*, 2021 ABCA 294 (Chambers):
- [6] The well-known tripartite test for a stay pending appeal is set out in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, 334, 111 DLR (4th) 385. The applicant has the burden of showing that: (i) there is a serious question to be tried, an arguable issue that is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.
- [7] In matters involving parenting and children, the test is modified to consider, in light of the best interests of the child, if the child will suffer irreparable harm resulting from the granting or denial of the stay: *AR v JU*, 2020 ABCA 337, para 6; *Noel v Maj*, 2006 ABCA 393, para 3. The best interest of the child is not necessarily the best interest of the parents, or what the parents may like, or dependant on what their plans may be: *CLS v BRS*, 2013 ABCA 349, para 11. Irreparable harm to the best interests of a child is not found in mere disruption to the children's lives. There must be evidence of special circumstances that demonstrate potential harm to the child, or some harm that is "real and significant" and is more than a transitory disturbance: *Lloyd-Martinez v Martinez*, 2021 ABCA 13, para 15; *Millington v Millington*, 2021 ABCA 256, para 14; *Fossey v Fossey*, 2021 ABCA 285, para 15.
- [40] I consider these principles to be appropriate for consideration of the irreparable harm test in reviewing a relocation order, and would adopt them in this case.

The Balance of Convenience

- [41] The balance of convenience test requires the Court to consider the effect of granting or refusing a stay in all the circumstances, recognizing that the burden of establishing that a stay should be granted is on the applicant. Again, to the extent that the test has been articulated as weighing "the inconvenience to the applicant if the stay was refused [against]

the inconvenience to the respondent if the stay was granted", as summarized in Skookum Creek, the test must be modified to measure the effect on the children (not the parents) if the stay is refused, against the effect on the children if the stay is granted.

Application of the Test

Merits of the Appeal

- [42] The appellant submits that that the principal error of the trial judge was to rely on the findings of fact and result in the Civil Action, without giving him the opportunity to challenge those findings, although the Civil Judgment was under appeal. He considers that if the appeal of the Civil Action is successful, that result will have what he describes as a "waterfall" effect on the correctness of the Family Judgment, in light of the trial judge's reliance on those findings for comments on family violence. The appellant acknowledges that if his appeal of the Civil Action is unsuccessful, he will need to reassess his position.
- [43] As mandated by s. 16(3)(j) of the Divorce Act, the trial judge does consider family violence, and particularly the Violent Incident assessed in the Civil Action, as one of the factors supporting K.S. having primary care and decision-making responsibilities for M. and W., which in turn were necessary considerations for the relocation decision pursuant to s. 16.92(1) of the Divorce Act. There were a great many factors weighed by the trial judge in accordance with the statutory direction of the Divorce Act, and it is not clear to me that a successful appeal in the Civil Action would fundamentally affect the result in the Family Judgment, but I accept that the position is arguable. Given the low threshold for assessing the merits and in light of the uncertainty as to the result of the appeal in the Civil Action, the applicant has met the merits test for a stay.

Irreparable Harm

- [44] I am not satisfied that refusing a stay would lead to irreparable harm to the children, as that term applies to matters involving parenting and children. The breakup of a marriage can be expected to have a negative effect on children, particularly when the parents will be living so far apart and the relationship with one parent will be significantly affected. In this case, the trial judge gave extensive reasons explaining why it was in the best interests of the children to reside with their mother, and why it was in the best interests of the children to have considerable physical separation between their parents.
- [45] Some of the conclusions of the trial judge on this topic, made by reference to the factors mandated for consideration under s. 16(3) of the Divorce Act, are these:
- [356] The Children's needs and stability will be enhanced when they are surrounded by extended family members, in a place where their mother will feel safe and can recover from the effects of the Violent Incident.

- [357] As K.S.'s family live close to Hannover, and are committed to supporting K.S. and the Children, I conclude that the Children will have stability in their homelife and in the family members with which they interact. As I detail below, J.T.P.'s family's involvement with the Children has been inconsistent, and their support of the Children has arguably wavered according to the state of K.S. and J.T.P.'s relationship.
- [358] While relocation from a place where the Children have lived their entire lives appears antithetical to fostering stability, the last several years in Vancouver have been marked with intense conflict and instability due to the Violent Incident and, more generally, J.T.P. and K.S.'s inability to cooperate. I am satisfied that a relocation to Germany would provide much needed stability.
- [359] K.S. has been the Children's primary caregiver since 2018. If they are permitted to relocate, they will have an enhanced relationship with their maternal family. K.S. has proposed arrangements that will facilitate a continued relationship with J.T.P. and, if he wishes, their paternal family, in a manner that balances their need for security, peace, and a healthy mother.
- [46] After an extensive review of the evidence, the judge concluded:
- [398] Having regard to these and other examples set out in the evidence, I am satisfied that relocation and affording all decision-making authority to K.S. will further the best interests of the Children by minimizing conflict between the parties
- [399] Based on the history of family violence and the use of the court system to perpetuate that violence, it is nearly certain that some form of family violence will continue and makes any form of co-parenting impossible. I have also concluded that Mr. Colby's suggestion of parallel parenting, with the intercession of a PC, is not workable. It will not meet the best interests of the Children.
- [400] Distance needs to be put between these parties to allow K.S. to heal and to engage in ordinary activities with the Children.
- [404] The family violence has not been directed towards the Children but they have been exposed to it and have been profoundly and negatively affected by it. They have been emotionally and psychologically harmed by it.
- [411] It is not in the Children's best interests to continue to be exposed to the conflict between their parents as is currently the case.
- [414] A relocation will insulate the Children from the continued effects of the family violence and, what continues to be, the toxic interpersonal dynamics between their parents.
- [47] The trial judge considered at length the relationship between K.S.'s well-being and the best interests of the children, and cited passages from the decision of the Supreme Court of Canada in *Berendregt* that bear on the subject:

- [423] In *Barendregt*, the Supreme Court also commented on the connection between a primary caregiver's emotional well-being and the best interests of a child. Justice Karakatsanis confirmed that a parent's need for emotional support is a relevant consideration in a relocation analysis as it relates to a child's best interests. She wrote:
- [169] A move that can improve a parent's emotional and psychological state can enrich a parent's ability to cultivate a healthy, supportive, and positive environment for their child. Courts have frequently recognized that a child's best interests are furthered by a well-functioning and happy parent
- [Citations omitted.]
- [424] Additional support of family and community in a new location may also enhance a parent's ability to care for a child: *Barendregt* at para. 172.
- [425] I am satisfied that K.S.'s reasons for relocating are compelling and further the Children's best interests in this case.
- [48] The trial judge recognized that the relocation would negatively affect the relationship between the children and their father, but was satisfied that K.S. had provided a parenting plan that would mitigate to the extent reasonably possible this negative effect. These include travelling to Vancouver to visit the appellant in October 2023, Spring Break 2024 and July 2024, as well as providing electronic devices to communicate with their father. K.S. has confirmed that she will comply with these orders. The trial judge commented that she had always complied with court orders. I am satisfied that she will do so.
- [49] As the Court observed in *Berendregt*:
- [132] Concerns about parenting time with the child will inevitably be engaged in relocation cases: the crux of the dispute is whether it is in the child's best interests to move notwithstanding the impact on their relationship with the other parent. In other words, this concern is folded into the central inquiry before the court.
- [50] On this application, J.T.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.

Balance of Convenience

- [51] In weighing the balance of convenience to the children, if the stay is granted or refused, I am influenced by the strong findings of the trial judge that relocation is in the best interests of the children and my own conclusion that the children will not suffer irreparable harm if they relocate to Germany with their mother. I also place this factor in the context of the potential appeal of the Family Judgment.
- [52] J.T.P. has placed extensive reliance on his anticipation that he will be successful in his appeal of the Civil Judgment. For that reason, he seeks a stay pending that decision, rather than pending the appeal of the Family Judgment. He has stated that if he is unsuccessful in his appeal of the Civil Judgment, he will have to reassess his appeal of the Family Judgment. The real question before me, however, is whether the children should be permitted to move to Germany on August 6, in order to begin school in Germany later on in August.
- [53] If I conclude that a stay of the relocation is not warranted, and no other intervening order is made, the children should relocate with their mother on August 6, regardless of when the decision on the appeal of the Civil Judgment is released. While that decision is important to the appellant's thinking about the appeal of the Family Judgment, it will have no direct impact on the relocation order.
- [54] I have some concern that even if the appellant's appeal of the Civil Judgment is successful, an appeal of the Family Judgment may never take place. That concern is based on the unfortunate but very real cost of prosecuting an appeal of a 40-day trial. The cost of transcripts will be very high, and appeal books must also be prepared. It is clear from the Family Judgment that both parties have exhausted their resources in continuing this high-conflict case, and J.T.P. will have to give some serious consideration to whether the costs of an appeal are warranted, particularly in light of the strong reasons of the trial judge and the reluctance of this Court to interfere with discretionary decision of trial judges in family law matters.
- [55] Once the judgment in the Civil Action is released, and provided the parties comply with the Court's rules for filing appeal materials, the appeal should be able to be heard by the spring of 2024. A judgment may be possible by the summer of 2024. 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] In my view, the 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.

Stay of the Timelines for Filing Appeal Materials

- [57] The appellant has also sought an order that the timelines for filing his factum, appeal record, book of transcripts, and appeal book be stayed pending the decision of the Civil Judgment. Given the importance the appellant places on the result of the appeal of the Civil Judgment to his decision to continue the appeal of the Family Judgment, I consider it appropriate that he not be required to undertake the significant expense of preparing appeal materials for the appeal of the Family Judgment until he has had an opportunity to consider the results of the Civil Appeal.
- [58] As I have indicated, I do not consider a short delay in beginning the preparation of the appeal materials should negatively impact the possibility of having an appeal of the Family Judgment heard and decided by the summer of 2024, which would be the best time for the children to be returned to British Columbia if the appeal is successful.
- [59] Accordingly, I will extend the timelines for filing the appeal record, appeal books, transcripts and factum to begin running the day following the decision in Appeal No. CA47941.

Conclusion

[60] For the foregoing reasons, I order as follows:

1. The applications to stay execution of the Family Trial Judge's order or alternatively, grant a partial stay of execution of the Family Trial orders related to parenting arrangements and the sale of the residence at O.P. are dismissed for lack of jurisdiction.
2. The application to stay the relocation order made in the Family Judgment is dismissed.
3. The timelines for filing the appeal record, appeal books, transcripts and factum in this appeal are extended and will begin to run the day following the decision in Appeal No. CA47941.

"The Honourable Mr. Justice Hunter"

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