

CANADA / JUDGMENT

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

2022 BCSC 1508

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Supreme Court of British Columbia

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2022 BCSC 1508 K.S.P. v. J.T.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2022 BCSC 1508

Date: 20220829

Docket: E162647

Registry: Vancouver

Between:

K.S.P. aka K.P.

Claimant

And

J.T.P.

Respondent

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Claimant:

A.M. Ouellett

Counsel for the Respondent:

M. Witzman

Place and Date of Hearing:

Vancouver, B.C.

August 22, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2022

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- [1] J.P. seeks an order bifurcating this trial into two parts. He proposes that the first part deal with child-related issues including K.S.'s application to relocate to Germany with the children and the parenting arrangements based on that relocation, if allowed, and, if not allowed, the parenting arrangements in Vancouver. He suggests that the first part be heard in the course of a ten-day trial during the current trial dates commencing September 26, 2022.
- [2] The second part would be scheduled for four days and would deal with financial issues, including division of assets, and debt and support. J.P. proposes that the second trial be heard no later than six months after the disposition of his appeal with respect to a civil judgment granted against him and in favour of K.S. That judgment followed a 16-day trial before Justice Fleming. J.P. is also appealing Fleming J.'s subsequent cost order. The parties have agreed that both appeals will be heard together on November 3, 2022, the date currently set for the argument ("Appeal").
- [3] In the alternative, J.P. seeks an adjournment of the September 26, 2022 trial until after the disposition of his Appeal.

- [4] K.S. opposes both bifurcation of the issues and the adjournment in the alternative.
- [5] Bifurcation or an adjournment are the most contentious issues but J.P. also seeks a number of other orders.
- [6] First, J.P. seeks anonymization of all published decisions in this proceeding, initializing the parties' and the children's names, and redacting any information identifying the parties.
- [7] K.S. takes no position on the anonymization of decisions but sees no need to anonymize anything but the parties' and the children's names.
- [8] Second, J.P. seeks an order that K.S. forthwith provide a signed authorization directed to Dr. Ramona Penner authorizing J.P. to directly obtain the complete medical files, including notes and correspondence, relating to the children from September 1, 2020 to present and on an ongoing basis.
- [9] K.S. consents to this order on condition that copies of the records are delivered to both parties and that any associated costs are at J.P.'s sole expense.
- [10] Third, J.P. seeks an order that, within seven days, K.S. provide him with copies of all medical records related to her mental health, including any notes and correspondence, from any health care providers who have treated her for mental health concerns, including but not limited to Dr. Penner, from September 1, 2020 to present. J.P. says that he will be responsible for the reasonable photocopy fees incurred by K.S. in producing these records.
- [11] K.S. will consent to seeking and obtaining records, relevant to her mental health, from Dr. Penner on the following conditions:
- i. The production order will be in the Halliday form such that the records will first be produced to counsel Alison Ouellet and/or Bonnie Lepin (counsel on the Appeal) who may redact the records for relevance and remove any information that does not pertain to K.S.'s mental health before producing them to J.P.;
 - ii. J.P. will be responsible for all costs associated with the production and preparation of the records including up to two hours of legal fees for the redaction exercise, and photocopying charges, and he will pay the invoice prior to the records being produced;
 - iii. K.S. will seek the records from Dr. Penner forthwith upon pronouncement of the order and on receipt of the records, her counsel will have seven business days to complete the redaction and render the statement of costs for reimbursement. Counsel for K.S. will release the records to counsel for J.P. within one (1) business day of receiving payment.
- [12] Fourth, J.P. seeks an order abridging the time limits in Rule 13-6(3) of the Supreme Court Family Rules, B.C. Reg 169/2009 [Rules] to permit him to serve and rely on the October 15, 2016 expert report of Dr. Michael Elterman.

- [13] Fifth, as it relates to Dr. Penner he seeks an order extending the time limit in Rule 13-7(2)(a) of the Rules to permit him to demand that she attend the trial for cross-examination.
- [14] K.S. will consent to the order abridging the time limits for Dr. Elterman on condition that he is able to attend the scheduled trial dates for cross-examination.
- [15] Similarly, K.S. will consent to extend the time limits for demanding Dr. Penner's attendance for cross-examination so long as she is available on the scheduled trial dates.
- [16] Sixth, J.P. seeks that the five-hour limit for examinations for discovery in Rule 9-2(2)(a) of the Rules be extended to permit an additional two hours of discovery of K.S.
- [17] K.S. opposes a time extension of her Examination for Discovery but says that, if it is granted, it be on the following terms:
- a) That she be permitted to sit for two half-days and not a full day;
 - b) That she be provided a 10-15 minute break after every 45 minutes of questioning;
 - c) That J.P. not be present in-person for any portion of the Examination; and
 - d) That J.P.'s counsel not be permitted to re-question K.S. on matters already asked at her prior Examination for Discovery.
- [18] Finally, in his notice of application, J.P. seeks his costs. K.S. is opposed to paying costs. Costs were not spoken to.

The Background to These Applications

- [19] The parties commenced living together in May 2002 and married on May 3, 2003. The parties have two children a ten-year-old daughter and a nine-year-old son.
- [20] There have been a significant number of court orders in this case. The first was a without notice protection order granted by Master Muir on September 15, 2016.
- [21] The parties reconciled in August 2017. On September 16, 2018, J.P. assaulted K.S. He was criminally charged and pleaded guilty. The Ministry of Children and Family Development ("MCFD") became involved with the family and prohibited J.P. from having contact with the children until March 2019. From March 2019 to September 2019, MCFD permitted J.P. to have supervised parenting time with the children. Since then, J.P. has had regular parenting time with the children, but not at the level he would like.
- [22] Parenting issues have been the subject of multiple court applications consuming many court days. In November 2020, the parties appeared before Justice Winteringham for six days at the end of which she delivered comprehensive oral reasons. Her principal orders were that the children reside primarily with K.S. and that she exercise all of the parenting responsibilities. She ordered parenting time on an interim basis but not shared parenting. The parties were to abide by conduct orders.

- [23] K.S. sued J.P. for injuries arising from the assault and, after a trial before Fleming J., received a judgment in her favour of almost \$800,000 and costs including some special costs. Fleming J. made significant credibility findings against J.P. and it is those findings that he seeks to have overturned in the Appeal.
- [24] This has been a high-conflict family case. It has resulted in more than 20 court orders since it commenced in September 2016, almost six years ago. For the most part, the applications have been initiated by J.P., many of them when he was self-represented.
- [25] The parties have spent about 25 days, in full or in part, in court so far. They spent 16 days in the civil trial.
- [26] In November 2021, I was appointed by the Chief Justice to case manage and hear this trial and I have heard all of the applications since, including the following two trial adjournment applications.
- [27] The first trial, scheduled to commence on Monday, November 22, 2021 was adjourned the Friday before as a result of J.P.'s then counsel's COVID-19 exposure. New trial dates were set to commence on April 4, 2022. The second trial was adjourned on J.P.'s application after his counsel was permitted to withdraw. Counsel advised that he could not ethically continue to represent J.P. I adjourned the trial to commence on September 26, 2022, peremptory to both parties.
- [28] In these reasons, I will deal with the less contentious issues first and then deal with J.P.'s application to bifurcate or, in the alternative, to adjourn the trial.

Anonymization

- [29] The court has jurisdiction to anonymize decisions in exceptional circumstances where the public interest in open courts is displaced by another public interest of superordinate importance: Practice Direction 61.
- [30] The open court principle refers to the public's right to access the courts and their processes. Open courts are recognized as one of the hallmarks of a democratic society.
- [31] The court's ability to manage its own processes and s. 206 of the Family Law Act, S.B.C. 2011, c. 25 give the court discretion to prohibit the publication of a party's or a child's identity in family law proceedings. Such an order is discretionary, to be exercised where publication would have an adverse effect on, or would cause undue hardship, to the party or child.
- [32] In the relatively recent Supreme Court of Canada decision, *Sherman Estate v. Donovan*, 2021 SCC 25 [Sherman], the Court reviewed the legal requirements for a discretionary order that limits a court's openness.

- [33] Justice Kasirer wrote, that for any limit on openness to be ordered, the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance: at paras. 3, 38. The Court described the threshold requirement as a "high bar". Once the threshold requirement is met, the applicant must then show that the order is necessary to prevent the identified risk and that, as a matter of proportionality, the benefits of the order restricting openness outweigh its negative effects.
- [34] As a result, and as Kasirer J. summarized at para. 38 of *Sherman*, the three things that J.P. must show are that: 1) court openness poses a serious risk to an important public interest; 2) the order sought is necessary to prevent the serious risk because reasonable alternative measures will not prevent the risk; and 3) the benefits of the order outweigh its negative impacts.
- [35] Justice Kasirer said that privacy considerations may constitute an important public interest, but not all privacy interests qualify, noting that the privacy of individuals will be at risk in many court proceedings. What is required is a risk to privacy that imperils the dignity of the person.
- [36] Prior to *Sherman*, the privacy interests of children had been recognized as justifying limits on the open court principle. See for example *A.P. v. L.K.*, 2019 ONSC 4010 where the application was for an order prohibiting the publication of any information that would identify the parties' children. In that case, the court ordered a more limited ban on publication of the children's names, dates of birth, address, schools and genders.
- [37] There, the Court said that permitting limits on the openness principle when necessary to protect the privacy interests of children recognizes that although children are often the focus of family law proceedings, they do not choose to be involved and, for the most part, have no ability or agency to protect themselves. As a particularly vulnerable group, their vulnerability may put them at greater risk of harm if their privacy interests are not protected.
- [38] Anonymization by initialization of the parties and their children's names is not uncommon in family proceedings in this Court. See, for example *A.B. v. C.D.*, 2014 BCSC 1676 and *S.M.M. v. J.P.H.*, 2011 BCSC 287.
- [39] In the circumstances of this case, I accept that the privacy interests of the parties' children constitute an "important public interest". In this family case, there is evidence that is likely to be led that would affect the children's privacy interests including evidence about: the parties' relationship, including acts of violence, some of which involved the children as witnesses; mental health issues with respect to both of their parents; developmental challenges facing one of the children and the supports that have been provided, and issues about the parties' ongoing difficulties in jointly parenting their children.

- [40] I also expect there to be evidence about J.P.'s bail conditions following a guilty plea to assault, and K.S.'s allegation that he repeatedly breached those conditions, and evidence about the involvement of the MCFD with this family. I accept that the sensitivity of all of that evidence has the potential to harm the children's interests.
- [41] I am satisfied that replacing the parties' and the children's names with initials will minimally impair the openness of these proceedings and will protect the best interests of the children. This minimal impairment will still preserve the public's right to understand the issues and the court's findings with respect to them. The court's work and reasoning will still be available to the public.

Dr. Penner's Records With Respect to the Children

- [42] J.P. does not explain in his materials why the children's complete medical files are relevant to the issues between the parties in this family trial except his complaint that he has not received them to date and is "entitled to review [his] own children's medical files".
- [43] I fail to see how the children's medical files are relevant to any issue in the family trial.
- [44] Nonetheless, as K.S. does not object to J.P. receiving them, on the condition that copies of the records are delivered to both parties and that any costs for doing so are at J.P.'s sole expense, I am prepared to make the order for Dr. Penner to produce her medical files with respect to the children from September 1, 2020 to present.
- [45] I am not prepared to make an order that Dr. Penner do so on an ongoing basis as, in my view, that order is not warranted in the circumstances of this case. J.P. is a joint guardian of the children and he is entitled to information about the children's medical treatment. There is no need for an ongoing order in that regard.
- [46] Counsel for J.P. is to write to Dr. Penner, explaining the order and the conditions on which it was made.

Dr. Penner's Records With Respect to K.S.'s Mental Health

- [47] As set out, K.S. does not object to the production of Dr. Penner's records as they relate to her mental health on three conditions.
- [48] I have considered the conditions proposed by K.S. and agree that all of them are reasonable in the circumstances of this request.
- [49] I therefore order that:
- i. Dr. Penner's records with respect to K.S.'s mental health will first be produced to her counsel Alison Ouellet who may redact them for relevance and remove any information that does not pertain to K.S.'s mental health before producing them to J.P.;

- ii. J.P. will be responsible for all costs associated with the production and preparation of the records including up to two hours of legal fees for the redaction exercise and photocopying charges. He will be required to pay the invoice prior to the records being produced to him; and
- iii. K.S. will seek the records from Dr. Penner forthwith upon pronouncement of this order and thereafter her counsel will have seven business days to complete the redaction and render the bill for the costs for reimbursement of fees and photocopying, if any, and will release them to counsel for J.P. within one (1) business day of receiving payment.

[50] I also make the order extending the time for counsel for J.P. to require Dr. Penner's attendance at trial for cross-examination. Counsel are to accommodate Dr. Penner's availability to attend on any of the currently scheduled trial dates in September. If she is not available for any of the dates, counsel are to arrange for her evidence to be taken by video deposition in advance of the trial.

Dr. Elterman's Report

[51] Counsel for J.P. advised me that he has spoken to Dr. Elterman and he is available on October 6, 2022, one of the currently scheduled trial dates. On that basis, and on the basis of K.S.'s consent, I make the order abridging the time for service of Dr. Elterman's report.

Extension of the Time Available for Discovery

[52] K.S. was previously examined for discovery by J.P.'s previous counsel on November 2, 2021 for about two hours. J.P. seeks a further five hours of discovery.

[53] J.P. submits that this case is significantly bigger, has a longer history, and contains more documents than the average family case and that, as a result the number of questions to be asked are higher than average and that the total of five hours permitted by the Rules is insufficient.

[54] In *Dionne v. Masters*, 2017 BCSC 2332 [Dionne], a case relied on by J.P., the Court said at paras. 77-81:

[77] As noted, subrule 9-2(2) is the rule limiting examination for discovery to five hours or as agreed.

[78] The issues in this family action are much more complex than the typical family claim. There is a denial of the spousal relationship and there are various corporate interests and claims of conversion and unjust enrichment.

[79] Numerous requests were left on the record at the 2017 examination for discovery that, but for the time limitation, the respondents would be entitled to pursue at a further examination. Additionally, there have been new documents produced by the claimant since her 2017 examination for discovery.

- [80] Although many issues will overlap with the Civil Action, there will be questions that particularly resonate in the Family Action.
- [81] In all of the circumstances, I conclude that a further two hours of examination for discovery of Ms. Dionne is appropriate. It will be limited, however, to matters arising from the requests left on the record at the 2017 examination for discovery of Ms. Dionne and those arising from the documents produced by the claimant since her 2017 examination for discovery, including with respect to the Doubting Thomas companies and the sale of her book.
- [55] I decline to make the order for further examination for discovery of K.S. The factors that were determinative in Dionne are not present in this case. There is no denial of the spousal relationship, no corporate interests to be divided, and no claims for conversion or unjust enrichment.
- [56] Although the evidence on the application did not deal with whether there were outstanding questions from K.S.'s earlier discovery, her counsel, who attended, said she could recall none.
- [57] In this case, the issues are not more complex than the average family file. The parties were both T-4 employees. The family property consisted of two homes, some vehicles, RRSPs, some other minor investments and assets. There will be arguments about imputation of income. In those respects, it is a rather straightforward family case that, absent the distrust between these parties and the contentious litigation to date, should be capable of resolution.
- [58] With respect to the parenting issues, by my count there have been at least 29 sworn affidavits from J.P. and 16 from K.S. That count does not include sworn financial statements. There is an expert report from Dr. Elterman and an extensive report and an addendum from Mr. Colby. Transcripts were ordered for many of the interim proceedings in this family case and transcripts are available to the parties from the lengthy civil trial conducted before Fleming J. during which both parties gave evidence and were cross-examined extensively. Those transcripts were ordered for the purposes of the Appeal.
- [59] It is hard to conceive of any aspect of the parties' relationship that is not the subject of affidavit or trial evidence.
- [60] In all the circumstances, I decline to order an extension of the time permitted for examinations for discovery in the Rules.
- [61] I now turn to address what the parties conceded were the most contentious issues. J.P.'s request that the child-related issues be bifurcated and heard separately from the financial issues or, in the alternative, that the current trial dates be adjourned.

[62] In his submissions, J.P. acknowledges that the reason for seeking the bifurcation or adjournment is the Appeal. He is seeking to have Fleming J.'s decision overturned and, in particular, her credibility findings. He seeks an order that there be a new trial. However, he says that he recognizes the need to resolve the child-related issues, and wants to do so, and that is why he proposes bifurcation as his preferred option.

Bifurcation

[63] Pursuant to Rules 14-6(2) and 14-7(67), the court may order that one or more questions of law or fact be tried and determined before others. The decision to bifurcate is a discretionary decision.

[64] The test for bifurcation was recently summarized by Justice Baker in *Hudema v. Moore*, 2020 BCSC 1502 at para. 7 [Hudema]:

[7] In *K.M.W. v. M.D.W.*, 2016 BCSC 228, the B.C. Supreme Court applied the law as set out by the B.C. Court of Appeal in *Ross River Dena Council v. Canada*, 2013 YKCA 6, in which the court found that, for an issue to be determined separately from other issues in the litigation, the applicant must demonstrate that the issue is capable of being decided independently of other issues and that trying one issue independently will result in efficiencies in the litigation.

[Emphasis added.]

[65] In *Hudema*, the issue of bifurcation arose because there was insufficient trial time to deal with all the issues between the parties. There was a threshold issue about whether the parties were in a marriage-like relationship or were in a tenancy relationship.

[66] The issue sought to be bifurcated was whether the parties' written agreement that they were not in a marriage-like relationship and would not make a claim against the other for support or division of assets was effective to determine the issues between them.

[67] The court bifurcated the issue of the effectiveness of the agreement as it was potentially determinative of all issues between the parties and, if it did not determine the issues, it would encourage the parties to settle the remaining issues. If a trial was required, it would be for a shorter period than the ten days needed to address all the issues.

[68] In contrast, in *Holmes v. Fedoruk*, 2021 BCSC 442, Justice Milman distinguished *Hudema* when dealing with whether parties were in a marriage-like relationship for the purposes of spousal support and property division. He wrote:

[50] That case is clearly distinguishable from this one because the agreement, if valid and enforceable, provided the respondent with a complete defence to the claim. In this case, there is no such discreet and potentially determinative defence.

- [69] In *D.S. v. J.S.*, 2021 BCSC 282 at para. 13, Justice Funt said that severance is the exception, not the rule. He cited the following cases to support that conclusion:
- [12] In considering the severance of various issues, Justice Rogers in *K.M.W. v. M.D.W.*, 2016 BCSC 228, quoted (in part) at para. 37 from *Ross River Dena Council v. Canada (Attorney General)*, 2013 YKCA 6:
- [37] ...
- [18] In *Nguyen v. Bains*, 2001 BCSC 1130, Martinson J. summarized some of the jurisprudence under former British Columbia Rule 39(29):
- [11] Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:
- a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
 - b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.
 - c. Severance is most appropriate when the trial is by judge alone.
 - d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.
 - e. A party's financial circumstances are one factor to consider in the exercise of the discretion.
 - f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.
- [19] Other cases suggest that severance of issues under former Rule 39(29) might be confined to "extraordinary or exceptional cases": see, for example, *Hynes v. Westfair Foods Ltd.*, 2008 BCSC 637 at para. 33.
- ...
- [21] In general, the jurisprudence suggests a cautious approach to the severance of issues. Issues should only be severed where it appears that efficiencies will result from having one issue determined in advance of others. Cases in which severance of an issue is appropriate are the exception rather than the rule.
- [70] In this case, I would highlight the factors set out in a, b, d, and e of *Nguyen*.
- [71] In the circumstances of this case, I do not agree with counsel for J.P. that the child-related issues can be bifurcated from the financial issues. The child-related issues are not capable of being determined separately. They are inextricably linked. As a result, there will be no efficiencies in the litigation by bifurcating.

- [72] In this case, K.S. is seeking to relocate with the children to Germany, her country of origin. Among the factors the court will have to consider is to what extent K.S.'s plan for her and the children's life in Germany will be in the children's best interests. In order to determine that issue, the court will have to determine the division of the parties property and debt and what spousal or child support would be payable. The property division will clarify what resources K.S. will have available to her to build a life in Germany.
- [73] If relocation is not allowed, there will still be a need to determine property and debt division and support issues so that the parties will know where they will be living and where the children will be going to school. Based on the current financial picture, it is entirely possible that both of the homes owned by the parties will need to be sold in order to divide the parties' property after consideration of any excluded property claims. It is not likely that both of them will be able to continue to live in their current community. Parenting orders like arrangements for exchanges will depend on where the parties are living and where the children will be attending school.
- [74] Whether the parties share parenting time and on what basis will determine child support obligations.
- [75] The current situation is that, despite a court order requiring J.P. to pay child support, he is not doing so. Nor has he contributed to the costs of the children's speech and physical therapy or the school fees required for them to attend a private Catholic school. K.S.'s income is reduced as she is working part time and is on a partial disability. She is bearing all of the children's expenses without contribution from J.P.
- [76] Both J.P. and K.S. would be required to testify twice, once with respect to child-related matters and again with respect to financial matters. That is not efficient. In addition, some of the witnesses the parties intend to call are likely to give evidence about both parenting and financial issues and will be required to testify twice. Those witnesses are likely to include both parties' fathers. K.S. says in her affidavit that she will seek to have her father testify by video conference from Germany. He will require an interpreter and will testify about his observations of the parties' parenting capacity and about financial contributions he made to the parties. It will not be efficient if he has to testify twice.
- [77] Although J.P. suggests that if the parenting issues are resolved there is a higher likelihood that the parties will be able to resolve their financial issues, given the history of the litigation to date, and the more than twenty orders that have been issued, there is very little likelihood that an order with respect to parenting issues will lead to resolution of the other matters. J.P. is most likely to appeal any order permitting K.S. to relocate with the children.
- [78] In all the circumstances, this is not a case in which it would be appropriate to exercise my discretion to bifurcate the trial.

Adjournment

- [79] J.P. alternatively seeks an order that the trial dates in September be adjourned until disposition of his Appeal. Fleming J. delivered her reasons in the civil action on November 12, 2021 and J.P. filed his notice of appeal on December 7, 2021. There is no evidence that he sought to expedite the Appeal despite knowing of the September trial dates. He has also not sought a stay of Fleming J.'s judgment pending the Appeal.
- [80] The test to be applied in considering a trial adjournment were well summarized in *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at paras. 19-20. The paramount consideration is the interests of justice in ensuring that there will be a fair trial on the merits of the action.
- [81] At para. 20, the court set out a number of factors to be considered. The factors that apply to this case are: i) the expeditious and speeding resolution of matters on their merits; ii) the reasonableness of the request; iii) the grounds or explanation for the request, iv) the timeliness of the request; v) the potential prejudice to each party; vi) the right to a fair trial; vii) the proper administration of justice; viii) the history of the matter including deliberate delay or misuse of the court's process; and the fact of a self-represented litigant. I have considered each of these factors.
- [82] As I have said, there have been two earlier adjournments of this family trial. On November 19, 2021, the first trial set to commence the following Monday on November 22, 2021 was adjourned to a 13-day trial commencing April 4, 2022 as a result of J.P.'s then counsel's exposure to COVID-19. K.S. was prepared to proceed to trial in November.
- [83] Then, on February 10, 2022, the April 4 trial was adjourned. Mr. DeWolf sought to withdraw as J.P.'s counsel and J.P. opposed his withdrawal. At the hearing, Mr. DeWolf said that he could no longer ethically represent J.P. He had earlier sent a letter to J.P. indicating that he was moving away from litigation and focusing on mentoring junior lawyers at his firm. I allowed Mr. DeWolf to withdraw and J.P. required an adjournment of the trial.
- [84] At that time, J.P. says that he thought his appeal would be heard in the summer but he did not state that as a reason for agreeing to the September trial dates that I set. Those were the dates on which counsel, J.P. and the court were available and were made peremptory to both parties. At the time, I expressed my view of the need to resolve this contested family matter in the best interests of the children. I have not changed that view.
- [85] While I accept that even a peremptory trial can be adjourned when justice requires it, justice does not require it in this case.
- [86] It is in the children's best interests that this lengthy and contested family matter be resolved particularly because K.S. is seeking to relocate with them to Germany. These children need certainty. This action was commenced in 2016, almost six years ago. The parties attempted a reconciliation in 2017 and it ended as a result of an incident involving family violence in 2018. For almost a year, J.P. did not see his children or if he did, his visits with them were supervised. He blames K.S. for that and has repeatedly described it as her "withholding" the

children from him.

- [87] It is in the children's best interests to have all matters in this family dispute resolved as quickly as possible as they have lived, for much of their lives, in the middle of family conflict.
- [88] J.P. has repeatedly, but unsuccessfully, applied to vary Justice Winteringham's interim order giving K.S. sole parenting responsibility. He has brought repeated applications for interim orders many of which have been unsuccessful and have resulted in costs orders against him.
- [89] Most recently, the parties appeared before me on J.P.'s application for a further litigation advance. I ordered the advance for the purposes of the family litigation but declined to order an advance for the purposes of the Appeal. Following my order, counsel for K.S. sought to expedite the entering of the order so as to ensure that the advance was paid to J.P.'s current lawyers in time for them to prepare for the trial. The email exchanges between J.P. and counsel for K.S., attached as exhibits to K.S.'s 16th Affidavit, demonstrate how a simple matter, like signing an order that was made at J.P.'s request, and for his benefit, can become unduly complicated.
- [90] The parties cannot continue litigating at this pace.
- [91] Mr. Colby, who prepared a lengthy s. 211 report, and an addendum, has been served with notice requiring his attendance for cross-examination at the September Trial. He was served with notice for the earlier trial dates.
- [92] The parties have exhausted a significant portion of their family assets on interim applications. They have used up savings, cashed in RRSPs, and exhausted all of their assets apart from the family homes. They are also dealing with the Appeal.
- [93] J.P. has not been paying child support since late 2021. K.S. is paying for the support of the children without assistance from him including towards the cost of their attendance at a private Catholic school, which J.P. wanted for his children.
- [94] The parties have both received significant litigation advances from their family assets, in excess of \$200,000 each, all of which is secured against the home in which K.S. is currently living. Both homes are also mortgaged. K.S. says that she is running out of money and cannot afford the trial to be adjourned yet again with all of the attendant costs.
- [95] The litigation advances have been financed by a secondary lender at high interest rates. The loan will come due next August and the parties cannot afford to continue bleeding their equity to fund litigation. After all, this action was commenced in September 2016 and became active in 2018.

- [96] On the evidence, the financial matters between these parties are urgent. As K.S. explains in her affidavit, if she is permitted to relocate, she will need money from the parties' homes to acquire housing and pay for the children's schooling in Germany. She hopes to have them attend an international school in Hannover for which she will have to pay fees.
- [97] K.S. says that she is struggling with the financial upkeep of the home in which she is living. She is paying for the mortgage on the property and there are significant costs to maintain and heat it.
- [98] Although the Appeal is scheduled to be heard on November 3, 2022, absent an order from the bench, which I think unlikely, there is no guarantee as to when the decision on the appeal will be released. The uncertainty of a decision release date will mean that rescheduling the family trial would have to wait. Based on the length of the trial and the current court availability, the first available family trials of between 6-15 days are in February 2024.
- [99] K.S. says that she feels as if her life is on hold. She does not want to continue living blocks away from J.P. for any longer than necessary. Doing so increases her stress and anxiety and is preventing her from healing. She needs a final determination of all issues so that she can move on regardless of where she will be living.
- [100] The fact that the child-related matters need to be resolved was acknowledged by J.P. as a basis for his argument for bifurcation.
- [101] For all of these reasons, I am not prepared to exercise my discretion to adjourn this trial.

One Further Issue

- [102] In his submissions, J.P. made several arguments about his ability in the family proceedings to challenge the credibility findings made against him in the civil proceedings. Whether the findings in the civil judgment will be admissible in the family proceedings, and, if they are, the effect of them, involves a contextual analysis: *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 at paras. 46-47.
- [103] As explained in *Bank of China v. Fan*, 2014 BCSC 2043 at para. 18, there is a spectrum of potential uses or effects of previous judicial determinations when they are entered into evidence in a subsequent proceeding. On one end, certain findings may be conclusive and not subject to relitigation in later proceedings. On the other end, some findings will be admitted as contextual evidence that must be weighed against all other evidence admitted at trial. Between the ends of the spectrum, prior findings may constitute *prima facie* proof, subject to rebuttal by way of other admissible evidence.
- [104] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, the Supreme Court held that the doctrine of abuse of process allowed for the most principled means of assessing whether a matter could be relitigated. Justice Arbour said:

- [52] relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudication process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original result; or (3) when fairness dictates that the original result would not be binding in the new context.
- [105] It is not possible, in advance of hearing evidence and argument in the family trial to determine the extent to which the findings in Fleming J.'s civil judgment will be sought to be admitted. I will address those issues when they arise during the course of the trial.

Costs

- [106] The parties did not speak to costs. If, in light of K.S.'s success on the issues that she did not consent to, the parties cannot agree on a cost order, they may make written submissions, of no more than two pages in length, to be filed within 10 days of these reasons.

"MacNaughton J."

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