
CANADA / JUDGMENT

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

2022 BCSC 1727

COURT

Supreme Court of British Columbia

DECIDED

3 October 2022

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2022 BCSC 1727 K.S.P. v. J.T.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2022 BCSC 1727

Date: 20221003

Docket: E162647

Registry: Vancouver

Between:

K.S.P. aka K.S.

Claimant

And

J.T.P.

Respondent

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Claimant:

A.M. Ouellet

Counsel for the Respondent:

M. Witzman

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 26-27, 2022

Place and Date of Judgment:

Vancouver, B.C.

October 3, 2022

Table of Contents

The Parties' Positions. 3

Conclusion.. 6

Background to the Dispute. 7

The Civil Proceedings. 7

The Family Proceedings. 8

Analysis. 14

Res Judicata and Issue Estoppel 14

Abuse of Process. 15

Dr. Mead-Wescott's Evidence. 22

The Text Messages. 23

The Assault 24

The Parties' Positions

- [1] At the commencement of this family trial, counsel for the claimant, K.S., applied for a finding that as a result of issue estoppel or abuse of process, J.T.P. should not be permitted to relitigate facts that were found by Justice Fleming after a 16-day civil trial of a tort claim for battery involving the same parties: [K.S.] v. [J.T.P.], 2021 BCSC 2209.
- [2] I note at the outset that references to earlier decisions in this proceeding and in the civil proceeding, and the parties' submissions related to this trial have been anonymized in accordance with my earlier decision to do so: K.S.P. v. J.T.P., 2022 BCSC 1508 at para. 41 [K.S.P.].
- [3] In this family trial, K.S. seeks to rely on 29 facture findings made by Justice Fleming in her decision on the merits of the civil claim, an adjournment decision, and in her costs decision. I have incorporated those findings into these reasons from K.S.'s opening submissions in this family trial:

1. [J.T.P.] perpetrated a serious battery on [K.S.] on September 16, 2018, causing significant physical and psychological injuries (para. 389) and those injuries include (in addition to bruising and pain following the incident):
 - a. A concussion and a mild traumatic brain injury ("MTBI");
 - b. Physical symptoms including headaches, dizziness, feeling faint, ringing in her ears, sensitivity to lights, trouble concentrating, trouble looking at a screen and reading, and an inability to drive safely;
 - c. Significant psychological injuries, including post-traumatic stress disorder ("PTSD"), major depressive disorder ("MDD") and somatic symptom disorder ("SSD");
 - d. Feelings of depression and intense fear; and
 - e. Profound trauma

The full list of [K.S.]'s injuries and the details are set out at para. 393 of the reasons.

2. Ongoing contact with [J.T.P.], written communications from him, the civil litigation, and the family litigation trigger, increase her fear and feelings of emotional trauma, which, in turn, impacts her other symptoms (para. 394).
3. [K.S.]'s symptoms improved when she was in Germany with the children in 2019 and felt physically safe (para. 394).
4. [K.S.]'s psychological and emotional suffering has been profound and includes fear for her safety which has been severely limiting and distressing (para. 407).
5. To the date of the civil trial, as a result of her injuries, [K.S.] had not been able to work at the job she loved and was excelling at before the battery for more than 12 hours per week (para. 408).
6. There were humiliating, oppressive and malicious aspects to [J.T.P.]'s battery that aggravated [K.S.]'s suffering (para. 409).
7. During the battery he committed significant acts of violence in the presence of their young children (para. 409).
8. The parties' daughter was able to observe aspects of the September 16, 2018 assault including her father hitting her mother in the head with a clenched fist on the sides of the head (paras. 322 and 323).
9. Their daughter also had fear and concerns following the assault as follows:
 - a. She was scared to go to soccer with daddy in case he hurt her like he hurt her mom;
 - b. She was worried mom got more hurt by dad because of how long it took for her to call the police (she called 911);

- c. She was worried about her mom at the hospital on the day of the assault. (para. 330).
- 10. [K.S.]'s hitting her belly was not indicative of, and is quite distinct from, a propensity to be violent towards others (para. 360).
- 11. It is probable if not likely that [K.S.]'s symptoms will improve in the future, once the litigation is at an end, with the benefits of specialized psychological treatment and other interventions provided for in the cost of care award and given the possibility of relocating to Germany with the children (para. 474).
- 12. The violent conflict began when M. was a baby - and that [J.T.P.] was the aggressor in that violence (para. 392)
- 13. There was a specific violent incident that [J.T.P.] perpetrated against K.S. in late January 2015 wherein he put his hands around her neck making it difficult for her to breathe, and punched her, causing a painful injury to her left shoulder (para. 392).
- 14. There was a specific violent incident that [J.T.P.] perpetrated against [K.S.] on or about February 1, 2016, after telling her friends who had been invited for dinner to leave, and as she sat on the couch with both children who had nose bleeds, [J.T.P.] struck [K.S.] in the back of the head very hard, resulting in dizziness and a sore head for some time. (para. 392).
- 15. [K.S.] was a credible witness in relation to the facts and evidence at the Civil Trial (para. 345).
- 16. [J.T.P.] was not a credible witness in relation to the facts and evidence at the Civil Trial (para. 346).
- 17. [K.S.]'s fear of [J.T.P.] plays a significant role in triggering her medical (including psychological) symptoms and when she is less fearful she has felt much better (para, 359).
- 18. [J.T.P.] did not show any feelings of empathy for his children in relation to their exposure to the September 16, 2018 assault (para. 362).
- 19. On a balance of probabilities, [J.T.P.] manipulated a text message addressing the "belly punching incident" on February 16 and 17, 2013 and that text message is not authentic (para. 373).
- 20. [J.T.P.]'s attempt at an apparent reconciliation between February and April 2019 was motivated by his goals of persuading [K.S.] to recant her allegations of physical violence in the criminal proceeding, most significantly his blows to her head, and to bring an end to the Civil action as well as to gain access to the children and that his conduct, including the taking of photographs and films of activities together, was a sustained and organized effort to create evidence that would undermine [K.S.]'s claim (paras. 375, 376).
- 21. In relation to [J.T.P.]'s conduct at the Civil Trial and his testimony and evidence as a whole, [J. T.P.] was dishonest, calculating and cleverly manipulative (para. 379).

22. The ongoing family litigation is a source of significant, if not intense stress and therefore an ongoing trigger for [K.S.]'s ongoing symptoms (para. 475)
23. Dr. Mead-Wescott, was a credible witness whose opinions and conclusions were well-reasoned and persuasive and the court fully accepts her interpretation of [K.S.]'s overreporting of symptoms as primarily a "cry for help" or an attempt to relay the severity of her objective experience and it is not malingering (para. 297).
24. The court also accepted Dr. Mead-Wescott's opinion that [K.S.] "might do best" psychologically if she returned to Germany with the children semi-permanently because it would allow for a greater sense of physical safety and the support of close family and friends (para. 290).
25. Absent a relocation to Germany, the chance of substantial improvement in [K.S.]'s symptoms is somewhere between more likely than not and likely. With relocation, the chance of substantial improvement is more likely than not (para. 47).
- [4] Justice Fleming also provided a detailed account of what she found occurred on September 16, 2018, at paras. 384-387 of her reasons.
- [5] K.S. also seeks to have the following findings of fact from Justice Fleming's decisions, determined to be binding and final and not subject to re-litigation in this proceeding:

From Justice Fleming's Adjournment Decision 2021 BCSC 1620:

26. [J.T.P.] is well educated and intelligent as well as capable and strategic. He deliberately delayed retaining a lawyer to represent him at the civil trial for the purpose of delaying or avoiding the trial (para. 45)

From the Costs Decision 2022 BCSC 455:

27. [J.T.P.] has been physically violent with [K.S.] on previous occasions, as well as controlling and emotionally abusive toward her for a number of years before the battery (para. 5)
28. [J.T.P.] sought to disqualify [K.S.]'s civil counsel from acting for her by way of making an unsuccessful non-meritorious claim alleging a conflict of interest and filing a complaint against her with the Law Society because he was motivated by the goal of undermining the [K.S.]'s ability to pursue his claims against him as he viewed her counsel as a threat to his ability to effectively deceive or manipulate [K.S.] and the court. (para. 36)
29. The whole of [J.T.P.]'s conduct in seeking to have [K.S.]'s counsel disqualified in the civil proceedings was reprehensible misconduct and that reprehensible misconduct was sustained and multifaceted. It also included emails to [K.S.] and a bad faith reconciliation attempt to influence [K.S.] to terminate her counsel and terminate the proceeding. The conduct was harmful given [K.S.]'s vulnerability (health and financial) and the nature of the proceedings (paras. 29 -31, 35 and 28)

- [6] J.T.P. submits, and K.S. acknowledges, that Justice Fleming's overall assessment and conclusion about the parties' credibility is not binding on me, and that I will need to assess the credibility of the witnesses who testify before me. I accept that a witness' credibility in a prior proceeding is only a factor in the assessment of that witness' credibility in a subsequent proceeding.
- [7] J.T.P. opposes K.S.'s application and submits that it would be unfair for him to be unable to challenge Justice Fleming's findings in this proceeding. He submits that the focus of the evidence in the civil proceeding was the damages to which K.S. was entitled if it was found that J.T.P. assaulted her. In this family proceeding, apart from the financial issues, the focus is on K.S.'s application to relocate with the parties' children as well as the parenting arrangements and responsibilities regardless of the outcome of the relocation application.

Conclusion

- [8] For the reasons which follow, I conclude that allowing J.T.P. to relitigate Justice Fleming's findings of fact in the civil action would violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice, and amount to an abuse of process. In particular, it would be an abuse of process to relitigate Justice Fleming's factual findings in:
- a) 2021 BCSC 1620 (the "Adjournment Decision"), where she declined to adjourn the civil trial on J.T.P.'s fourth application to do so, brought on the first day of trial;
 - b) 2021 BCSC 2209 (the "Merits Decision"), where she made findings on the merits of the civil action, as outlined in K.S.'s opening statement and outlined above; and
 - c) 2022 BCSC 455 (the "Costs Decision"), where she assessed costs and special costs.
- [9] I reach this conclusion on abuse of process despite the fact that J.T.P. has appealed Justice Fleming's Merits and Costs Decisions.

Background to the Dispute

- [10] This case involves a clear example of the need for judicial economy and consistency and invokes the integrity of the administration of justice. It involves a highly contentious dispute between a married couple over the parenting of their two children. I begin by setting out the extensive factual background that underlies K.S.'s application.

The Civil Proceedings

- [11] K.S. and J.T.P.'s relationship ended after he assaulted her on September 16, 2018 (the "Assault"). J.T.P. was charged criminally with the Assault and pled guilty on November 23, 2020. By his guilty plea, J.T.P. has admitted the Assault occurred.

- [12] As a result of the Assault, K.S. sued J.T.P. civilly for damages for her injuries. J.T.P. responded to the claim and counterclaimed for injuries that he alleged he suffered in the same altercation.
- [13] After a 16-day trial--in which both parties testified, were vigorously cross-examined, and called other evidence that was also tested by cross-examination--Justice Fleming awarded K.S. damages of close to \$800,000 and, subsequently, costs, including some special costs. J.T.P. has appealed Justice Fleming's Merits and Costs Decisions. He did not seek a stay of either decision. The appeal is scheduled to be heard on November 3, 2022, but may not be determined on that date.
- [14] Based on his appeal factum, a copy of which was provided to me, J.T.P.'s challenge to the Merits Decision is with respect to Justice Fleming's credibility findings. He asks the Court of Appeal to order a new trial and seeks to admit fresh evidence.

The Family Proceedings

- [15] In the current proceedings, the parties have engaged in extensive pre-trial litigation, resulting in more than 20 orders since K.S. filed her notice of family claim. J.T.P. filed a significant number of applications. He was represented by three different counsel at different points in time and was self-represented at times.
- [16] Despite an order that J.T.P. pay child support to K.S., he has not done so since the fall of 2021. He has also not contributed to the children's special expenses, including therapy, tutoring, and the costs of the Catholic School at which they attend.
- [17] Between the civil action and these family proceedings, the parties have expended a significant amount of their family assets. They have mortgaged one of their residential properties in the secondary mortgage market at high-interest rates to fund litigation advances and have cashed in Registered Retirement Savings Plans and other investments.
- [18] On this family file, there have been at least contested 14 court applications. I do not intend to review them all. J.T.P. has filed at least 29 affidavits and K.S. has filed 16.
- [19] One such application was heard by Justice Winteringham over five days in October and November 2020. She dismissed J.T.P.'s application for 50/50 shared parenting time and shared parenting responsibilities: [K.S.] v. [J.T.P.] (6 November 2020), Vancouver E162647 (B.C.S.C.).
- [20] In her oral reasons for judgment delivered on November 6, 2020, Justice Winteringham wrote:
- [93] Without resolving the disputed record regarding historical incidents of domestic violence, I am satisfied on the materials presented that [K.S.] has been significantly impacted by the nature of her relationship with [J.T.P.], including by physical violence, to the point where there has been a level of fear that has impacted her ability to manage a very complicated

relationship with her former partner. I accept that she remains fearful of him and that her ability to communicate with him has been thereby impacted. I accept further that the evidence demonstrates [J.T.P.] (and despite his assertion to the contrary) has often exhibited controlling behaviour that limits [K.S.'s] ability to engage with him in the shared parenting regime that he envisions. The impact of violence in the relationship has resulted, based on the circumstances presented to me, in an unequal balance of power.

- [21] Justice Winteringham found that the parties could not then cooperate to make a shared parenting regime workable: para. 109. She ordered that the children would reside primarily with K.S., who would have sole decision-making authority over all parenting responsibilities set out in s. 41 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], paras. 110, 112. She required K.S. to keep J.T.P. informed of the children's status, including any significant circumstances related to their health, education, activities and religion: para. 113. The children were to "forthwith" resume counselling with Arianna Clarke-Watts, or any other counsellor deemed suitable by K.S.: para. 115.
- [22] Justice Winteringham ordered that J.T.P. have specified parenting time with the children: paras. 110, 144.
- [23] Justice Winteringham also repeated and incorporated the conduct orders she had earlier granted on October 23, 2020: para. 116. She added further conduct orders with respect to parenting at paras. 124 and 125 (the "Winteringham Order").
- [24] Since the Winteringham Order, the parties have appeared on at least eight other applications.
- [25] J.T.P. has not always followed the order that K.S. has sole parenting responsibilities. For example, he unilaterally made appointments for the children to be vaccinated against Covid-19, which he was not permitted to.
- [26] In reasons delivered in January 2021, [K.S.] v. [J.T.P.] (29 January 2021), Vancouver E162647 (B.C.S.C.), Master Bilawich adjourned the parties' applications and commented on the extensive number of court days consumed by applications that were "very lengthy and very contentious": para. 15.
- [27] The parties next appeared before Justice Mayer on March 16, 2021. J.T.P. sought to retroactively adjust income that Justice Brundrett had imputed to him for child support purposes on July 9, 2020, and, as a result, to reduce his child support. J.T.P. also sought a declaration that his child support payments were current and an order that a "Hear the Child" report be prepared for the trial that was then scheduled for November 2021. In his reasons, [K.S.] v. [J.T.P.], 2021 BCSC 698, Justice Mayer dismissed the application for a retroactive adjustment of J.T.P.'s imputed income and a reduction of his child support: para. 26.

- [28] With respect to the declaration J.P. sought about the currency of his child support, J.T.P. submitted that he had paid the required amounts for July to October into a joint bank account. Justice Mayer wrote:
- [30] [K.S.] says that her counsel wrote to [J.T.P.] later in August and specifically advised him that depositing child support payments into the TD Bank account did not constitute payment, given that making a withdrawal from this account would put the account into overdraft.
- [31] The July 2020 order of Justice Brundrett required [J.T.P.] to pay monthly child support to [K.S.]. I do not consider that payment into a joint account, which at the material time did not have a sufficient positive balance equivalent to [J.T.P.'s] monthly child support obligations, was in compliance with the order of Justice Brundrett. Accordingly, I decline to provide the declaration sought by [J.T.P.] that he has paid child support for the months of July to October 2020.
- [29] Justice Mayer also declined to order a Hear the Child report, instead ordering a report under s. 211 of the FLA. He wrote in that regard:
- [39] Given the history of family violence in this case, the allegations by both parents that the other is seeking to manipulate the children or to otherwise influence their views regarding parenting time, I am not satisfied that a Hear the Child Report will be of sufficient assistance to the court in determining what parenting arrangements are in the best interests of the children. As an additional factor militating against the utility of such a report, I note that the children are still relatively young - 7 and 9. In my view a stand-alone views of the child report would likely be more probative for an older child, less prone to parental influence, and with better developed sense of their own best interests.
- [30] In September 2021, J.T.P. sought to vary the Winteringham Order. He submitted that he was not being kept informed about the children's activities and that K.S. was deregistering the children from extracurricular activities. He sought shared parenting responsibilities. The parties appeared before Justice G.C. Weatherill on September 17, 2021. J.T.P. was then represented by counsel. In dismissing the application, Justice G.C. Weatherill wrote:

I am not persuaded or even close to being persuaded that there is any merit whatsoever in this application. It should never have been brought. It was unnecessary and it had nothing, in my review, not even a modicum there, particularly in the context of a trial date less than two months from now that's going to deal with all of these issues, and a s. 211 report which is being prepared. For [J.T.P.] to file this application raising the incredibly [picky] complaint has served to do nothing other than inflame an already toxic situation. I am dismissing this application in its entirety, and awarding costs in any event of the cause to the claimant [at page 51 of the Transcript.]

- [31] The ten-day trial that was originally scheduled to commence on November 22, 2021, was adjourned to April 4, 2022, for 13 days, at J.T.P.'s request due to his counsel's exposure to Covid-19.

- [32] The 13-day trial scheduled to start on April 4, 2022, was adjourned as J.T.P.'s counsel filed a notice of his intention to withdraw, which was opposed by J.T.P. I permitted counsel to withdraw. The trial was rescheduled to commence on September 26, 2022, for 14 days, and the date was made peremptory to both parties. I expressed my view that there was a need to resolve this family dispute in the best interests of the children: K.S.P. at para. 84.
- [33] The parties then appeared before me on April 13 and 14, 2022, on cross-applications. After hearing the parties' submissions, I permitted K.S. to travel to Germany with the children between July 4 and August 3, 2022, and varied the Winteringham Order as it related to parenting time. I dismissed J.T.P.'s claim for compensatory parenting time for the time he said he lost over the spring break and approved a list of intermediaries to assist with parenting exchanges.
- [34] The parties then appeared before me on May 19 and 20, 2022, both seeking to vary the Winteringham Order. J.T.P. sought a variation of the parenting schedule to implement recommendations from Mr. Colby's s. 211 report. K.S. sought a variation of the parenting schedule to reduce the number of exchanges between the parties. I did not make any of the orders sought. In my oral reasons, [K.S.] v. [J.T.P.] (20 May 2022), Vancouver E162647 (B.C.S.C.), I stated:
- [19] Having heard the arguments and considered all of the extensive material that was appropriately before me, I am dismissing [J.T.P.]'s application. [J.T.P.] has not satisfied me that it is in his children's best interests to make any changes to the [Winteringham Order] at this time. A right to seek a review does not mean that the review will be successful.
- [20] It is best, and in the children's best interests, that the current parenting arrangements, as fraught with conflict as they continue to be, remain in place until a final decision is made after the September trial. [J.T.P.] continues to see his children and has a good relationship with them. The dispute over Mr. Colby's recommendations is significant and needs to be dealt with at trial.
- [21] The parties have been unable to collaborate to this point, and a change has the potential of causing further conflict, which is not in their children's best interests, particularly where there is a possibility of further changes after the September trial.
- [24] Finally, on the history of these proceedings since the [Winteringham Order], there has never been a period of calm between the parties.
- [35] On August 22, 2022, J.T.P., who was represented by counsel now appearing on this trial, applied for a number of orders, including that the trial be bifurcated, or in the alternative, adjourned. J.T.P. sought to have the child-related issues dealt with first, followed by the financial issues once the Court of Appeal had rendered its decision on J.T.P.'s appeal of the Merits Decision. I declined to bifurcate or adjourn the trial: K.S.P. With respect to bifurcation, I wrote:

- [71] In the circumstances of this case, I do not agree with counsel for [J.T.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] 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.
- [36] I also wrote that the parenting arrangements would determine the child support obligations: K.S.P. at para. 74. Furthermore, J.T.P. was in breach of the existing court order that he pay child support and had not contributed to the costs of the children's therapy or school fees: K.S.P. at para. 75.
- [37] With respect to J.T.P.'s request for an adjournment pending the outcome of the appeal, I noted that there was no evidence that J.T.P. sought to expedite his appeal-- despite knowing of the peremptory September trial dates--and did not seek a stay of Justice Fleming's judgment pending the appeal. I wrote:
- [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.T.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.

- [89] Most recently, the parties appeared before me on [J.T.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.T.P.]'s current lawyers in time for them to prepare for the trial. The email exchanges between [J.T.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.T.P.]'s request, and for his benefit, can become unduly complicated.
- [38] I commented on the litigation advances that had been ordered under s. 89 of the FLA, in excess of \$200,000 each, and the financial pressure that this was putting on K.S. I also commented that K.S. gave evidence on the stress and anxiety she experiences as a result of the litigation: para. 99.
- [39] I declined to order the trial adjournment.
- [40] Having summarized the factual background, I now turn to K.S.'s current application.

Analysis

Res Judicata and Issue Estoppel

- [41] The parties agree that there are two branches of res judicata that may arise from a previous judgment: issue estoppel and cause of action estoppel. The parties also agree that the branch that would be engaged here is issue estoppel. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, Justice Binnie, writing for the Court, stated:
- [33] The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. The first step is to determine whether the moving party has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle [v. Minister of National Revenue]*, [1975] 2 S.C.R. 248, 1974 CanLII 168]. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. [Citations omitted.]
- [42] Issue estoppel operates when three conditions are met:
- 1) that the same question has been decided;
 - 2) that the judicial which is said to create the estoppel was final; and,
 - 3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

(*Danyluk* at para. 25, citing *Angle* at 254).

- [43] There is some inconsistency in the caselaw as to whether a decision under appeal is "final" for the purposes of issue estoppel. Justice Sigurdson highlighted that inconsistency in *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600 at para. 36, citing a number of cases (although, in that case, the application was not decided on the question of finality but on the question of whether the parties were the same or their privies). Other cases have been decided since *Giles*.
- [44] I need not resolve that issue in this case, as I have concluded that it is more appropriate to consider this application under the abuse of process doctrine.

Abuse of Process

- [45] The doctrine of abuse of process engages the court's inherent power to prevent the misuse of its procedure in a way that would be manifestly unfair to a party or bring the administration of justice into disrepute: *Gonzalez v. Gonzalez*, 2016 BCCA 376 at para. 18. The primary focus of the doctrine is ensuring the integrity and the coherence of the administration of justice and of judicial decision making: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 29, 43 [C.U.P.E.]; *Lamb v. Canada (Attorney General)*, 2017 BCSC 1802 at para. 79, *aff'd* 2018 BCCA 266.
- [46] The abuse of process doctrine is flexible. It precludes re-litigation where one or more of the requirements of issue estoppel are not met. Courts may apply abuse of process where re-litigation would violate principles such as: judicial economy, consistency, finality, and the integrity of the administration of justice: *C.U.P.E.* at paras. 39-42. It also applies to issues that should have been raised in earlier proceedings: *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633 at para. 12.
- [47] In *C.U.P.E.*, the Court summarized the doctrine of abuse of process and its background:
- [35] Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
- ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

- [37] [T]he doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
- [55] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
- [56] One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[Emphasis in original.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel ...

- [38] It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (*Lange*, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange*, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

- [42] The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See *Doherty J.A.*'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

- [48] In determining whether the court should exercise its discretion to prevent an abuse of its process, it must take into account the entire context and background of an action. In this case, that context and background include the history of this proceeding as partly set out above. It also includes the history of the civil proceeding that led to Justice Fleming's findings, which K.S. seeks to rely on in this family trial. Most importantly it includes the issues in dispute between the parties.
- [49] In my view, J.T.P.'s conduct over the course of the civil and family proceedings is sufficiently serious to attract the application of the abuse of process doctrine. Although I have already summarized the history of the dispute above, I find it necessary to identify specific instances of J.T.P.'s conduct below.
- [50] In light of his past actions, I conclude that J.T.P.'s present opposition to K.S.'s application is another example of his attempt to frustrate the court process. Allowing J.T.P. to relitigate Justice Fleming's findings in the Merits Decision would amount to an abuse of process.
- [51] To begin, the civil litigation was lengthy, expensive, and contentious. A few examples will suffice.
- [52] J.T.P. brought four unsuccessful applications to adjourn the trial; the last of which was brought on the first day of trial. Two of those applications were heard by Master Elwood, as he then was, and the second of those was appealed. The appeal was heard by Justice Duncan, who dismissed it summarily and also dismissed another pending application to adjourn.
- [53] On January 8, 2021, Master Elwood gave oral reasons for dismissing the first adjournment application on the basis that it was premature: [K.S.] v. [J.T.P.] (8 January 2021), Vancouver S1810941 (B.C.S.C.). He said:

The plaintiff alleges serious injuries and serious psychological symptoms. It is in the interests of both parties that this litigation be resolved. [T]he parties require closure on this litigation, and the only way to do that is to proceed with the trial. [J.T.P.] has known about this trial date since last January and based on the current materials, there is no grounds for an adjournment. [I]t is my view it is very important for this matter to go to trial as scheduled.

- [54] On April 21, 2021, Master Elwood dismissed J.T.P.'s second adjournment application: [K.S.] v. [J.T.P.] (21 April 2021), Vancouver S1810941 (B.C.S.C.). At that time, J.T.P. applied on the basis that he needed time to obtain his own expert reports, to investigate a medical issue, and to retain counsel. However, Master Elwood said that J.T.P. had no plan to obtain experts, that he ought to have applied for medical records on proper evidence earlier, and that his proposed counsel had not provided evidence that he agreed to represent J.T.P. if the trial were adjourned. At para. 16, Master Elwood stated:

[J.T.P.] may have an argument for an extension of time to file responding reports but his request to adjourn the trial generally so that he can now begin to investigate possible expert reports, is, in my view neither reasonable nor timely.

[55] Master Elwood went on to discuss prejudice:

[11] This is a family violence case. The plaintiff deposes to the proceedings and the manner in which they have been conducted by the defendant have affected her profoundly, physically and psychologically. The evidence, including expert evidence demonstrates a need on a human level to reach a final resolution in this case and for the parties to go their separate ways following a related family law trial in November of 2021.

[56] On May 6, 2021, J.T.P. appealed Master Elwood's second refusal to adjourn. At his request, the appeal was adjourned from May 17 to May 20, 2021.

[57] The appeal was heard by Justice Duncan and dismissed: [K.S.] v. [J.T.P.] (21 May 2021), Vancouver S1810941 (B.C.S.C.). Justice Duncan stated that J.T.P. had asserted that only a few Vancouver lawyers had sufficient expertise to assist him. She viewed that as "wildly inaccurate" and "likely offered as an explanation for why [J.T.P.] has effectively sat on his hands and not attempted to retain counsel for the trial": para. 16. Justice Duncan determined that J.T.P. had failed to demonstrate that Master Elwood's decision was clearly wrong: para. 22. Furthermore, she said the equities were not in his favour. She concluded that he had done "essentially nothing in a timely fashion" to retain counsel and had instead spent a lot of time in court on a variety of applications: paras. 23-24.

[58] Justice Duncan also dismissed J.T.P.'s third adjournment application. She was satisfied that it was brought on essentially the same basis as his April 21, 2021, application. Allowing it to proceed was not in the interests of justice and would constitute an abuse of the court's process. She prohibited him from applying again before May 31, 2021, the start of the civil trial: para. 25

[59] J.T.P. retained counsel on May 27, 2021, and, on the first day of trial, his counsel sought an adjournment because he had insufficient time to prepare. Justice Fleming refused the adjournment: 2021 BCSC 1620. She found that J.T.P. was well-educated, intelligent, capable, and strategic; "he deliberately delayed retaining a lawyer to represent him at the trial for the purpose of delaying or avoiding the trial": para. 45. Justice Fleming notes that such conduct should be discouraged in a case where serious family violence and psychological injuries are alleged and where "prompt resolution may well be necessary to avoid prolonging or exacerbating those injuries and symptoms": para. 46. Justice Fleming concluded:

[48] [G]iven the nature and seriousness of the alleged wrongdoing, significant family violence, the seriousness of the alleged psychological injuries and ongoing symptoms, including but not limited to [K.S.]'s stated fear for her safety and fear in [J.T.P.]'s presence, as well as the timing of the upcoming family trial, this case requires urgent resolution.

- [60] She also concluded that J.T.P. would not suffer any meaningful prejudice if the trial were to proceed and that she would accommodate J.T.P.'s counsel with additional time during the trial if necessary: para. 49.
- [61] As another example of the contentious nature of the civil proceedings, counsel for J.T.P. alleged that Ms. Lepin, K.S.'s counsel in the civil action, was in an apparent, or actual, conflict of interest. He demanded that she immediately send the file to alternate counsel and, that if she did not do so by the following day, J.T.P. would "raise the issue with the Law Society": Costs Decision at para. 16. Ms. Lepin responded that she was not in a conflict and explained why.
- [62] J.T.P. then complained to the Law Society. Ms. Lepin did not learn of the complaint until months later when she received a letter from the Law Society indicating that it was closing its file. The Law Society determined that Ms. Lepin was not in a conflict.
- [63] J.T.P. then applied for a court order that Ms. Lepin be disqualified. Justice Gaul dismissed the application and ordered J.T.P. to pay K.S.'s costs at scale B in any event of the cause: [K.S.] v [J.T.P.], 2019 BCSC 1400 at para. 48.
- [64] As I have said, the trial then proceeded over 16 days before Justice Fleming. Her reasons include comprehensive findings of fact about the circumstances of the Assault and the extent of the injuries and symptoms experienced by K.S.
- [65] An abuse of the court's process must take into account proportionality and accessibility.
- [66] The Supreme Court of Canada in *Hryniak v. Mauldin* observed that that "protracted trials" can cause Canadians to "give up on justice": 2014 SCC 7 at paras. 24-25. The Court emphasized that the "proportionality principle", balancing accessibility and timeliness with the truth-seeking function of the courts, should "act as a touchstone for access to civil justice": *Hryniak* at para. 30.
- [67] Although *Hryniak* arose in the context of the scope of the summary judgment rule, the Court's criticism of "protracted trials" and call for a culture shift "away from the conventional trial" is applicable to considering abuse of process in this case. In my view, proportionality and accessibility are particularly important in family litigation. Section 199 of the FLA provides:
- (1) A court must ensure that a proceeding under this Act is conducted
 - (a) with as little delay and formality as possible, and
 - (b) in a manner that strives to
 - (i) minimize conflict between and if appropriate, promote cooperation by, the parties, and
 - (ii) protect children and parties from family violence.

- [68] This section aligns with the Court's comments in *Barendregt v. Grebliunas*, 2022 SCC 22, on the relationship between the litigation process, relocation, and the children's best interests. Protracted litigation takes a toll on both the children and parties' emotional and financial resources: *Barendregt* at para. 68. Permitting unnecessary re-litigation "does little to assist parties who must find a way to restructure their relationships and cooperate for the sake of their children": *Barendregt* at para. 68.
- [69] Abuse of process is one tool that courts may use to ensure that the principles of accessibility and proportionality are upheld.
- [70] Where abuse of process prevents the relitigation of a factual issue, the practical impact of applying the doctrine will vary case by case. In some circumstances, it may warrant the entire case's dismissal. In other situations, it may merely curtail the factual issues in dispute.
- [71] I am satisfied that the factual issues in dispute in this family trial should be curtailed, as requested by K.S.
- [72] There are three areas of Justice Fleming's specific findings in the Merits Decision that appear to be of particular concern to J.T.P. The first is with respect to Justice Fleming's acceptance of Dr. Mead-Wescott's opinion evidence. The second relates to certain text messages--one of the bases on which Justice Fleming found that J.T.P. was not credible. The third relates to her findings about the circumstances and impact of the Assault.

Dr. Mead-Wescott's Evidence

- [73] J.T.P. wishes to challenge Justice Fleming's finding that Dr. Mead-Wescott was a credible witness whose opinions were well-reasoned and persuasive. In particular, he takes issue with Dr. Mead-Wescott's opinion that K.S. "might do best" psychologically if she returned to Germany semi-permanently due to a "greater sense of physical safety" and the social supports available to her there: Merits Decision at paras. 290, 477.
- [74] J.T.P. submits that he should be able to call those conclusions into question in this family proceeding, as they are central to the relocation decision and only peripheral to the issues in the civil litigation.
- [75] I do not agree that he should be entitled to do so. J.T.P. had notice of Dr. Mead-Wescott's opinion about a possible relocation as it formed part of her report in the civil proceedings. It was open to him to call rebuttal evidence in the civil trial based on either a records review or on the basis of an independent medical assessment by a neuropsychologist of his choosing. He did not do so.
- [76] J.T.P. did, however, have an opportunity to cross-examine Dr. Mead-Wescott. According to Justice Fleming, the cross-examination was "at length and in detail": Merits Decision at para. 297.

- [77] J.T.P. also had the opportunity to make submissions as to the reliability of Dr. Mead-Wescott's opinions: Merits Decision at para. 294.
- [78] It would be an abuse of process for J.T.P. to relitigate those issues in this family proceeding.

The Text Messages

- [79] Justice Fleming concluded that J.T.P. manipulated or compiled text messages that were put in evidence. In her reasons, Justice Fleming said that him having done raised a significant concern about his credibility: Merits Decision at paras. 58-62, 210-211, 373.
- [80] J.T.P. seeks to challenge this credibility finding before me and seeks to introduce a report prepared by Tyler Hatch of DFI Forensics to challenge Justice Fleming's finding with respect to the text messages. I note that J.T.P. also seeks leave to admit the DFI Forensics report as fresh evidence in the appeal of the Merits Decision.
- [81] Justice Fleming gave a number of reasons for why she did not find J.T.P. credible. Her conclusion about the text messages was only one of them.
- [82] As I have said, Justice Fleming's finding as to J.T.P.'s credibility, as distinct from the factual findings underpinning it, is not binding on me. Her finding is but a factor to consider in my own assessment of his credibility.
- [83] The issues before me in this trial are with respect to property division and debt. Most importantly, the issue is K.S.'s relocation application and the parenting arrangements and responsibilities if she is permitted to relocate and the arrangements and responsibilities if she is not.
- [84] Parenting decisions are based on an assessment of the best interests of a child or children under s. 37 of the FLA.
- [85] It is true that deciding the relocation application will involve an assessment of the parties' parenting capacity and the impact of family violence on the children. However, that assessment focuses on what is now in the children's best interests. That determination will not be based on whether there were one or two incidents of K.S. punching her belly while pregnant with the parties' son in 2013. It also will not focus on whether J.T.P. manipulated text messages.
- [86] It is not always necessary for the court to make definitive conclusions on the specifics of alleged family violence: D.D.R. v. K.T.R., 2019 BCSC 1805 at para. 82, citing N.G.T. v. T.F.T., 2016 BCSC 134 at para. 103; M.H. v. A.M., 2016 BCSC 1664 at para. 73. Rather, the court must only do so to the extent that it is necessary to determine the best interests of the children: D.D.R. at paras. 82-83.

[87] I conclude that the possible manipulation of text messages is a tangential issue to these family proceedings. In the circumstances, it would be an abuse of process to allow J.T.P. to attempt to undermine Justice Fleming's findings by the introduction of the evidence of Mr. Hatch and his report. It will not be helpful to me or relevant to my assessment of the parties' parenting capacity or whether K.S. relocating will be in the children's best interests.

The Assault

[88] There is no dispute that J.T.P. pled guilty to Assault.

[89] In submissions before me on this application, J.T.P. said that he pled guilty based on an agreed statement of facts ("ASOF") that was filed in the criminal proceedings with respect to sentencing and that he would agree, in this family trial, to be bound by a finding that the Assault occurred as described in the ASOF.

[90] This issue was addressed in the civil proceedings. Justice Fleming found that K.S. was not involved in the preparation of the ASOF, gave uncontradicted evidence that she was not consulted about it, and strongly disputed most of its contents: para. 99.

[91] J.T.P.'s civil counsel agreed that he was bound by the ASOF, but Justice Fleming was not: para. 364.

[92] Justice Fleming determined that the Assault was not as described in the ASOF. Of note, in her assessment of J.T.P.'s credibility, Justice Fleming also found as a fact that J.T.P.'s trial evidence was inconsistent with the ASOF.

[93] The nature of the assault and its impacts on K.S. were central issues to the damages award in the civil action. That issue is one of the factors that I will consider with respect to K.S.'s relocation application.

[94] The relocation inquiry must be rooted in a "forward-looking" risk assessment: Barendregt at para. 8; see also N.D.T. at para. 103, citing *Leveque v. Leveque* (1983), 54 B.C.L.R. 164 at para. 13, 1983 CanLII 717 (C.A.). The issue is what is in the children's best interests now and in the future. An extensive inquiry into past events--particularly facts that have already been determined in a prior proceeding, like here--is not appropriate. In some cases, incidences of abuse between the parents may not be relevant to the children's best interests; "even the most egregious past conduct by one spouse against the other may not bear on the children's interests going forward": D.D.R. at para. 87; see also *M.P. v. P.P.*, 2022 BCSC 1511 at para. 30.

[95] I do not suggest that family violence is irrelevant to the relocation analysis. In fact, consideration of family violence is mandatory under s. 37 of the FLA, and it would be a "serious error in principle" not to consider it: *K.W. v. L.H.*, 2018 BCCA 204 at para. 125.

- [96] However, a re-litigation of findings of fact at the granular level submitted by J.T.P. is unnecessary and amounts to an abuse of process. Given Justice Fleming's findings about the Assault, re-litigation would have a significant emotional impact on K.S., which is particularly concerning in circumstances of a finding of family violence and K.S.'s particular vulnerabilities. Given the circumstances, permitting J.T.P. to relitigate facts already decided would be at a high personal financial and emotional cost to K.S. and should not be permitted.
- [97] Finality is particularly important in a case in which the best interests of children are at stake: Barendregt at para. 67, citing Perre v. Edwards, 2001 SCC 60 at para. 13. As I have said, these parties and their children need a degree of certainty. Relitigating issues that were determined after a lengthy civil trial does not further the children's interests.
- [98] J.T.P. can cross-examine K.S., and make submissions, about changes in her condition since she was examined by the experts who testified at the civil trial and since the release of the Merits Decision. He can lead evidence about any of the factors in s. 37 of the FLA and make submissions on the children's best interests, but he cannot challenge Justice Fleming's factual findings regarding the Assault or the injuries K.S. suffered as a result in the Merits Decision in this proceeding.

"MacNaughton J."

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Prepared on 29 October 2026 · Esheria