

CANADA / JUDGMENT

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

2023 BCSC 1365

COURT

Supreme Court of British Columbia

DECIDED

4 August 2023

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2023 BCSC 1365 K.S.P. v. J.T.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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

2023 BCSC 1365

Date: 20230804

Docket: E162647

Registry: Vancouver

Between:

K.S.P. aka K.S.

Claimant

And

J.T.P.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 55, 74, 78, 82, 86-90 on August 16, 2023

Before: The Honourable Justice MacNaughton

Oral Reasons for Judgment

Counsel for the Claimant:

A.M. Ouellet

The Respondent, appearing in person:

J.T.P.

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 31, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 4, 2023

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Introduction

- [1] The parties, J.T.P. and K.S., have brought applications in respect of orders I made in my judgment cited at K.S.P. v. J.T.P., 2023 BCSC 1188, released on July 11, 2023 ("Family Judgment"). I will use the defined terms in the Family Judgment in these reasons.
- [2] Most importantly, J.T.P. asks me to stay execution of certain financial and parenting orders in the Family Judgment. K.S. seeks to enter the final order ("Final Order") and other orders or directions.
- [3] The Family Judgment was released after a 40-day trial in the fall of 2022 and in the winter and early spring of 2023. In it, I permitted K.S. to relocate the parties' Children to Germany. I made parenting orders, decided retroactive and prospective child support, and divided the parties' property.

Events Following the Family Judgment

- [4] Since the release of the Family Judgment, the following events have occurred. On July 13, 2023, J.T.P. filed an appeal and, before the Court of Appeal, sought a stay of execution of my orders in the Family Judgment. In the Court of Appeal, J.T.P. also filed an application for a stay of execution of the Fleming Judgment and the Fleming Costs Reasons, pending the resolution of his Fleming Judgment appeal, and "in support of" his related application for a stay of the Family Judgment.
- [5] The parties appeared in the Court of Appeal on three occasions: twice on preliminary matters, and the third for argument.
- [6] Justice Hunter determined that the stay application of the Fleming Judgment and the Fleming Costs Reasons was not urgent and adjourned it to be heard on August 16, 2023. Due to the timing of his stay application, his arguments on that application did not form part of the argument on the appeal of the merits of the Fleming Judgment, which was heard on November 3, 2022.
- [7] The stay of the Family Judgment orders was determined to be urgent and was argued in the Court of Appeal on July 21, 2023.
- [8] In reasons released on July 25, 2023, Hunter J.A. determined that, absent an "extraordinary" case or one demonstrating an "egregious error", the Court of Appeal did not have jurisdiction to stay the execution of orders made under the Family Law Act, S.B.C. 2011, c. 25 [FLA], and that this was not one such case: J.T.P. v. K.S., 2023 BCCA 303 at paras. 15, 17-18 and 21-22 ("Hunter Stay Reasons").
- [9] Justice Hunter concluded that the Court of Appeal did have jurisdiction to consider a stay of the order I made permitting K.S. to relocate the Children to Germany ("Relocation Order"), made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

- [10] The Court of Appeal declined to stay the Relocation Order. Applying the three-part test discussed below, Hunter J.A. determined that, based on the low threshold for assessing the merits of the appeal, and in light of the uncertainty as to the outcome of the Fleming Judgment appeal, J.T.P. met the merits part of the test for a stay: Hunter Stay Reasons at para. 43.
- [11] Justice Hunter was not, however, satisfied that refusing a stay would lead to irreparable harm to the Children, as that term applies to matters involving parenting and children: para. 44. He wrote:
- [50] J.T.P. has pointed out that relocation will remove the children from the community they know and friends they have made, which is undoubtedly true. But this is the case whenever families move, a common occurrence in life. I accept that the most significant negative effect of the relocation on the children will be the interference with their ongoing relationship with their father, who the trial judge accepted had a close and loving relationship with the children. But I am not satisfied, in light of the extensive examples from the evidence provided by the trial judge and her reasoned conclusions, that the relocation will result in irreparable harm to the children.
- [12] With respect to the balance of convenience, whether the stay was granted or refused, Hunter J.A. relied on my findings that relocation is in the Children's best interests and his conclusion that the Children would not suffer irreparable harm if they relocate to Germany. Justice Hunter concluded that:
- [55] If the appeal of the Family Judgment is successful, the children could be returned to British Columbia in the summer of 2024 to resume their lives here. If it is unsuccessful, they will presumably continue their life in Germany. In either case, they will have experienced a year abroad, supported by their mother and extended family.
- [56] [T]he balance of convenience favours the dismissal of the stay application of the relocation order. I am also satisfied that considering all the factors that have been brought to my attention, it is in the interests of justice and in the best interests of the children that the stay be denied.
- [13] Shortly after J.T.P. filed his notice of appeal, I set aside a full day on July 31, 2023, to deal with J.T.P.'s application for a stay of certain of my orders under the FLA and K.S.'s applications for orders or directions arising from the Family Judgment. I heard both parties' applications that day.
- [14] Orders made by this Court under the FLA remain in effect throughout an appeal process unless the Court orders otherwise: FLA, s. 234.

J.T.P.'s Applications

- [15] J.T.P. seeks several orders and leave to apply for orders relating to the Children and financial matters. Most importantly, in his current stay application, J.T.P. seeks a stay of my orders with respect to:
- a) The sale of the O.P. to a third party;
 - b) The distribution of funds held in trust from the net sale proceeds of A.M.W., including distribution of the Fleming Judgment award, about which a decision is under reserve in the Court of Appeal. As a term of the stay, J.T.P. proposes that certain of the proceeds of the sale of A.M.W. would be distributed to K.S. as set out at clauses 1(m)(1)-(4) of his notice of application; and
 - c) The parenting orders on terms set out at subparas. 2(a)-(d) of his notice of application.
- [16] In addition, at subpara. 3(d) of his notice of application, J.T.P. seeks a stay of my order imputing guideline income to him for 2024 and seeks an order adjusting his guideline income to what he actually earns in 2023 and 2024. He suggests that there then would be a retroactive child support adjustment.
- [17] In subparas. 3(a)-(c) of his notice of application, J.T.P. seeks leave to apply for certain orders, including for:
- a) M. and W. to be provided legal counsel from the Children and Youth Legal Centre;
 - b) M. to be interviewed for a Hear the Child report after February 6, 2024 (her 12th birthday); and
 - c) Disclosure of K.S.'s 2022 income tax return and notice of assessment to determine taxes paid on her April 4, 2022, disposition of RRSPs.
- [18] Finally, in para. 4, J.T.P. seeks an order that jurisdiction with respect to the family matters, particularly those involving the Children, remain in British Columbia. He submits that it would be prejudicial for him to retain counsel and participate in the German legal system as a foreigner who does not speak the language.

Conclusion

- [19] In the result, I have concluded that J.T.P.'s application for a stay should be dismissed. Although J.T.P. has satisfied the low burden of establishing his appeal is not vexatious or frivolous, he has not established he will suffer irreparable harm if the stay is not granted, and I find the balance of convenience favours K.S. The interests of justice do not demand that K.S. be denied the fruits of her judgment while J.T.P. pursues his right of appeal. In this case, based on comments J.T.P. made in the Court of Appeal, he may well reconsider his appeal of the Family Judgment if his appeal of the Fleming Judgment is unsuccessful. Indeed, he was granted an extension of the timelines for filing the appeal record, appeal

books, transcripts, and factum in the appeal of the Family Judgment to begin running the day following the decision in the appeal of the Fleming Judgment.

Test for a Stay

- [20] In approaching the question of whether a stay should be granted, the court starts from the position that a successful plaintiff/claimant should not be deprived of the fruits of their judgment unless the interests of justice require that they be withheld pending an appeal: *Rotaru v. Rotaru*, 2009 BCSC 480 at para. 11, citing *Gold v. Gold*, 70 B.C.L.R. (2d) 216 at para. 13, 1992 CanLII 721 (S.C.).
- [21] This starting position is appropriate with respect to the financial orders in the Family Judgment. It is not well-suited to the parenting orders, where a stay must be considered in light of the Children's best interests: *Butula v. Herrewig*, 2011 BCSC 1609 at para. 17.
- [22] The test for a stay in this Court is the same as the test applied by the Court of Appeal. The three parts of the test are well-settled. J.T.P. must establish that:
- a) There is a serious question to be tried. In a number of cases, this part of the test has been described as not difficult to meet. The applicant need only show that there is some merit to the appeal that is arguable and not frivolous;
 - b) He will suffer irreparable harm. "Irreparable" refers to the nature of the harm, rather than its magnitude. This has been described as harm that is either not compensable, or not easily compensable in damages, if the stay application is refused. As the Supreme Court of Canada said in *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 341, 1994 CanLII 117 [RJR], this is usually because one party cannot collect damages from the other. In *M.N. v. C.G.F.*, 2020 BCSC 2072 at para. 17, the Court gave the following examples of what might amount to irreparable harm, including where one party will suffer permanent market loss or irrevocable damage to its business reputation or a permanent loss of natural resources will result when a challenged activity is not enjoined. The impecuniosity of one party does not automatically determine the application in favour of the other who will not ultimately be able to collect damages, although it may be relevant consideration: *RJR* at 341; and
 - c) The balance of convenience favours the granting of a stay. This part of the test involves assessing which of the parties would suffer the greater harm from the granting or refusing of a stay.
- [23] With respect to child-related orders, the Court must determine whether a stay is in the best interests of the Children. As Hunter J.A. set out at para. 39 of his reasons, citing to a number of Alberta Court of Appeal decisions, irreparable harm to the best interests of a child is not found in mere disruption of their lives; "There must be evidence of special circumstances that demonstrate potential harm to the child, or some harm that is 'real and significant' and is more than a transitory disturbance": *Hunter Stay Reasons* at para. 39, citing *YM v. DT*,

2021 ABCA 294 at para. 7.

Application for Leave

[24] I will first deal with J.T.P.'s application for leave to bring the orders sought in para. 4 of his notice of application. I do not grant the leave he seeks for the following reasons.

Legal Counsel for M. and W.

[25] Part way through the trial, J.T.P. applied for exactly the same order.

[26] In my oral reasons, cited at K.S.P. v. J.T.P., 2023 BCSC 188, I declined to make that order. I wrote:

[7] Drawing the children into the proceedings as parties will further damage all parties' relationships and would be antithetical to the issue before me: the best interests of the children: J.E.S.D. v. Y.E.P., 2018 BCCA 286 at para. 55. I am satisfied that I have sufficient evidence of the children's views through other means.

[27] In paras. 8-13, I indicated that I already had the benefit of a s. 211 report from Robert Colby; the Children's views were only one factor to consider in determining what was in their best interests; I was concerned that the Children had been inappropriately involved in the parties' legal matters and their views may have been manipulated; the Children had experienced and witnessed family violence; and the Children had been interviewed by social workers from the Ministry, police officers, K.S.'s civil counsel, and Mr. Colby. They had many opportunities to provide their views, and it was not essential that the Children become parties to intensely adversarial proceeding. There was also the potential that another interview would disrupt their lives. Finally, the application should have been brought before trial and, if ordered mid-trial, might result in an adjournment.

[28] All of those concerns still apply.

[29] In addition, as the trial has concluded and an appeal has been filed, there are no outstanding issues for which legal counsel for the Children could or would be required.

Hear the Child Report from M.

[30] There are no outstanding issues for which a Hear the Child report could or would be required. As I made clear in the Family Judgment, despite Justice Winteringham's advice to J.T.P., there was no period of calm in the parties' relationship: Family Judgment at paras. 415, 439, 604.

[31] I concluded that distance needed to be put between these parties to allow K.S. to heal and to engage in ordinary activities with the Children: Family Judgment at para. 400. I concluded that K.S.'s safety continued to be compromised by J.T.P.'s conduct even five years after the Violent Incident: Family Judgment at para. 407.

[32] I wrote:

- [414] A relocation will insulate the Children from the continued effects of the family violence and, what continues to be, the toxic interpersonal dynamics between their parents. J.T.P. has demonstrated that he is incapable of conducting himself in a way that will allow K.S. the ability to recover from the parties' relationship and its violent breakdown. He continues to be antagonistic, combative, and punitive.
- [33] At para. 419, I also found that K.S. needed distance from J.T.P. to protect the Children from the continued effects of his coercive control and violence and that the Children needed their mother to be healthy and to have the best chance at recovering from the effects of the Violent Incident. I concluded K.S. had been worn down and damaged as a parent due to the ongoing conflict with J.T.P., who had been relentless in pursuit of his interests.
- [34] None of those issues will change when M. turns 12. I agree with Hunter J.'s comments that, even if J.T.P. is successful on his appeal, there is no irreparable harm to the Children from living in Germany for a year: Hunter Stay Reasons at para. 55.
- [35] The only purpose of a Hear the Child Report would be to create an evidentiary record on which J.T.P. might rely on in an attempt to vary my Relocation Order. At some point, this continued litigation has to stop. It is not in the Children's best interests to have J.T.P. gathering potential evidence for a variation application only seven months after the Relocation Order is implemented.

Disclosure of K.S.'s 2022 Income Tax Return

- [36] J.T.P. or his counsel could have sought K.S.'s 2022 Income Tax Return in advance of trial. If it was not then available, it could have been requested while the trial was ongoing in September-December 2022, or in February-April 2023. No request was made to me for a disclosure order.
- [37] J.T.P. cross examined K.S. for seven days on November 21-25 and December 1-2, 2022 and did not ask her questions about her 2022 income tax return.
- [38] J.T.P.'s reason for now seeking K.S.'s 2022 income tax return is, apparently, because he disputes a calculation in the Family Judgment. It is not now open to him to seek leave for access to documents in support of an argument he wishes to make on appeal. An appeal is based on the record that was before the trial judge unless the test for admission of new evidence on appeal is met: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 J.T.P. cannot meet that test in the circumstances as the evidence was available to him through reasonable diligence. In any event, an application for new evidence on appeal should be brought before the Court of Appeal, not in this Court.

Continuing Jurisdiction over Family Matters

- [39] J.T.P. seeks leave to apply for an order that the jurisdiction for family matters will remain in British Columbia. I decline to grant leave on this issue as such an order would be pre-emptive.
- [40] Having made the Relocation Order, permitting the Children to reside in Germany, the Children's habitual residence may no longer be British Columbia. It is unclear at what point--or even, if--that will occur. Accordingly, jurisdiction over matters relating to the Children will be determined if and when they arise.
- [41] With respect to other family matters, jurisdiction should be determined if they arise.

Application for Stay

- [42] As J.T.P.'s notice of appeal does not set out details of the basis of his appeal, I have considered what he sets out at para. 29 of Part 2 (Factual Basis) of his Notice of Application.
- [43] In summary, J.T.P. objects to: my conclusion that the facts found by Justice Fleming in the civil action should not be relitigated before me; my credibility findings with respect to his evidence; and my decision not to implement the s. 211 report prepared by Robert Colby.
- [44] Trial judges are entitled to considerable deference on their factual findings and are in the best position to determine the credibility of the witnesses who appeared before them.
- [45] Justice Hunter acknowledged, at para. 38 of his reasons, that an appellate court must be mindful of the "narrow scope of appellate review" in family cases as set out, most recently, in paras 100-104 of *Barendregt v. Grebliunas*, 2022 SCC 22. That is particularly true with respect to a trial judge's credibility findings.
- [46] Justice Hunter wrote, at para. 43, that it was not clear to him that a successful appeal in the civil action would fundamentally affect the result in the Family Judgment but accepted that the position was arguable and, given the low threshold for assessing the merits and the uncertainty as to the result of the appeal of the Fleming Judgment, J.T.P. met the merits part of the test for a stay.
- [47] I accept that, with respect to the appeal of the FLA orders in the Family Judgment, J.T.P. has also met the low threshold of the merits part of the test for a stay.

Sale of O.P. to a Third Party

- [48] In support of his application for a stay, J.T.P. submits that the sale of O.P. is dependent on the outcome of the civil appeal, as the sale will be unnecessary if the Fleming Judgment is overturned. He argues, based on average decision release statistics from the Court of Appeal website, that a decision is imminent. I have no way of knowing when a decision will be released and cannot predict the outcome of the appeal. My decision does not, however, turn on the issue of timing.
- [49] J.T.P. submits that he will suffer irreparable harm if O.P. is sold because he wishes to maintain it as the Children's home base in Canada and so that they are able to return to it if he is successful in his appeal of the Family Judgment. He submits that it is his residence and that he is in a position to purchase K.S.'s interest in it for \$230,000. He proposes to assign a \$1.6 million value to O.P., from which he would deduct his excluded property claim as quantified in the Family Judgment, and K.S.'s share of the implied capital gains and selling costs. These costs will not be incurred on a sale to J.T.P. and are not appropriately taken into account in the financial analysis.
- [50] J.T.P. made many of these same submissions during trial, although then he proposed to buyout K.S.'s interest at a value of \$1.5 million.
- [51] In the Family Judgment, I made the following findings with respect to the sale of O.P.:
- a) It had been appraised at \$1.7 million on October 18, 2021: para. 466;
 - b) J.T.P. had provided no evidentiary basis for his submission that O.P. was overvalued in the appraisal. The fact that the A.M.W. property sold for 11% over its appraised value suggested that there had not been a decline in the market in the area: paras. 469-470;
 - c) Before trial commenced, J.T.P. sought, and was granted an order, permitting him to obtain updated appraisals on both properties but he did not do so. He also did not call the appraiser for the purposes of cross-examination: para. 471; and
 - d) The only way to determine the true value of O.P. was to expose it to the open market and, given the financial consequences of the family litigation, it was important for the parties and the Children to obtain the highest and best value for their properties: paras. 472-473.
- [52] I did not provide J.T.P. with a first right of refusal.
- [53] J.T.P. has not persuaded me that he will suffer irreparable harm if O.P. is sold to a third party.
- [54] According to J.T.P.'s submissions, he is not currently employed. That is concerning given his obligation to support his Children and his trial evidence that, after the trial was over, he was going to "reach back" to Robert Half, the placement agency from which he obtained contract work, and "get placed". He also testified, with respect to Robert Half, that "there's a lot of work" and that he was open to accepting roles that "will pay the bills".

- [55] Accepting that he is unemployed, it is not likely that he will qualify for financing to purchase K.S.'s interest in O.P. He has not explained how, as an unemployed applicant, he will be able to assume the \$625,000 HELOC. I note that when the parties sought s. 89 litigation advances in the family proceeding, they had to resort to the secondary mortgage market, as they did not qualify for financing in the primary market.
- [56] J.T.P. and the Children only began living in O.P. in the spring of 2021. Until then it had been a rental property. While it is now his home, he does not have a deep attachment to it. The only family home the Children had known was the now-sold A.M.W. property.
- [57] I accept that J.T.P. made O.P. child-friendly with a trampoline, a basketball hoop, and other toys and sports equipment. However, all of those things are portable to another home.
- [58] In his affidavit filed in support of his stay application, J.T.P. extolled the value of O.P. as being on a cul-de-sac, between two schools, and close to a park and to a greenbelt. J.T.P. describes O.P. as a "unique house", and "kids house" with a big yard in the front and a wrap-around yard surrounded by a greenbelt. All of those features will make the home attractive to the market and belie his suggestion that the appraisal undervalued O.P. There are other homes that would be equally child-friendly.
- [59] If the Court of Appeal overturns any of my property and financial orders, a compensation award could be made, and there is no evidence that J.T.P. would be unable to collect on it.
- [60] On the balance of convenience part of the test for a stay, I conclude that the balance favours K.S. and the Children. She needs the financial wherewithal to provide them with a comfortable home, medical care, education, therapies, and activities in Germany. J.T.P. is critical of K.S. for staying with her parents on an interim basis in Germany and says that he wants the Children to be engaged in a number of activities. If the Children need tutoring or extra education support upon moving to Germany, K.S. will require money to pay for those things
- [61] It is not in the Children's best interests, on a balance of convenience, to deprive K.S. of funds that, after 40 days of trial, are clearly due to her in the Family Judgment. She should not have to await the outcome of the appeal to access those funds. I agree with her counsel's submission that this is especially the case because J.T.P. was disproportionately responsible for increasing the costs of the family law proceeding.
- [62] I also note that J.T.P.'s submission about maintaining O.P. as the Children's home base in Canada appears inconsistent with his submission that it was always his stated intention to move to Germany if K.S. was successful in her application to relocate the Children. He also said that D'arcey Musselman, his partner, has applied to teach at the International School Hannover Region, although there was no evidence from Ms. Musselman to that effect. J.T.P. will not be in a position to keep a home base in Canada and live in Germany, even on a part-time basis.

[63] For these reasons, I do not exercise my discretion to stay the order for sale of O.P.

Distribution of Funds from Net Sale Proceeds of A.M.W.

[64] J.T.P. seeks a stay of all payments from the net sale proceeds held in K.S.'s counsel's trust account, totalling \$1,817,996.21 as of July 4, 2023, with the exception of:

- a) \$4,000 payable to the TD Bank for the overdraft in the account ending in 0750;
- b) From K.S.'s share of the marital equity:
 - i. \$250,000 to K.S.;
 - ii. \$162,092.69 to K.S.'s counsel for legal fees; and
 - iii. \$19,522.57 to J.T.P. for a compensation payment;
- c) From J.T.P.'s share of marital equity:
 - i. \$57,625.50 to the FMEP for K.S. on account of arrears of past child support;
 - ii. \$21,647.94 to K.S. on account of past special and extraordinary expenses;
 - iii. \$1,781 to the FMEP for K.S. on the first of every month from August 2, 2023, to December 31, 2024; and
 - iv. \$230,000 to K.S. to sell her equity interest in O.P. to J.T.P.

[65] There are a number of difficulties with J.T.P.'s proposal. First, as I have set out above, I am not satisfied that K.S.'s equity interest in O.P. is \$230,000.

[66] Second, the Family Judgment sets out that child support for 2023 is \$1,781 but for 2024, I imputed \$150,000 in employment income to J.T.P. resulting in child support to the end of that year at \$2,159.

[67] Finally, K.S.'s counsel has accrued more legal fees since she registered a certificate of fees against K.S.'s interest in A.M.W. She estimated her fees to be about \$220,000 including: various correspondence with J.T.P. after release of the Family Judgment and with respect to his applications in the Court of Appeal; the preparation of materials for the Court of Appeal; and three July appearances in that Court culminating on July 21, 2023; and the preparation of the materials before me and this appearance.

[68] K.S. needs access to more of her share of the family equity in order to establish a home and to provide for the Children in Germany. The calculations provided by her counsel show that, even excluding the Fleming Judgment award, the interest on that award, and the costs and special costs that were ordered in the Fleming Judgment but have yet to be assessed, K.S. is entitled to over \$975,000 out of the monies held in trust. The balance of convenience favours disbursement of those funds to her.

- [69] I am not satisfied that J.T.P. has established irreparable harm or that the balance of convenience favours a stay of the distribution of the net sale proceeds to K.S. There is no evidence that J.T.P. will be unable to collect from K.S. if his appeal is successful and a significant sum is required to be paid to him. Any such amount is compensable.
- [70] For that reason, I order that K.S.'s counsel is permitted to release to K.S., or on her behalf, the funds in her trust account aside from \$795,029.68 on account of the personal injury damages awarded in the Fleming Judgment and that will be paid to Bonnie Lepin's trust account to hold and payout on her undertaking to the Court of Appeal that it not be released until the appeal decision of the Fleming Judgment is rendered. J.T.P.'s submission that it should not be transferred to a sole practitioner's trust account was nonsense. Ms. Lepin is bound by the same rules as all lawyers with respect to funds in their trust accounts and she is bound by the undertaking she gave to the Court of Appeal. There is no need for K.S.'s family counsel to continue to be the trustee of the Fleming Judgment amount.
- [71] I also order that K.S.'s counsel is entitled to release the balance of the funds in her trust account to K.S. with the exception of the payment to retire the TD overdraft and the compensation payment to J.T.P.
- [72] I accept that the arrears of past child support should be handled through the FMEP as they will calculate the interest on the arrears. I do not accept that ongoing child support should be paid through the FMEP as, in light of my order that \$100,000 of security for child support is to be deducted from J.T.P.'s share of the family equity in A.M.W., it appears that FMEP enforcement will not be immediately necessary.

Parenting Orders

- [73] J.T.P. seeks what he characterizes as a stay of the parenting orders. In fact, what he seeks is a variation of the parenting orders as follows:
- a. The Children may bring with them any personal possessions they wish to Germany including their personal phones which will remain in their personal possession and private. The Children may initiate contact [with] friends and family at their discretion.
 - b. The Children will continue counselling with their current child counsellor on a weekly basis.
 - c. Whenever the Respondent visits or resides in Germany during the school year, the Respondent will exercise parenting time on a week on/week off parenting schedule.
 - d. The Respondent may have parenting time in North Vancouver during the following school breaks for the next 12 months with the children for:
 - i. October break October 6 - 23, 2023;
 - ii. One week during winter break December 20 - January 4, 2023;

- iii. One week during Spring break from March 15 - April 2, 2024; and
- iv. Summer break from July 1-31, 2024.

- [74] With respect to subpara. 73(a) above, K.S. agrees that the Children may bring any favourite clothing, toys, mementos, or keepsakes so long as they are reasonably packed and can be reasonably transported as luggage on a typical airline. The Children should also be permitted to copy and bring with them contact information for friends and family and any photographs either electronically or in hard copy.
- [75] K.S. does not agree that the Children should be able to bring their cell phones with them. Because I gave her all parental decision-making authority with respect to the Children, it is up to her to decide whether the Children should have unfettered access to cell phones. In para. 444, subparas. 21-34 of the Family Judgment, I set out the terms governing communication. They are binding on the parties as no stay has been sought. I will not substitute those provisions with the ones sought by J.T.P.
- [76] With respect to the order with respect to counselling sought in subpara. 67(b) above, K.S. responded that as part of her exercise of parenting responsibilities, she intends to have transitory sessions with the Children's current counsellor, Arianna Clarke-Watts, following the relocation. In her evidence, Ms. Clarke-Watts said that she was open and willing to continue with the Children's sessions and that she could do them online from anywhere. In fact, because Ms. Clarke-Watts moved to Vancouver Island, her most recent sessions with the Children have been online.
- [77] As K.S. has full parental responsibilities, it will be up to her to decide whether continuing counselling is needed and, similarly, if Ms. Clarke-Watts continues to be the most suitable counsellor for the Children.
- [78] With respect to the orders sought by J.T.P. in subparas. 73(c) and (d), they are variations of the parenting time ordered in the Family Judgment and are not appropriately characterized as stays.

K.S.'s Application

- [79] In her notice of application filed on July 26, 2023, K.S. seeks certain orders or directions. Many of the orders or directions were dealt with during the hearing.

Final Order

- [80] Despite J.T.P.'s objection to entering the Final Order pronounced by me on July 11, 2023, I was satisfied that, in light of the circumstances, the Final Order should be entered. J.T.P. said that he required the assistance of counsel and had not read the Family Judgment in full. I explained that his signature was not needed and, so long as the Final Order drafted by counsel for K.S. reflected the orders made by me in the Final Judgment, I could enter it without his signature.
- [81] In any event, we went through the Final Order, paragraph by paragraph, and J.T.P. made submissions on those paragraphs with which he had concerns. I settled the Final Order and signed the divorce order.

Pay Out of Trust Accounts

- [82] What remained to be dealt with was the order or direction of the Court confirming the payouts due to each party arising from the Family Judgment and the entered Final Order. K.S. sought an order that her counsel could pay out all amounts currently held in her trust account to K.S. or on her behalf, aside from \$795,029.68 on account of the personal injury damages awarded by in the Fleming Judgment and which amount she sought to be paid to Ms. Lepin to hold and payout on her undertaking to the Court of Appeal. I have addressed the pay out of trust amounts above at para. 71. As a result of my order, the alternative relief sought by K.S. need not be dealt with.
- [83] The parties agreed that K.S.'s counsel could release the Children's passports to Ms. Lepin for release to K.S. on or after July 31, 2023 at 4:00 p.m.
- [84] K.S. also sought an order that the J.T.P., or his agent, return the Children to K.S.'s care by handing the Children over to Stefan Loose at the Parkgate Community Centre by no later than 4:00 p.m. on August 5, 2023. J.T.P. did not object to that order and advised me that he had arranged for Ms. Musselman to make the exchange.
- [85] J.T.P. agreed to an order that, in the event that K.S. is unable to apply for German citizenship for the Children without his signature, he must sign the applications within three days of being requested to do so by K.S.

Order [Dealing with Matters about Which There is a Sealing Order]

- [86] [Redacted]
- [87] [Redacted]
- [88] [Redacted]
- [89] [Redacted]
- [90] [Redacted]

Costs

[91] As K.S. has been fully successful, I see no reason to depart from the usual rule that the successful party is entitled to her costs of these applications.

"MacNaughton, J."

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