

CANADA / JUDGMENT

Lipskaya v. Guo

2021 BCCA 244

COURT

British Columbia Court of Appeal

DECIDED

10 June 2021

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2021 BCCA 244 Lipskaya v. Guo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lipskaya v. Guo,

2021 BCCA 244

Date: 20210610

Docket: CA47244

Between:

Viktoriya Lipskaya also known as Viktoriya Alexandovna Lipskaya

Respondent

(Claimant 1)

And

Yu Guo

Appellant

(Claimant 2)

Before:

The Honourable Mr. Justice Voith

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

December 31, 2020 (Lipskaya v. Guo, 2020 BCSC 2090, Vancouver Docket E111512).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

J. Dubas

No one appearing on behalf of the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

June 10, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 10, 2021

Summary:

Application for directions as to whether leave to appeal is required and for this appeal to be heard together with appeal CA46615. Held: Leave to appeal is not required; directions issued. The order on appeal is not a limited appeal order. It is appropriate that the two appeals be heard together, with adjustments to filings and timelines.

- [1] VOITH J.A.: This appeal (CA47244, the "Charges Appeal") arises from an order of Justice Skolrood, pronounced December 31, 2020, cancelling, on the authority of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], a certificate of pending litigation ("CPL") filed by the appellant as a charge against a property registered in the name of the respondent in Chilliwack (the "Chilliwack Property"). The order also cancelled, on the authority of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA], two charges filed by the appellant under the FMEA against the Chilliwack Property.
- [2] The appellant applies for direction as to whether leave to appeal is required and for various orders or directions pertaining to timelines pursuant to that direction. He also seeks a direction that this appeal be heard together with another appeal (CA46615, the "Support Appeal"), involving the same parties and arising from the same underlying family claim (Vancouver Registry No. E111512, the "Claim"). The Support Appeal arises from an order of Justice Baker, pronounced December 5, 2019, which set child support obligations for the respondent, ordered the respondent to pay the appellant a lump sum for retroactive child support from a certain date, and made various orders concerning special and extraordinary expenses.

- [3] The appellant, Mr. Guo, and the respondent, Ms. Lipskaya, were married in 2006. They had a son in July 2006. The parties divorced five years later. The Claim was brought on May 17, 2011, by way of a notice of joint family claim. On September 15, 2011, the parties entered into a consent order granting a divorce with various terms (the "Divorce Order"). Pursuant to those terms, Mr. Guo has sole custody of their child, and Ms. Lipskaya was to pay a modest amount in monthly child support and extraordinary expenses, such amount being subject to annual adjustment pursuant to the Federal Child Support Guidelines and based on the parties' incomes. No orders for spousal support were made.
- [4] In June 2014, Mr. Guo went on social assistance, which required him to register with the Family Maintenance Enforcement Program ("FMEP"). At that time, Ms. Lipskaya was over \$3,000 in arrears for child support, which she said was due to Mr. Guo's refusal to receive payments or to provide her with his accounting information. Ms. Lipskaya caught up with her payments through the FMEP and voluntarily increased her payments in July 2017 and September 2019.
- [5] Ms. Lipskaya remarried in 2015 and had a second child in April 2018. She and her second husband purchased the Chilliwack Property, which is registered in her name. She is now separated from her second husband.
- [6] On July 22, 2019, almost eight years after the Divorce Order was issued, Mr. Guo filed a notice of application against Ms. Lipskaya under the same file number as the Claim, seeking various orders pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). He alleged, inter alia, that Ms. Lipskaya had not met her child support obligations for years and had not properly disclosed her income as required by the Divorce Order. That application was adjourned by consent by Justice McDonald on September 4, 2019, with an interim order made at that time increasing Ms. Lipskaya's child support obligations.
- [7] On October 16, 2019, Mr. Guo brought another application pursuant to the Divorce Act and the Family Law Act, S.B.C. 2011, c. 25. Namely, he sought a declaration of the parties' Guidelines incomes for the purposes of child support (which were not stated in the Divorce Order), a variation of the terms of the Divorce Order, and a lump sum of retroactive child support payments that he said had not been paid by Ms. Lipskaya since January 2016. That is the application underlying the Support Appeal.
- [8] New to the October application, and relevant to the Charges Appeal, Mr. Guo sought to secure the amounts he claimed for retroactive child support by claiming an equitable interest in the Chilliwack Property, "pursuant to the doctrines of constructive trust, unjust enrichment, resulting trust and principles of restitution". He also claimed that any agreement whereby Ms. Lipskaya's now-separated second husband would receive an interest in the Chilliwack Property is a fraudulent conveyance and/or a fraudulent preference. Concurrent to that application, Mr. Guo filed the CPL and the two FMEA charges against title to the Chilliwack Property.

- [9] In her reasons for the order arising from that application, indexed at 2019 BCSC 2095, Justice Baker determined that a variation was unnecessary because the Divorce Order itself contemplated that child support would be recalculated annually based on the Federal Child Support Guidelines and the parties' annual incomes. She ordered the adjustment of child support obligations accordingly. She also set terms for the payment of special and extraordinary expenses.
- [10] However, Justice Baker refused to order retroactive payment from January 2016 as sought by Mr. Guo and instead ordered retroactive payment from July 2019 onwards. She found that until July 2019, Ms. Lipskaya had reasonably believed that no increase to child support was required due to communications from Mr. Guo that Ms. Lipskaya's support obligations were appropriate. She noted that Ms. Lipskaya had voluntarily increased her support payments and had exhibited every intention to comply with any child support orders made.
- [11] Relevant to the Charges Appeal, Justice Baker also declined to make orders sought by Mr. Guo for security for child support payments. She said:
- [56] I decline to make any of these further orders sought. Ms. Lipskaya has paid all child support in accordance with the consent order, and has increased that payment amount voluntarily since September 2019. I have no evidence that she would not comply with the orders I have made. No security is appropriate. Further, Mr. Guo has not established any legitimate interest in Ms. Lipskaya's dispute with her husband and no orders with respect to their dispute or him personally are appropriate.
- [12] Justice Baker ordered that the parties bear their own costs of the application.
- [13] Mr. Guo filed a notice of appeal of that order on January 3, 2020, beginning the Support Appeal.
- [14] On September 21, 2020, Ms. Lipskaya applied, also under the same file number as the Claim, for an order cancelling the CPL and the two FMEA charges on the Chilliwack Property. Mr. Guo opposed the application, in part on the basis that it should not be determined until the resolution of the Support Appeal.
- [15] For reasons indexed at 2020 BCSC 2090, Skolrood J. granted the orders sought by Ms. Lipskaya, which are the subject of the Charges Appeal. Regarding the CPL, he found that Mr. Guo's pleadings failed to disclose an interest in land and that a CPL cannot be used to secure a claim for retroactive child support. In doing so, he noted that "[t]o allow Mr. Guo to use a CPL as security for child support would be to subvert Baker J.'s decision not to grant security." He cancelled the CPL pursuant to the LTA. He declined, however, to summarily dismiss the portions of Mr. Guo's October application alleging constructive trust, resulting trust, unjust enrichment, and fraudulent conveyance and/or preference.
- [16] Regarding the FMEA charges, Skolrood J. found that, because Mr. Guo was registered with the FMEP, it was not open to him to file charges against the Chilliwack Property on the basis of securing child support. He found the combined effect of ss. 5 and 26 of the FMEA give the

director of maintenance enforcement the sole authority to enforce the child support order, including through registration of a charge on property. He found he had the authority under s. 26(10) of the FMEA to cancel the charges, which had been registered in breach of the FMEA, and he so ordered.

- [17] Justice Skolrood awarded Ms. Lipskaya her costs of the application.
- [18] Mr. Guo filed a notice of appeal of that order on February 1, 2021, beginning the Charges Appeal.
- [19] On April 19, 2021, Ms. Lipskaya brought an application in chambers on the Charges Appeal for an order that Mr. Guo post security for costs of the appeal and in the court below. During the hearing of that application before Justice Willcock on April 27, 2021, the question of whether leave was required to appeal Justice Skolrood's order arose. It was decided that, in order to potentially prevent any unnecessary further legal fees, Ms. Lipskaya's security for costs application would be adjourned, and Mr. Guo would apply for direction from the Court as to whether leave to appeal is required. Justice Willcock directed that counsel for Mr. Guo attempt to have the application for directions brought on for hearing within 30 days, that is, by May 27, 2021, and that if they failed to do so, counsel would seek directions from the Court to extend that timeline. Counsel for Mr. Guo agreed to the timeline and stated that he would contact Ms. Lipskaya to determine her availability for a hearing date.
- [20] On May 26, 2021, Mr. Guo filed this application for, inter alia, directions as to whether leave is required and for a direction that the Charges Appeal be heard together with the Support Appeal.
- [21] Counsel for Mr. Guo filed this application without seeking to extend the timeline for the hearing of the application. He says he misunderstood Willcock J.A.'s direction. He also did not contact Ms. Lipskaya to ask for her available dates. Rather, he set down this application unilaterally, and he did so at a time when Ms. Lipskaya, who is a single parent and who works, was not available. Ms. Lipskaya filed materials in response to the present application but unfortunately was not able to participate. She has, however, indicated that she wished the application to proceed in her absence as she does not wish to delay matters further.
- [22] Ms. Lipskaya does, however, point to Mr. Guo's failure to follow Willcock J.A.'s directions as exhibiting a pattern of non-compliance with court orders and directions, which she says amounts to an abuse of process. I am satisfied that it would be in the interests of all parties to address the present applications on the merits. It may be open to Ms. Lipskaya to raise her concerns about Mr. Guo's conduct at the hearing of the appeal, but she would likely be better served by focusing on the merits of the matter.
- i) Is Leave to Appeal Required?
- [23] Pursuant to s. 7 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, leave is required to appeal a "limited appeal order", as defined in Rule 2.1 of the Court of Appeal Rules. Rule 2.1 sets out an exhaustive list of circumstances where leave to appeal is required: Yao v. Li, 2012 BCCA

315 at para. 27. This is to simplify the practice of the court and provide greater certainty as to whether leave is required: *Bentley v. The Police Complaint Commissioner*, 2012 BCCA 514 at para. 5. The Court accordingly adopts a restrictive approach to interpreting the exhaustive categories of limited appeal orders in Rule 2.1: see, e.g., *Wallman v. Gill*, 2013 BCCA 110 at para. 20; *Clifford v. Lord*, 2013 BCCA 302 at para. 29.

[24] Ms. Lipskaya submits that Skolrood J.'s order is an interlocutory order and therefore requires leave to appeal. Prior to an amendment to s. 7 of the Court of Appeal Act on May 31, 2012, leave was required to appeal from any interlocutory order. That is no longer the case. The authorities Ms. Lipskaya relies on for the requirement for leave to appeal interlocutory orders pre-date that amendment. Only orders that are classified as limited appeal orders under Rule 2.1 require leave to appeal.

[25] The potentially relevant parts of Rule 2.1 provide:

2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act:

- (b) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Family Rules:
- (v) Part 12 [Property and Injunctions];
- (c) an order granting or refusing interim relief under the Family Law Act;

[26] Interim orders under the Divorce Act are currently not limited appeal orders and do not require leave to appeal, pursuant to s. 21(1) of that Act. See *Nestor v. Nestor*, 2018 BCCA 453.

[27] Justice Skolrood issued his orders in the following manner:

[53] I make the following orders:

- a) The CPL filed against the Chilliwack Property under charge no. CA7813603 is cancelled pursuant to s. 215(1) of the LTA; and
- b) The charges filed against the Chilliwack Property pursuant to the FMEA, under numbers CA7812839 and CA7812840, are cancelled.

It is apparent from Skolrood J.'s reasons at paras. 49-51 that the second order was made pursuant to s. 26(10) of the FMEA. Mr. Guo challenges Skolrood J.'s reliance on that section, but that issue is not pertinent to this application.

[28] There is nothing in Rule 2.1 of the Court of Appeal Rules that relates to orders made pursuant to the LTA or the FMEA. This, alone, is largely determinative of the issue.

- [29] Although the orders were made in the course of a family law action commenced by a notice of joint family claim, "it is the nature of the order that determines the requirements for leave to appeal, and not the subject matter or substance of the order, or the context of the larger proceeding": Clifford at para. 14.
- [30] Nor are any relevant sections of the Supreme Court Family Rules engaged. The only such rules mentioned in the reasons were under Rule 1-1 (definitions), Rule 2-2 (joint family law case), and Rule 3-1 (choosing the correct form of proceeding), none of which fall under Rule 2.1(b) of the Court of Appeal Rules. In any case, Skolrood J. considered Rule 3-1 of the Family Rules only for the purpose of rejecting Mr. Guo's argument that it applied. Rule 12-1 of the Family Rules, which is listed in Rule 2.1(b)(v) of the Court of Appeal Rules, allows a court to make an order for the detention, custody, or preservation of property subject to a family law case, but this rule was never invoked by Skolrood J., likely because Baker J. had not made such an order in her reasons.
- [31] Further, Skolrood J. at para. 34 of his reasons explicitly based his decision to cancel the CPL under the LTA in part on the basis that the charge was not registered pursuant to various provisions related to the Family Law Act or the Divorce Act: at para. 34. That aspect of the order was accordingly not an interim order under the Family Law Act such that Rule 2.1(c) would be engaged.
- [32] The cancellation of the charges that had been filed, ostensibly under the FMEA, is slightly more complicated. Those charges were notices of a maintenance order under s. 26 of the FMEA. A maintenance order could arise from an order, judgment, or arbitration award pursuant to the Family Law Act, and may be an interim order, which would engage Rule 2.1(c) of the Court of Appeal Rules. However, there is no indication the underlying action engages an interim maintenance order under the Family Law Act. The Divorce Order appears to have been final for the purposes of the Claim, notwithstanding the parties' subsequent applications. In any case, cancellation of the notices of maintenance order under s. 26(10) of the FMEA is not engaged anywhere in Rule 2.1 of the Court of Appeal Rules.
- [33] Further, the parties did not specify whether the Claim or the applications were governed by the Divorce Act or the Family Law Act, and this was not a material issue on either application. Where it is not clear which statute governs, it may be assumed, for the purposes of a leave application, that the Divorce Act governs because the federal government's authority in divorce is paramount: *De Fehr v. De Fehr*, 2002 BCCA 577 at para. 15. I note also that the Divorce Order was issued pursuant to the Divorce Act and made reference to the Federal Child Support Guidelines.
- [34] I therefore conclude that leave to appeal is not required.

ii) Further Directions

- [35] Mr. Guo applies for direction that the Charges Appeal be heard together with the Support Appeal. Ms. Lipskaya opposes such a direction, submitting that the Support Appeal has already been unreasonably delayed. Factums have been filed on the Support Appeal, but there are currently no court dates set. The two appeals appear to engage largely similar factual issues, and Skolrood J.'s reasons engage directly with Baker J.'s at various points. Separate hearings for these appeals could result in further unnecessary costs. I direct that the two appeals be heard together.
- [36] In order to prevent unnecessary inefficiency or redundancy of materials, I also direct that the appeal books that have been or will be filed on each appeal are deemed to have been filed in the other appeal, with any necessary supplements to be filed within 30 days of this order. Mr. Guo is directed to file his appellant's factum on the Charges Appeal within 30 days of this order.
- [37] As I have indicated, Ms. Lipskaya was not able to attend the hearing today. Had she been able to attend, I would have provided her with some direction to address some of the concerns raised in her materials. For example, she states that she has suffered significant financial hardship due to the CPL and charges at issue, which have not been removed from title to the Chilliwack Property. I note that Mr. Guo has not sought or obtained a stay of Skolrood J.'s order to date. There are mechanisms available to Ms. Lipskaya to address her concerns, and she may wish to seek legal advice on this issue.
- [38] I note also that the Access Pro Bono Court of Appeal Counsel Referral Program provides self-represented litigants in this Court the opportunity to meet with a lawyer without paying a fee to discuss their appeal and, potentially, to assist with the appeal. Ms. Lipskaya may wish to contact the Court of Appeal Registrar for more information about this program.
- [39] Ms. Lipskaya also seeks directions as to her adjourned application for security for costs of the Charges Appeal and for costs of the application before Skolrood J. As I have concluded leave to appeal is not required, it is open to her to seek to reset that application for hearing on another date. Ms. Lipskaya should contact counsel for Mr. Guo to arrange a date.
- [40] In summary, I order or direct that:
- a) Leave to appeal is not required in appeal CA47244;
 - b) Appeal CA47244 will be heard together with appeal CA46615;
 - c) The appeal books that have been or will be filed in appeals CA47244 and CA46615 are deemed to have been filed in the other appeal;
 - d) Any further appeal books will be filed within 30 days;
 - e) Mr. Guo will file his factum for appeal CA47244 within 30 days; and
 - f) If Ms. Lipskaya wishes to advance her adjourned application for security for costs, she will contact counsel for Mr. Guo and arrange a new date for that hearing.

[41] The costs of this application will be costs in the cause of the appeal.

"The Honourable Mr. Justice Voith"

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Prepared on 28 October 2026 · Esheria