

CANADA / JUDGMENT

Lipskaya v. Guo

2022 BCCA 118

COURT

British Columbia Court of Appeal

DECIDED

31 March 2022

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2022 BCCA 118 Lipskaya v. Guo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lipskaya v. Guo,

2022 BCCA 118

Date: 20220331

Dockets: CA46615; CA47244

Docket: CA46615

Between:

Viktoriya Lipskaya also known as Viktoriya Alexandovna Lipskaya

Respondent

(Claimant 1)

And

Yu Guo

Appellant

(Claimant 2)

And

Romald Geoffery Anthonymuthu

Respondent

(Respondent)

- and -

Docket: CA47244

Between:

Viktoriya Lipskaya also known as Victoriya Alexandovna Lipskaya

Respondent

(Claimant 1)

And

Yu Guo

Appellant

(Claimant 2)

Corrected Judgment: The text of the judgment was corrected
at para. 5 on April 5, 2022.

Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

On appeal from: Orders of the Supreme Court of British Columbia dated
December 5, 2019 and December 31, 2020 (Lipskaya v. Guo, 2019 BCSC 2095 and
2020 BCSC 2090, Vancouver Docket E111512).

Counsel for the Appellant:

J. Dubas

Counsel for the Respondent,

Viktoriya Lipskaya:

G.K. Thomas

Counsel for the Respondent,

Ronald Geoffrey Anthonymuthu:

B.J. Ingram

Place and Date of Hearing:

Vancouver, British Columbia

March 22, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 31, 2022

Written Reasons by:

The Honourable Madam Justice MacKenzie

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Abrioux

Summary:

The appellant appeals from two orders made in related proceedings. By the first order, the judge enforced a 2011 consent order for child support by fixing the parties' incomes and setting the associated child support payable by the respondent mother under the Guidelines. The judge also ordered what was characterized as retroactive payment of child support and fixed limited s. 7 expenses, commencing the first month after the respondent received the notice of the application seeking increased support. The judge declined to order security for child support. By the second order, the judge cancelled a certificate of pending litigation ("CPL") and two liens the appellant had registered against the respondents' property. Held: Appeals dismissed. The first judge made no reviewable error in any terms of her order. By the appellant's repeated refusal to accept child support and his statements that he did not need support, the respondent reasonably believed that she did not owe child support. The second judge made no error of law when he cancelled the CPL and the two liens. The appellant did not claim an interest in land, as required to register the CPL, and did not have authority to register the liens under the Family Maintenance Enforcement Act.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

Introduction

- [1] Mr. Guo appeals from two orders made in related proceedings in the Supreme Court of British Columbia.
- [2] By her order of December 5, 2019, Justice Baker fixed the parties' respective incomes under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and the child support payable by the respondent, Ms. Lipskaya. Justice Baker also ordered retroactive payment of child support and s. 7 expenses. Justice Baker declined to order security for retroactive and future payments. Her reasons for judgment are indexed as 2019 BCSC 2095.

- [3] By his order settled February 26, 2021, Justice Skolrood cancelled a certificate of pending litigation ("CPL") and two liens that Mr. Guo had registered against a property owned by Ms. Lipskaya and her second husband, Mr. Anthony Muthu. Justice Skolrood's reasons for judgment are indexed as 2020 BCSC 2090.

Background Facts

- [4] Mr. Guo and Ms. Lipskaya married in 2006. Their son was born in July 2006. On September 15, 2011, the parties obtained a consent order granting a divorce and agreed to the following terms:
- a) Mr. Guo will have sole custody of their child;
 - b) Ms. Lipskaya will pay \$1.00 per month in child support commencing on May 1, 2011;
 - c) Ms. Lipskaya will pay \$84.00 per month for s. 7 expenses, including medical, dental, and extracurricular expenses, commencing on May 1, 2011;
 - d) The parties shall exchange their income tax Notices of Assessment by June 30 of each year; and
 - e) The monthly child support and additional expense payments amount shall be adjusted on July 1 of each year, based on the parties' income tax Notices of Assessment of the previous tax year.
- [5] The consent order did not set out the parties' Guidelines incomes and did not provide for spousal support. At that time, Ms. Lipskaya was a full-time student at Kwantlen Polytechnic University and worked part-time as a bank teller. During her studies, Ms. Lipskaya incurred approximately \$50,000 in student loans and credit card debt, which she primarily used to support Mr. Guo and their child.
- [6] Justice Baker accepted Ms. Lipskaya's evidence that Mr. Guo told her he would not collect child support if she would not claim spousal support or make any claims against the family assets. She understood that her share of the family assets would be used to support their child. Over the years, Ms. Lipskaya offered to make additional payments, but Mr. Guo consistently rejected her offers and repeatedly offered to pay Ms. Lipskaya's expenses. He also offered to repay Ms. Lipskaya's student loan. Ms. Lipskaya produced several examples of such communications.
- [7] In 2013, Ms. Lipskaya advised Mr. Guo when she received a job offer that would pay her a salary of \$45,000 and asked him to provide his bank account number so she could make payments for child support. Mr. Guo did not provide the account information and indicated he did not want Ms. Lipskaya to make any payments.
- [8] In June 2014, Mr. Guo began receiving social assistance payments. A condition of these payments was that he register with the Family Maintenance Enforcement Program ("FMEP"), pursuant to the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127

[FMEA]. Ms. Lipskaya was then over \$3,000 in arrears because Mr. Guo had refused to receive payments from her. Once Mr. Guo was registered with the FMEP, Ms. Lipskaya began making payments. She paid arrears through a lump sum payment and increased monthly payments. Ms. Lipskaya has since made the required monthly payments and voluntarily increased her payments. Although Mr. Guo had registered with FMEP and knew that Ms. Lipskaya was employed, he took no steps to increase Ms. Lipskaya's child support payments.

- [9] Ms. Lipskaya remarried in 2015 and gave birth to a second child in April 2018. Ms. Lipskaya and Mr. Anthonymuthu purchased a property which was registered in her name ("the Property"). She is currently separated from Mr. Anthonymuthu and has support obligations to her second child. Mr. Guo has alleged that any separation agreement whereby Mr. Anthonymuthu receives an interest in the Property is a fraudulent conveyance or preference.
- [10] On July 19, 2019, Ms. Lipskaya received a letter from Mr. Guo's counsel advising her that Mr. Guo would be claiming child support retroactive to January 2016. This correspondence was her first notice of Mr. Guo's claim. On July 22, 2019, he filed a notice of application seeking a variation of child support retroactive to January 1, 2016 and arrears of s. 7 expenses.
- [11] On October 16, 2019, Mr. Guo filed a notice of application seeking to vary the consent order of September 2011 and seeking an order for lump sum child support secured by the Property pursuant to the "doctrines of constructive trust, unjust enrichment, resulting trust and principles of restitution". On the same day, Mr. Guo registered a CPL and the two FMEA liens against the Property as security for the alleged arrears of child support.
- [12] Mr. Guo's application for security for the child support ordered was dismissed by Baker J. Accordingly, Ms. Lipskaya applied for cancellation of the CPL and the FMEA liens; her application was granted by Skolrood J.

Appeal from Justice Baker's Order

- [13] The first appeal is from Baker J.'s order following Mr. Guo's application for increased and retroactive child support and s. 7 expenses from January 1, 2016 to the present (notice of application filed July 22, 2019 at paras. 2-3). Justice Baker observed that although Mr. Guo purported to make an application to vary the consent order of 2011, he in fact sought enforcement of the terms of that order. The consent order expressly contemplated child support would be recalculated each year based on the Guidelines and the parties' income tax Notices of Assessment for the previous year.
- [14] Accordingly, Baker J. determined the parties' respective incomes; increased Ms. Lipskaya's child support to \$688 per month starting August 1, 2019; ordered a lump sum for retroactive child support owing since August 1, 2019; determined how s. 7 expenses would be shared; identified eye and dental exams, glasses, and orthodontic work as s.7 expenses; ordered that, prior to incurring expenses for glasses and orthodontics, cost estimates would be provided and agreed to by both parents; and ordered Ms. Lipskaya to pay \$100 per month for

the child's advanced musical training.

- [15] Justice Baker adjourned the application for counselling expenses as a s. 7 expense on the basis that Mr. Guo had provided insufficient evidence. She dismissed the application to treat daycare, summer camps, swimming lessons, and tutoring as s. 7 expenses.
- [16] Justice Baker also dismissed the applications for retroactive child support prior to August 2019, security for support arrears, and for Mr. Guo to receive notice of steps taken in proceedings between Ms. Lipskaya and her second husband.
- [17] Finally, Baker J. ordered that each party would bear their own costs.

Issues

- [18] Mr. Guo contends that Baker J.'s conclusions were not supported by law or evidence. Specifically, he says Baker J. erred in:
1. fixing August 1, 2019, as the commencement date for "retroactive" and increased child support;
 2. limiting Ms. Lipskaya's contribution to music expenses to \$100 per month;
 3. not awarding counselling expenses as a s. 7 expense;
 4. not ordering security for the arrears and ongoing payments of child support;
 5. fixing a procedure for s. 7 expenses whereby the parties would agree in advance and provide receipts for expenditures; and
 6. not awarding costs to Mr. Guo.
- [19] Mr. Guo also seeks an order for substituted service upon Mr. Anthonymuthu for this appeal and for the proceedings below by email or by serving Ms. Lipskaya.
- [20] Finally, Mr. Guo applies for leave to adduce fresh and/or new evidence on appeal. He filed his application on March 18, 2022, and applies to abridge the time for service of his motion and affidavits. I address the application below.

Standard of Review

- [21] The issues on this appeal arise from Baker J.'s discretionary decisions. Reviewing courts are highly deferential in family law appeals because decisions are fact-based and discretionary in nature: see e.g., *Colucci v. Colucci*, 2021 SCC 24 at para. 115; *Rick v. Brandsema*, 2009 SCC 10 at para. 30; *Michel v. Graydon*, 2020 SCC 24 at para. 30.
- [22] The Court explained the rationale for this deference in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 as follows:

12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[Emphasis added.]

See also *Oddou v. Mpega*, 2021 BCCA 258 at para. 10; *Gill v. Benipal*, 2022 BCCA 49 at para. 16, quoting *Jean Louis v. Jean Louis*, 2020 BCCA 220 at para. 24.

Discussion

Commencement Date for Retroactive and Ongoing Child Support

[23] In my view, Baker J. did not err in setting August 1, 2019, as the commencement date for what was characterized as retroactive child support, and for increased child support.

[24] In his reply factum, Mr. Guo relies on *Meyer v. Content*, 2014 ONSC 6001. Meyer distinguished original retroactive child support applications (to which the framework in *D.B.S. v. S.R.G.*, 2006 SCC 37 applies) from cases where an existing agreement for child support requires automatic adjustment when income increases: at paras. 56-62. In this case, the September 2011 consent order contained an automatic adjustment provision, which reads as follows:

3. The parties shall exchange their income tax Notices of Assessment by June 30 of each year.
4. The monthly child support and the additional expenses payment amount shall be adjusted on July 1 of each year so that [Ms. Lipskaya] shall pay to [Mr. Guo] the amounts of monthly child support and her portion of the Section 7 extraordinary expenses prescribed by the Federal Child Support Guidelines, based on the parties' income tax Notice of Assessment of the previous year.

[25] Thus, Mr. Guo argues that his request for increased support is an issue of enforcement of an order, rather than an original application for retroactive child support. He contends that Ms. Lipskaya must apply to cancel existing arrears of Guidelines support that accumulated in the years when she was not increasing payments.

[26] In my view, even if *D.B.S.* did not strictly apply (a question we need not decide), it provided a convenient and relevant analytic framework on the unusual facts of this case. This is particularly so where Mr. Guo disregarded the 2011 consent order and actively precluded

Ms. Lipskaya's efforts to pay support. Justice Baker considered all the circumstances and was alive to the fact Mr. Guo was seeking enforcement of an existing agreement to pay support: see e.g., paras. 20-21 and the order of Baker J. at para. 7. She did the best she could with a difficult and confusing application. She arrived at a reasonable outcome based on her analysis.

- [27] Justice Baker referred to the principles governing retroactive support orders and emphasized the recipient parent's obligations, including taking steps to seek required adjustments and avoiding lengthy delay: at paras. 24-38, citing D.B.S. and concluded as follows:
- [28] I find that until July 19, 2019 Ms. Lipskaya had a reasonably held belief that no increase to child support was required. I do not accept Mr. Guo's submission that Ms. Lipskaya ought to have known that her child support needed to be increased. Mr. Guo made statements to her and her mother which led her to believe that her support obligations were appropriate and he required nothing more. As of July 19, 2019, Ms. Lipskaya had notice that an increase was required. In September 2019 she voluntarily increased her support payment to \$400/month and indicated before me that she has every intention to comply with any child support order made.
- [28] Justice Baker recognized it is necessary to consider the child's needs and the potential hardship caused by an order for retroactive support: at para. 29. Applying these considerations, she said this:
- [30] I have considered the child's circumstances leading up to this application. Mr. Guo has not provided reliable evidence that he has been unable to provide for the child. To the contrary, he claims he spends a considerable amount of money each month on the child, up to \$1,600 a month - far in excess of any child support Ms. Lipskaya would be required to pay under the Guidelines. Mr. Guo asserts that he has borrowed money from his mother and accessed a line of credit and Visa card to pay expenses, but this assertion is supported by no documents or corroborating evidence. As such, I am unable to place much weight on this assertion.
- [29] Finally, Baker J. noted the date a paying parent receives notice of a need for increased support is typically an appropriate commencement date of the retroactive period in the absence of blameworthy conduct: at para. 31. Ultimately, she concluded:
- [32] In the case before me, I am satisfied that a retroactive award for child support is appropriate. However, I do not agree that such an award should be made back to 2016. I find that the appropriate commencement date for the retroactive period is the date Ms. Lipskaya received notice of this application from counsel for Mr. Guo - July 19, 2019.
- [30] Mr. Guo inaccurately characterizes the order as having cancelled child support arrears from January 1, 2016 to August 1, 2019. However, Baker J. found on the evidence that until July 19, 2019, Ms. Lipskaya reasonably believed that she did not owe child support. Justice Baker was entitled to make the order she did. Before then, there were no arrears to cancel.

- [31] Mr. Guo also submits Baker J.'s order ignores the principle that support belongs to the child, and puts too much weight on Mr. Guo's delay. Mr. Guo says he raised the issue of ongoing support as early as 2017 by telling Ms. Lipskaya he could ask her for more support but was not doing so because he felt she needed the money more. He says he was trying to reconcile with Ms. Lipskaya.
- [32] Mr. Guo further argues Baker J. misconstrued his statements about not wanting or needing money from Ms. Lipskaya. He contends Baker J. failed to refer to the entirety of his emails from 2012 to 2014, which disclose that he did not have a lot of money and had "beefed up what he was worth" to save the parties' relationship. Mr. Guo disputes Baker J.'s findings of fact and says she failed to consider certain evidence in its proper context.
- [33] Mr. Guo submits that Ms. Lipskaya actively avoided her obligations by failing to provide her Notice of Assessment each year, as contemplated by the consent order of 2011. This submission overlooks the fact Mr. Guo himself repeatedly ignored the 2011 order and is inconsistent with his own behaviour. Justice Baker described Mr. Guo's communications with Ms. Lipskaya as "extremely aggressive, insulting, racist, harassing and threatening".
- [34] In light of the high-conflict relationship, Ms. Lipskaya's repeated attempts to pay child support, Mr. Guo's rejection of offers of support, his behaviour in preventing Ms. Lipskaya from making payments, and Ms. Lipskaya advising Mr. Guo informally when her income changed, I would not sustain Mr. Guo's submissions. Even had Ms. Lipskaya provided formal notification of her income in the form of her annual Notice of Assessment, she would have been unable to increase support given Mr. Guo's refusal to accept payments. As Baker J. held, this fails to meet the standard required for blameworthy conduct in the circumstances: at paras. 27-28.
- [35] I understand the remainder of Mr. Guo's confusing submissions to repeat arguments made before Baker J. in an attempt to relitigate his application based on his own interpretation of the evidence, together with a certain degree of reframing of his application below. However, Baker J. gave carefully considered reasons for her orders on child support. She based her findings of fact on a reasonable interpretation of the evidence and considered all the circumstances.
- [36] I see no merit to this ground of appeal.

Section 7 Expenses

- [37] Justice Baker considered Mr. Guo's claims for various expenses. For the reasons above, she concluded that Ms. Lipskaya was only responsible for s. 7 expenses commencing August 1, 2019. Based on her income, Ms. Lipskaya was ordered to pay 54% of the allowed s. 7 expenses. Mr. Guo appeals the award for music lessons (which was limited to \$100 per month) and the claim for counselling costs (which was adjourned generally).
- [38] Section 7 of the Guidelines allows parents to claim special or extraordinary expenses:

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

[39] Unlike baseline Guidelines support, s. 7 expenses are discretionary. The availability of s. 7 expenses depends on various factors including the parents' combined income and the nature and number of the child's special activities, needs, and talents. They must be necessary having regard to the child's best interests, and reasonable having regard to the parents' means and spending pattern prior to separation: *Santelli v. Trinetti*, 2019 BCCA 319 at para. 151.

[40] Justice Baker set out the principles governing s. 7 expenses and applied them to this case: at paras. 36-37. She focused on the parents' means and Ms. Lipskaya's obligation to support two children. Justice Baker concluded that in this case, she would only order s. 7 expenses that were clearly necessary: at para. 37.

[41] As to music lessons, Baker J. acknowledged the child is a gifted musician, that some of the basic child support would contribute to his lessons, and an additional \$100 per month was appropriate to assist with these expenses: at para. 44.

[42] Mr. Guo says there was no logical basis to limit Ms. Lipskaya's contribution to \$100 per month. He contends he was incurring significant expenses to nourish the child's musical gift and that it was wrong not to allow the claim for \$17,173.10, which was 56% of the costs he incurred from 2016-2018.

- [43] I conclude Mr. Guo has identified no error in Baker J.'s exercise of discretion respecting the award for music lessons. She found the music lessons were a reasonable expense properly characterized as a s. 7 expense, and based her order on the parents' resources and other obligations.
- [44] As to counselling, Mr. Guo provided evidence that the child was seeing a counsellor and provided receipts for both the child's and Mr. Guo's counselling. Ms. Lipskaya requested a diagnosis from a psychiatrist indicating that treatment was necessary so her extended health benefits would cover some portion of the cost: at para. 46. Mr. Guo did not provide reports from the counsellor to demonstrate the sessions were necessary or productive, nor would he give permission for the child to be assessed: at paras. 48-49.
- [45] Ultimately, Baker J. resolved the issue as follows:
- [51] While counselling may be appropriate as a s. 7 expense, I am not able to properly assess this claim on the evidence before me. If Mr. Guo wishes to pursue this further, he must provide evidence of the necessity of this counselling with a report from a counsellor or medical professional. In addition, if Ms. Lipskaya wishes to have the child assessed by a medical professional in accordance with the requirements of her extended benefits, Mr. Guo must facilitate this in a timely way.
- [52] Until both parties are in a position to provide the court with a complete picture, no order under s. 7 for counselling expenses will be made. If the court on further application is satisfied that counselling expenses are reasonable and appropriate for contribution in some amount from Ms. Lipskaya, such expenses may be payable retroactively to no earlier than August 1, 2019.
- [Emphasis added.]
- [46] Mr. Guo submits there was overwhelming evidence the child was "acting out" at school. He was fighting and emotionally upset. He says the counselling expenses are reasonable and necessary, and that a report on the facts was not required. I am unable to accede to this submission.
- [47] Justice Baker did not find that counselling was an inappropriate s. 7 expense. Rather, she could not assess that claim on the evidence before her. Justice Baker suggested that, should Mr. Guo wish to pursue the claim, he must provide the relevant report as evidence of the necessity of counselling. Therefore, Baker J. adjourned generally the claim for counselling expenses. I consider this reasoning both sensible and sensitive. The appropriate venue for Mr. Guo to pursue this relief is in the court below.

- [48] Finally, Mr. Guo alleges Baker J. erred in ordering all allowable s. 7 expenses be paid within 30 days of proof of payment by the parent who incurred the expense. He says his judgment should be trusted, the parties do not speak, and the order that he provide receipts and obtain consent will discourage him from incurring the expenses. There is no merit to this argument. Justice Baker made a reasonable order which is routinely made in family cases to reduce conflict between the parties.

Security for Child Support, Notice, and Substituted Service

- [49] Justice Baker declined to order security for the payment of child support, that Mr. Guo be given notice of steps taken in litigation between Ms. Lipskaya and Mr. Anthonymuthu, or substituted service on Mr. Anthonymuthu.
- [50] On these issues, Baker J. reasoned there was no evidence or pattern of behaviour suggesting Ms. Lipskaya would not comply with the orders, and that Mr. Guo had not established any legitimate interest in Ms. Lipskaya's dispute with her husband or against him personally.
- [51] Mr. Guo alleges "equitable fraud" against Ms. Lipskaya and Mr. Anthonymuthu, and says Mr. Anthonymuthu evaded service. However, there is no basis in the evidence for these allegations. Mr. Anthonymuthu was not a party to the application before Baker J. nor is there evidence that he has evaded service. The issue is moot in any event. Again, Mr. Guo has failed to identify any error in Baker J.'s exercise of discretion on these matters.

Costs

- [52] Finally, Mr. Guo objects to Baker J.'s order that the parties bear their own costs. Mr. Guo says his application "to get additional support" was successful. In light of the outcome in the court below and the discretionary nature of costs awards, there is no merit to these submissions.
- [53] In summary, Mr. Guo's arguments largely overlook Baker J.'s findings of fact and reflect his own interpretation of the evidence. He has not identified a reviewable error in the judgment of Baker J. I would dismiss his appeal from her order.

Appeal from Justice Skolrood's Order

- [54] After receiving Baker J.'s order, Ms. Lipskaya applied to cancel the CPL and two liens that Mr. Guo had registered against the Property. Ms. Lipskaya also applied to vary Baker J.'s child support order, but that application was adjourned pending resolution of Mr. Guo's appeal from that order.
- [55] Mr. Guo alleges Ms. Lipskaya was only able to purchase the Property with the funds she saved by under-paying child support. He further alleges that any interest Mr. Anthonymuthu receives in the Property during their separation is a fraudulent conveyance or fraudulent preference.

[56] As to the CPL, Skolrood J. concluded that neither Mr. Guo's pleadings nor his application filed on October 16, 2019, alleged an interest in land (the Property) in law or fact. Nor had Mr. Guo complied with the specific process for adding to the joint family claim of 2011 the additional relief sought in his application of October 16, 2019 of "the doctrines of constructive trust, unjust enrichment, resulting trust and principles of restitution". Justice Skolrood therefore cancelled the CPL for non-compliance with s. 215(1) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA]. Regarding the liens, Skolrood J. concluded they were not properly registered, and accordingly he cancelled the liens pursuant to s. 26(10) of the FMEA. Finally, Skolrood J. awarded costs to Ms. Lipskaya. However, Skolrood J. declined to summarily dismiss the claims of constructive trust, unjust enrichment, and resulting trust as it was not clear to him that they could not be advanced if properly pleaded: at paras. 37-38.

Issues

[57] Mr. Guo argues that Skolrood J.'s conclusions were not supported by law or evidence. Specifically, he says Skolrood J. erred in:

1. cancelling the CPL;
2. cancelling the FMEA liens;
4. failing to consider the need for security for the support order; and
5. awarding costs to Ms. Lipskaya.

Standard of Review

[58] The first and second issues raise questions of law: whether Mr. Guo has alleged an interest in land and the correct interpretation of the FMEA: *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357 at para. 22 [Yi Teng].

[59] The remaining issues relate to discretionary decisions, which are subject to a high degree of deference. Discretionary decisions are reviewable only where the court has misdirected itself or made a decision that is so clearly wrong it amounts to an injustice, including by giving no weight or insufficient weight to a relevant consideration: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at paras. 42-43; *Nolin v. Ramirez*, 2021 BCCA 191 at para. 6.

Discussion

Cancelling the Certificate of Pending Litigation

- [60] Mr. Guo largely repeats the arguments he made before Skolrood J. He contends the CPL was not registered to secure payment of child support. Rather, he says that he should be allowed to pursue a broad claim in resulting trust, constructive trust, and unjust enrichment to obtain financial relief as asserted in his notice of application of October 16, 2019. He further contends that registration of a CPL is permitted when there has been a fraudulent conveyance or preference.
- [61] Mr. Guo also argues that dismissing the CPL before his constructive trust and unjust enrichment claims are decided will cause him prejudice, as Ms. Lipskaya may dispose of the Property. If there is any prejudice (which I need not decide), it is irrelevant to the question of whether he was entitled to register the CPL.
- [62] In resisting the appeal, Ms. Lipskaya primarily relies on the deficiency of the pleadings.
- [63] Pursuant to the LTA, a CPL may be registered in the following circumstances:
- 215 (1) A person who has commenced or is a party to a proceeding, and who is
- (a) claiming an estate or interest in land, or
 - (b) given by another enactment a right of action in respect of land,
- may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.
- [64] The court has inherent jurisdiction to cancel a CPL that does not meet the preconditions for registration, that is, where no interest in land is claimed: *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 7; *Bilin v. Sidhu*, 2017 BCCA 429. An "interest in land" is claimed where title may change as a result of the proceedings: *V.B. v. K.B.*, 2013 SKQB 412 at para. 72. The court can cancel a CPL where damages would be adequate relief: *Wai v. Chung*, 2020 BCSC 34 at paras. 26-28. An application to cancel a CPL for non-compliance with s. 215 of the LTA does not involve a weighing of the evidence or an assessment of the strength of the claim--the court only considers whether such a claim is pleaded: *Yi Teng* at paras. 36-38.
- [65] Further, as Skolrood J. noted, a CPL is not to be used as pre-judgment execution for a purely financial claim: at paras. 11-12, citing *Chen v. Jin*, 2019 BCSC 567.

- [66] I consider it unnecessary to address whether Mr. Guo's notice of application constitutes a proper pleading because I am not satisfied that the application claims an interest in land. As Skolrood J. said, "even if the alleged interest in land could be raised by way of notice of application, the notice here contains little more than bald assertions and does not set out material facts that would support a finding of constructive trust and a corresponding interest in land": at para. 20.
- [67] Further, Mr. Guo says that in framing the relief sought as restitution, constructive trust, resulting trust, and unjust enrichment, he is claiming an interest in the Property. However, it is unpaid child support (retroactive, ongoing, or increased) that underlies these claims. This alleged unpaid child support is the subject of the related appeal and as stated, I would dismiss that appeal. The claim for child support is untethered to the Property, so title could not change as a result of these proceedings.
- [68] Justice Skolrood provided a helpful analysis on the statutory mechanisms for securing child support: at paras. 29-34. He also noted the CPL to secure child support would subvert Baker J.'s decision not to grant security, which as stated, I would uphold on appeal.
- [69] I conclude there is no legal basis for the CPL and, as a result, Skolrood J. had jurisdiction to cancel it.

Cancelling the FMEA Liens

- [70] Again, Mr. Guo largely repeats the arguments made before Skolrood J. He contends the court does not have jurisdiction to cancel the liens because the FMEA gives the director of maintenance enforcement exclusive authority to withdraw an improperly enforced maintenance order. He says regardless of whether a lien is improperly registered, the court does not have authority to cancel it.
- [71] As Mr. Guo is registered with the FMEP, a maintenance order for child support was filed with the director of maintenance enforcement ("the director") and the FMEA governs the enforcement of that maintenance order. Under the FMEA, the director has the exclusive authority to enforce a maintenance order in these circumstances:
- 5(1) While a maintenance order is filed with the director, no person may enforce the order except
- (a) the director, or
 - (b) the creditor, if authorized to do so under subsection (2).
- [72] Section 5(2) is not relevant in this case.
- [73] While a notice of a maintenance order for child support can be registered as a lien in the land title office in some cases, a recipient parent (a "creditor" under the FMEA) cannot register such a lien if the maintenance order is filed with the director (in other words, if the recipient parent is registered with the FMEP):

26 (1) A notice of maintenance order may be registered in a land title office in the same manner as a charge is registered, and the maintenance order to which the notice relates is deemed for the purposes of Part 5 of the Court Order Enforcement Act to be a judgment as defined in section 81 of that Act if an application is made under this section for the registration and the application is accompanied by the notice of maintenance order.

- (2) The creditor may apply for registration of a notice of maintenance order unless the maintenance order to which the notice relates is filed with the director.

[Emphasis added.]

[74] Thus, the director has exclusive authority to enforce the child support maintenance order in this case. While the director could have registered a lien in the land title office, Mr. Guo was not entitled to do so himself.

[75] The FMEA confirms that the court may discharge a notice (lien) registered in the land title office:

26 (10) On application by

- (a) the person against whose land a notice of maintenance order is registered, or
- (b) the creditor, if the director refuses to sign a discharge or postponement of a registered notice,

the court may make an order discharging or partially discharging the registered notice or an order postponing the registered notice to allow the registration of a charge.

- (12) The court may, in an order made under subsection (10), impose any conditions as to security or otherwise it considers necessary and reasonable.

[76] Although the FMEA does not state the grounds upon which the court may cancel registration, Skolrood J. concluded the fact the liens were registered contrary to the provisions of the FMEA was a basis to cancel it. I agree and would not accede to this ground of appeal.

No Security for the Support Order

[77] Mr. Guo argues Skolrood J. ought to have ordered security for child support when he cancelled the FMEA liens because Ms. Lipskaya was in arrears of child support and allegedly in the process of improperly transferring the Property to Mr. Anthonymuthu to evade security for support. Presumably, the basis for this argument is that Skolrood J. could have ordered security pursuant to s. 26(12) of the FMEA.

[78] Mr. Guo was not entitled to an order for security when Baker J. had dismissed that application (again, I would dismiss Mr. Guo's appeal from Baker J.'s order that denied him security for child support). The language of s. 26(12) is permissible; it gives the court discretion to order security where it is appropriate to do so. Justice Skolrood did not misdirect himself or make a decision that is so plainly wrong as to amount to an injustice. In my view, this ground of appeal cannot succeed.

Costs

[79] Mr. Guo submits there was no basis for the costs award against him in the court below. He further argues that since he sought security for support payments in the court below, he is not seeking new relief on this appeal and therefore should not be liable for costs of the appeal, even if unsuccessful.

[80] Costs awards are discretionary and subject to deference. The basis for the costs award was Ms. Lipskaya's substantial success before Skolrood J. I would dismiss his appeal on this ground.

Mr. Guo's Fresh Evidence Application

[81] Mr. Guo applies for leave to adduce fresh and/or new evidence on these appeals. That evidence consists of Mr. Guo's own affidavit and the affidavit of his counsel's student. In his affidavit, Mr. Guo deposes to his concerns about the child's need for counselling and about money he alleges his mother borrowed to support Mr. Guo and the child. In her affidavit, the student of Mr. Guo's counsel deposes to a mortgage on the Property taken by Ms. Lipskaya in mid-February 2022.

[82] In my view, the purported fresh and/or new evidence is either not relevant to a decisive issue, or is inadmissible hearsay. Further, it would not affect the result of either appeal, given my view of the appropriate disposition of the appeals: See e.g., *Ratnam v. Priyanthan*, 2017 BCCA 343 at paras. 11-19. Counselling has been properly addressed. Admissible evidence of money borrowed for expenses could have been adduced with due diligence at the hearing below.

[83] I would therefore dismiss Mr. Guo's application for leave to adduce fresh and/or new evidence.

Costs of the Appeal

[84] In her factum, Ms. Lipskaya asked that Mr. Guo's counsel pay costs ordered in the proceeding below and costs of the appeal. She also sought an order that Mr. Guo's counsel return any legal fees paid from child support payments that she says ought to have been used to support the child. At the oral hearing, Ms. Lipskaya abandoned these unusual costs requests.

[85] Ms. Lipskaya has been substantially successful on appeal and is entitled to her costs of the appeal: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 23.

Disposition

[86] In the result, I would dismiss both appeals.

The Honourable Madam Justice MacKenzie

I AGREE:

The Honourable Mr. Justice Butler

I AGREE:

The Honourable Mr. Justice Abrioux

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