

CANADA / JUDGMENT

Mertz v. Symchyck

2020 BCCA 113

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 113 Mertz v. Symchyck

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Mertz v. Symchyck,

2020 BCCA 113

Date: 20200417

Docket: CA46622

Between:

Patricia Joanne Mertz

Appellant

(Claimant)

And

Robert Micheal Symchyck

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated March 16, 2018, and April 23, 2019 (P.J.M. v. R.M.S., 2019 BCSC 615, Nanaimo

Docket E81994).

Acting on her own behalf:

P.J. Mertz

Counsel for the Respondent:

T.A.B. Vining

Place and Date of Hearing:

Victoria, British Columbia

March 9, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 17, 2020

Summary:

Cross-applications in high-conflict family litigation involving a child. The mother seeks extensions of time to file leave applications from a 2018 costs order and a 2019 order dealing with retroactive and prospective child support, allocating half the cost of Family Law Act s. 211 reports to each party, and allocating costs of the child's travel. The father seeks security for costs of any appeal. Held: The extension of time with respect to the 2018 order is refused. Leave is not required to appeal the 2019 order. An extension is granted with respect to the operative terms of the 2019 order dealing with child support and travel costs. The leave application will stand as a notice of appeal. The mother is ordered to post security for costs in the amount of \$2,000. The father's request for a "guillotine order" if security is not posted is refused.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] This is a high-conflict family matter that dates back to 2006, involving Patricia Joanne Mertz and her former partner, Robert Micheal Symchyck. Ms. Mertz now seeks an extension of time and leave to appeal in regard to two orders made by a judge of the Supreme Court of British Columbia sitting in chambers, one in 2018, the other in 2019. Mr. Symchyck accepts that the 2019 order does not require leave, i.e., it is not a "limited appeal order". Therefore, the only issue with respect to it is whether an extension of time should be granted. If either appeal is allowed to proceed, then Mr. Symchyck seeks security for costs.
- [2] For the reasons that follow, an extension is granted to appeal two of the operative terms in the 2019 order and security for costs is ordered with respect to that appeal.

Factual Background

- [3] Ms. Mertz and Mr. Symchyck met in Saskatchewan in 2004. Their daughter was born in 2005. In early 2006, Ms. Mertz moved to Vancouver Island with their daughter. Since then the parties have been involved in litigation in both Saskatchewan and British Columbia. What follows is not intended as a comprehensive review of that litigation.
- [4] In 2010, following a summary trial, a judge of the Supreme Court of British Columbia ordered joint custody and guardianship of the child with primary residence with Ms. Mertz and specified access times to Mr. Symchyck. Some of the specified access was required to be in Campbell River, British Columbia. Mr. Symchyck was ordered to pay child support of \$841 per month and \$300 per month towards special expenses. In addition, the judge ordered that there be an annual review and adjustment of child support with an exchange of income tax documents for that purpose.
- [5] In 2013, the parties filed cross-applications. Those did not proceed because they agreed to retain a psychologist to prepare a s. 211 report to address parenting arrangements and responsibilities: see Family Law Act, S.B.C. 2011, c. 25, s. 211. Mr. Symchyck agreed to pay for the report on the basis that those costs would be allocated later.
- [6] The s. 211 report was completed in July 2014; it included a number of recommendations related to parenting time, which the parties did not follow. In May 2015, the psychologist advised the parties to return to court.
- [7] The chambers judge whose orders are now in issue first became involved in this litigation in March 2017, at which time he made an order on consent specifying parenting time through October 2017. In addition, he ordered an update of the s. 211 report, with those costs to be paid by Mr. Symchyck, subject to being allocated later. On December 1, 2017, the judge made an order on the application of Mr. Symchyck setting out Mr. Symchyck's parenting time through to the end of March 2018. Initially, Mr. Symchyck's parenting time was required to be exercised on Vancouver Island. Later, he was permitted to choose where to exercise it. No costs were ordered with respect to that application.
- [8] Mr. Symchyck's February 2018 parenting time did not occur. As a result, he applied to have Ms. Mertz found in contempt. On March 16, 2018, the chambers judge: (a) dismissed the contempt application; (b) ordered make-up parenting time to Mr. Symchyck; (c) ordered Ms. Mertz to pay Mr. Symchyck's parenting time expenses thrown away; and (d) ordered costs against Ms. Mertz. The formal order, which Ms. Mertz personally approved as to form, was entered on July 10, 2018.
- [9] The psychologist released her second s. 211 report in April 2018.
- [10] In November 2018, Mr. Symchyck filed an application to review or vary the terms of the 2010 order dealing with child support and special expenses. He sought both retroactive and prospective reductions based on his reduced employment income since 2016. That application commenced before the chambers judge on November 28, 2018, along with other

applications, including parenting applications that had been adjourned in March 2017. The hearing continued on April 9, 2019. Ms. Mertz acted on her own behalf; Mr. Symchyck was represented by counsel.

- [11] On April 23, 2019, the chambers judge released reasons for judgment that are indexed as P.J.M. v. R.M.S., 2019 BCSC 615. He summarized the various applications before him as follows:
- [1] These cross-applications concern parenting time and child support. RMS (the "father") seeks orders defining parenting time, varying child support, allocating the expenses of the updated s. 211 report, and continuing a restraining order in relation to the interest held by PJM (the "mother") in a Gabriola Island property. The mother seeks various parenting orders, and vexatious litigant orders.

It is only necessary to refer below to the disposition of some of these applications.

- [12] The chambers judge found it was no longer necessary to specify how much time the child, who was approaching her 14th birthday, should spend with each parent. He ordered that the child be allowed to decide where she lives and how much time she spends with each parent. Ms. Mertz was ordered to pay for the child's flights from Vancouver Island to Saskatchewan with Mr. Symchyck to pay for the return flights.
- [13] The chambers judge reduced Mr. Symchyck's child support payments to \$542 per month commencing May 1, 2019, and found he had overpaid child support from April 2017 to April 2019 in the amount of \$8,079. The judge ordered Ms. Mertz to pay Mr. Symchyck one-half of the costs of the s. 211 reports (i.e., \$16,535) and each party to bear their own costs of the various applications. With respect to the s. 211 reports, the judge said this:
- [32] With regard to the [s. 211] report expenses, those disbursements will be shared. It is evident that the first report was made necessary by parenting-time difficulties, and the father agreed to take on the up-front costs to try to break the logjam. The question of allocation of that expense was reserved. Similarly, the updated report was necessary in order to arrive at an appropriate parenting time order. Again, the father was persuaded to bear the up-front costs, with the ultimate allocation reserved to the Court.
- [33] The reports were necessary investigations into [the child's] best interests. There has been no conduct in the litigation that is worthy of rebuke. The usual order in such circumstances is the sharing of report costs: L.E.G. v. A.G., 2003 BCSC 412; Sandhu v. Sandhu, 2011 BCSC 853. In all the circumstances of this case, I think that equally sharing is the fair order.
- [14] On May 2, 2019, Mr. Symchyck's counsel received a telephone call from a lawyer who said he had met with Ms. Mertz to discuss the April 23, 2019 order, and proposed ways for Ms. Mertz to satisfy her financial obligations under that order.

- [15] On May 14, 2019, Ms. Mertz emailed Mr. Symchyck's counsel asking for the formal order arising from the chambers judge's April 23, 2019 judgment. There was further back-and-forth correspondence concerning that order until its 13 operative terms were agreed to. The order, which Ms. Mertz personally endorsed as to form, was entered on June 24, 2019. The following day, Mr. Symchyck's counsel emailed Ms. Mertz a copy of the entered order. Mr. Symchyck took steps to register the order with the family maintenance authority in Saskatchewan that administers his child support payments.
- [16] During May 2019, Ms. Mertz emailed Mr. Symchyck asking him to "waive and forgive" her indebtedness to him arising from the retroactive reduction in child support and her share of the cost of the s. 211 reports.
- [17] On June 22, 2019, Ms. Mertz unilaterally sent Mr. Symchyck a monthly payment schedule totalling \$24,614, with respect to her indebtedness, running from June 1, 2019, until November 1, 2021. That schedule was accompanied by cheques payable to Mr. Symchyck; the first one was dated June 1, 2019, with the others post-dated. Mr. Symchyck cashed the cheques dated June 1, 2019, and July 1, 2019.
- [18] On July 12, 2019, Ms. Mertz advised Mr. Symchyck by email that she had "cancelled" the remaining cheques and would send him a new payment schedule. She asked him to return the cheques. After receiving Ms. Mertz's email, Mr. Symchyck attempted to cash several of the cheques but they were returned marked "payment stopped".
- [19] On July 31, 2019, Ms. Mertz provided Mr. Symchyck's counsel with a signed bill of costs in the amount of \$1,200 in relation to the March 16, 2018 proceedings. A certificate of costs in that amount was entered on August 6, 2019. Mr. Symchyck's counsel emailed Ms. Mertz a copy of that certificate.
- [20] On August 9, 2019, Mr. Symchyck registered a certificate of judgment with respect to the \$1,200 costs certificate on a property in British Columbia, the title to which is registered to Ms. Mertz and her current partner as joint tenants.
- [21] On August 19, 2019, Mr. Symchyck filed a notice of intention to act in person. His counsel emailed a copy to Ms. Mertz that day.
- [22] On October 18, 2019, Ms. Mertz emailed Mr. Symchyck's now former counsel in connection with the certificate of judgment. Counsel responded by email later that day. He reminded Ms. Mertz that he no longer acted for Mr. Symchyck and again provided her with Mr. Symchyck's notice of intention to act in person, the bill of costs, and the certificate of costs relating to the March 16, 2018 proceedings.

- [23] On October 23, 2019, Ms. Mertz emailed Mr. Symchyck. She stated: "I have been advised to Appeal the financial orders [the chambers judge] made against me, because it is highly likely I will win." She asked Mr. Symchyck to agree to a consent order that would terminate all financial orders made against her and require him to be solely responsible for the cost of the s. 211 reports. Mr. Symchyck did not respond to that email.
- [24] On October 30, 2019, the Saskatchewan family maintenance authority wrote to Mr. Symchyck to advise him it had registered the April 23, 2019 order. The registration of the order resulted in Mr. Symchyck's current child support obligations being set off against the amount he was found to have overpaid.
- [25] On January 8, 2020, Ms. Mertz filed a notice of application for leave to appeal the March 16, 2018, and April 23, 2019 orders together with a motion book. In that notice, she seeks the following orders:
- (a) extensions of time and leave to appeal with respect to both orders;
 - (b) termination of the March 16, 2018 costs order;
 - (c) a variation of the April 23, 2019 order, making Mr. Symchyck solely responsible for costs relating to the child's travel (operative term no. 2);
 - (d) termination of the April 23, 2019 order in relation to Mr. Symchyck's overpayment of child support (operative term no. 3);
 - (e) a variation of the April 23, 2019 order, making Mr. Symchyck solely responsible for the costs of the s. 211 reports (operative term no. 12); and
 - (f) an order that Mr. Symchyck pay \$5,000 each to Ms. Mertz, the child, and Ms. Mertz's current partner.
- [26] The notice lists 14 grounds of appeal, many of which challenge findings of fact made by the chambers judge and allege his decisions are contrary to the best interests of the child.
- [27] On February 19, 2020, Mr. Symchyck filed a notice of motion seeking an order that Ms. Mertz post security for costs.

Analysis

Should Extensions of Time be Granted?

- [28] The factors relevant to a determination of whether to grant an extension of time are well known. They were summarized by Justice Rowles in *Wilson v. Newcomb* (1998), 111 B.C.A.C. 239 (Chambers):
- [24] On an application to extend the time for taking a step necessary in the prosecution of an appeal, the following questions, with the necessary modifications, will generally be considered: (1) was there a bona fide intention to appeal? (2) when were the respondents informed of the intention? (3) would the respondents be unduly prejudiced by an extension?

(4) is there merit in the appeal? (5) is it in the interest of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question. See *Davies v C.I.B.C.* [(1987), 15 B.C.L.R. (2d) 256 (C.A.)]

With respect to the merits, the question is whether the appeal is "doomed to fail": *Clock Holdings Ltd. v. Braich*, 2009 BCCA 269 at para. 31 (Chambers), 70 C.P.C. (6th) 203, application to vary *dism'd*, 2009 BCCA 437, 79 C.P.C. (6th) 1.

Intention to Appeal

[29] Section 14(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, stipulates that a notice of appeal or an application for leave to appeal must be brought within "30 days, commencing on the day after the order appealed from is pronounced". This means that Ms. Mertz had until April 16, 2018 to appeal the March 16, 2018 order and until May 23, 2019 to appeal the April 23, 2019 order. Put otherwise, the notice with respect to the March 16, 2018 order is out of time by some 20 months and three weeks, and the notice with respect to the April 23, 2019 order is out of time by some seven months and two weeks.

[30] Ms. Mertz says she formed the intention to appeal both orders within the applicable 30-day periods but did not act on that intention primarily because she was attempting to negotiate an out-of-court resolution whereby Mr. Symchyck would waive her monetary obligations to him under those orders. In addition, she says her ability to file within the prescribed time was hampered by the fact she did not have in hand the formal orders she wished to appeal. She expresses this in her affidavit as follows:

27. As I continued to encourage [Mr. Symchyck] to act reasonably, and have him agree to waive my financial obligations under those orders, I started researching Appeals. My understanding from what is available on the internet is that I had 30 days from the order being made to file an Appeal, but I had to include a filed copy of the order in my materials. Due to delays by [Mr. Symchyck's] lawyer, I was not able to do this.

[31] Ms. Mertz's reference to the need for a copy of a formal order relates to the fact that an applicant seeking leave to appeal is required to file a motion book that includes that order. I note, however, that information available on the Internet through this Court's website advises self-represented litigants: (a) that a motion book has to be filed within 30 days after the notice of application for leave to appeal is filed; and (b) how to apply for extensions of time.

[32] A copy of the entered April 23, 2019 order was sent to Ms. Mertz on June 25, 2019, i.e., six months and two weeks before she filed her leave application. It is not clear from the material before me when she was sent a copy of the March 16, 2018 order, entered on July 10, 2018. In any event, she was sent a copy of the entered order on July 17, 2019. i.e., five months and three weeks before she filed her leave application.

[33] I do not accept Ms. Mertz's assertion that she formed the intention to appeal shortly after each order was pronounced but deferred acting on that intention. Her conduct following each pronouncement is inconsistent with such an intention. She did not mention even the possibility of an appeal until her October 23, 2019 email to Mr. Symchyck. That email was sent very shortly after the certificate of costs was registered against property in her name. I agree with Mr. Symchyck that Ms. Mertz's intention to appeal arose only after the registration of the certificate. After that, she waited more than two months to file her leave applications. Mr. Symchyck only became aware of Ms. Mertz's intention to appeal when he was served with those applications.

[34] In conclusion, I find Ms. Mertz did not have a bona fide intention to appeal and did not inform Mr. Symchyck of that intention until well after the appeal periods had expired.

Would Mr. Symchyck be Prejudiced by an Extension?

[35] In my view, Mr. Symchyck would suffer some prejudice by an extension of time. He has had every reason to believe these two chapters in this protracted litigation were finalized a considerable time ago and he has governed his affairs accordingly. That Mr. Symchyck understood these matters to be at an end in so far as the courts are concerned is reflected in the fact that he released his counsel from the file in August 2019.

The Merits of the Proposed Appeals

[36] I will first deal with the March 16, 2018 costs order. Ms. Mertz submits that costs should not have been awarded against her because she is the payee parent, i.e., the one with the lower income. Her broad proposition is that any order requiring her to pay costs or for reports relating to this litigation is contrary to the child's best interests because it involves money she otherwise would have available to spend for the child's benefit. In effect, she argues that because of her financial circumstances she should be treated as a litigant for whom litigation is a cost-free environment.

[37] The case-law generally provides that the normal rule that costs follow the event--i.e., are awarded to the successful party--applies in cases involving parenting arrangements. Nevertheless, the best interests of the child can be a factor that results in a court exercising its discretion to require parties to bear their own costs: *S.C.J. v. S.-J.C.A.*, 2010 BCCA 31 at para. 62, 1 B.C.L.R. (5th) 12; *Reis v. Bucholtz*, 2010 BCCA 115 at paras. 82-86, 3 B.C.L.R. (5th) 71; *T.K. v. R.J.H.A.*, 2015 BCCA 8 at paras. 85-86, 380 D.L.R. (4th) 346. This is particularly so when awarding costs against a party would negatively affect that party's ability to exercise their parenting time: see, e.g., *N.L. v. D.L.*, 2018 BCSC 2199 at para. 17, 21 R.F.L. (8th) 323. That is not the situation here.

[38] Although, as Ms. Mertz points out, she was not found in contempt, the chambers judge did find she had denied Mr. Symchyck parenting time allotted to him under the December 1, 2017 order. Mr. Symchyck was clearly the successful party on the March 16, 2018 application and it was open to the judge, in the exercise of his discretion, to award costs against Ms.

Mertz. Further, Ms. Mertz has not shown that the costs order fundamentally upsets the balance achieved in an order made in the best interests of the child. Accordingly, I consider her proposed appeal from that order is doomed to fail.

- [39] With respect to the aspect of the April 23, 2019 order allocating the cost of the s. 211 reports, Ms. Mertz's position is again that the chambers judge erred in requiring her to pay half because she could otherwise spend that money for the child's benefit. However, the allocation of those costs was a matter within the chambers judge's discretion: *K.W. v. L.H.*, 2018 BCCA 204 at para. 166, 11 B.C.L.R. (6th) 119, leave to appeal ref'd [2018] 3 S.C.R. vii; *D.L.T. v. K.K.M.*, 2019 BCCA 13 at para. 30. I consider the prospect of a division of this Court interfering with how that discretion was exercised here is so remote that it can be said this proposed attack on the order is doomed to fail.
- [40] What remains to be considered are Ms. Mertz's challenge to the reduction in Mr. Symchyck's child support obligations and the requirement that she pay for the child's flights to Saskatchewan. In my view, it cannot be said those grounds are doomed to fail. The chambers judge did not state the legal authority for his decision to reduce child support or the test he was applying. While both retroactive and prospective orders can be made under s. 152 of the Family Law Act, the statutory conditions set out in that provision are not discussed in the reasons for judgment. In addition, the question of whether the best interests of the child should have been considered when support has already been paid has arguable merit. As for the allocation of the costs of the child's travel between Vancouver Island and Saskatchewan, the judge did not provide any reasons for that decision.

The Interests of Justice

- [41] This is the decisive question: *First Majestic Silver Corp. v. Santos*, 2014 BCCA 214 at para. 57, 356 B.C.A.C. 237, leave to appeal ref'd [2014] 3 S.C.R. x.
- [42] Given that I consider the challenge to the allocation of the costs of the s. 211 reports is doomed to fail, it is plainly not in the interests of justice to allow that challenge to go forward.
- [43] What militates against an extension on the challenges that are not destined to fail is the delay and the fact that Mr. Symchyck will suffer some prejudice. Child support, however, is the right of the child, not the parents: *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 38, [2016] 2 S.C.R. 231. Therefore, on the child support challenge, I must also take into account the child's best interests: *De Fehr v. De Fehr*, 2002 BCCA 308 at para. 25 (Chambers), application to vary dismissed 2002 BCCA 393, 29 R.F.L. (5th) 36, leave to appeal ref'd, [2002] 4 S.C.R. v; *McLellan v. Cooper*, 2007 BCCA 625 at para. 11 (Chambers). What I must ask myself is whether the child's best interests will be prejudiced if that issue does not go forward.

- [44] In my view, the child's best interest may be prejudiced if this Court is denied the opportunity to consider whether the chambers judge properly reduced Mr. Symchyck's child support obligations. By reason of the retroactive reduction set-off, no child support is payable for close to 15 months. When those payments resume, they will be less than before.
- [45] With respect to travel costs, I consider that the interests of justice are best served by allowing that challenge to go forward. If Ms. Mertz is obligated to cover a portion of those costs, then she has the right to know why that order was made and that it was properly made.

What Order is Appropriate?

- [46] As just discussed, I have concluded the interests of justice are best served by granting an extension of time in relation to the operative terms in the April 23, 2019 order pertaining to travel costs (no. 2) and child support (no. 3), but not with respect to the costs of the s. 211 reports (no. 12). What I must now decide is whether I have the authority to limit the order I make to the two challenges I have found to have some merit. It is apparent that I would have refused an extension of time if all Ms. Mertz sought to be challenged was the term in that order pertaining to the costs of the s. 211 reports.
- [47] In my view, s. 10(2)(f) of the Court of Appeal Act allows me to so limit the scope of an order extending the time to appeal. That section provides that a judge of this Court "may when making an order, impose terms and conditions and give any directions as the justice thinks just".
- [48] I am aware that in *Pavlis v. HSBC Bank of Canada*, 2009 BCCA 309 at paras. 12-14 (Chambers), Justice Kirkpatrick, in granting an extension of time to appeal, held she could not limit the relief being sought. In that case, Ms. Pavlis sought an extension of time to appeal an order dismissing the action she had brought against her employer. The employer did not oppose an extension being granted but objected to the fact that in her notice of appeal Ms. Pavlis sought relief pursuant to s. 24(1) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The employer's position was that an extension should be conditional on Ms. Pavlis abandoning her claim for Charter relief. Although Kirkpatrick J.A. was of the view the Charter relief argument lacked merit, she concluded that s. 10(2)(a) of the Court of Appeal Act prohibited her from preventing Ms. Pavlis from advancing that argument. That section provides that a chambers judge can "make an order incidental to the appeal or matter not involving a decision of the appeal on the merits." Justice Kirkpatrick opined that preventing Ms. Pavlis from asserting a claim for Charter relief was effectively deciding an issue in the appeal on its merits.

- [49] Pavlis is distinguishable. As Lord Halsbury L.C. observed in *Quinn v. Leathem*, [1901] A.C. 495 at 506 (H.L.), "a case is only an authority for what it actually decides". I consider Pavlis is support only for the proposition that when an appeal has merit, a judge of this Court cannot, in granting an extension of time to appeal, place limits on the relief an appellant can seek.
- [50] On an application for an extension of time to appeal, a judge serves a gatekeeper function. One of their tasks is to ensure judicial resources are not expended on challenges that do not merit the attention of a division of the Court. If a proposed challenge is devoid of merit, then an extension will be refused. I see no reason why, when a judge decides to grant an extension because there is some merit in a challenge to a particular term in an order, they must also allow the appellant to pursue an unmeritorious challenge to another term. Put otherwise, I do not consider the granting of an extension of time to be an all or nothing proposition.
- [51] I have, therefore, concluded Ms. Mertz should be granted an extension of time, but only in relation to the challenges to those terms of the April 23, 2019 order dealing with travel costs and child support. As leave to appeal those terms is not required, the notice of application for leave to appeal will stand as a notice of appeal.

Should Security for Costs be Ordered?

- [52] Mr. Symchyck seeks the following orders in his notice of motion:

1. An order that [Ms. Mertz] pay to or deposit with the registrar security for costs in an amount and in a form determined by the justice.
2. An order that the appeal of [Ms. Mertz] in these proceedings be stayed until the foregoing security has been posted.
3. An order that if [Ms. Mertz] does not post security within 14 days, her appeal in these proceedings be dismiss [sic] as abandoned.

- [53] A concise statement of the relevant criteria on an application for security for costs is found in the reasons for judgment of Justice Lowry in *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 (Chambers), 242 B.C.A.C. 299:

- [9] The jurisdiction to order security for costs of an appeal is found in s. 24 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. The appellant against which such an order is sought bears the onus of showing why security should not be required: *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 57 at para. 4 (C.A. Chambers), *Smith J.A.* Generally, the considerations are the appellant's ability to post security and the likelihood of costs awarded being recovered from it, as well as the merits and the timeliness of the application: *Southeast Toyota Distributors, Inc. v. Branch* (1997), 45 B.C.L.R. (3d) 163 (C.A.); *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125 (B.C.C.A. Chambers), *Seaton J.A.*; and *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. Chambers), *Esson J.A.*

- [54] In the present case, the most relevant factors are Ms. Mertz's ability to post security and the likelihood of Mr. Symchyck being able to recover any costs awarded to him.
- [55] With respect to Ms. Mertz's ability to post security, it appears from the incomplete financial information she provided that she has limited income and limited assets. However, she resides on Gabriola Island and was listed, with her current partner, as a joint tenant on the titles to two properties there. The nature of her interest in those properties is unclear. Given Ms. Mertz has been unwilling or unable to pay Mr. Symchyck in accordance with previous orders, there is a real risk he will not be able to recover any costs awarded to him by this Court.
- [56] In my view, an order that secures a portion of the likely costs of an appeal is appropriate. I consider \$2,000 to be an appropriate amount. The proceedings will be stayed until that amount is posted.
- [57] Mr. Symchyck's request that the appeal stand dismissed as abandoned if security is not posted within 14 days--what is referred to as a "guillotine order"--is unwarranted. Ms. Mertz is entitled to a reasonable time to post security. If she does not post security, then Mr. Symchyck can apply under s. 24(2) of the Court of Appeal Act to have the appeal dismissed.
- [58] Having regard to the fact that this Court's registry is currently closed to the public due to the COVID-19 crisis I will give Ms. Mertz until the later of May 31, 2020, or five business days after the day on which the registry reopens to post security.

Costs of these Applications

- [59] As success is divided, the parties will bear their own costs of the present applications.

Disposition

- [60] I make the following orders:

- (a) Ms. Mertz's application to extend to January 8, 2020, the time for filing a notice of application for leave to appeal the March 16, 2018 order made in Supreme Court of British Columbia Nanaimo Registry No. E81994 is dismissed;
- (b) Ms. Mertz's application to extend to January 8, 2020, the time for filing an appeal from the April 23, 2019 order made in Supreme Court of British Columbia Nanaimo Registry No. E81994 is granted on the condition that the appeal is limited to challenging operative terms nos. 2 and 3 of that order; the notice of application for leave to appeal filed on January 8, 2020, will stand as the notice of appeal;
- (c) Ms. Mertz shall post security for costs of the appeal from the April 23, 2019 order in the amount of \$2,000, in a form acceptable to Registrar or in such form as agreed to by the parties, by the later of May 31, 2020, or five business days after the day on which this Court's registry reopens to the public; the appeal is stayed until security is posted; if security is not posted, then Mr. Symchyck is at liberty to apply to have the appeal dismissed; if security is

posted, then the times for filing the material required by the Court of Appeal Rules will run from the date of posting; and

(d) the parties bear their own costs of these applications.

"The Honourable Mr. Justice Frankel"

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