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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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No to Jurisdiction; Yes to Jurisdiction; and Auf Wiedersehen

J.T.P. v. K.S. (2023), 90 R.F.L. (8th) 264 (B.C. C.A.) — Hunter J.A.

This was the father's motion to stay, pending appeal, an order allowing the children of the parties to relocate with their mother to Germany, on August 6, 2023 (for the start of the new school year). Not only does this case nicely summarize the test for a stay of such an order, but it also deals with an interesting jurisdictional question in British Columbia: Does the B.C. Court of Appeal have jurisdiction to stay a relocation order pending appeal?

The parties were married on May 3, 2008. They separated on September 16, 2016. They have two children: M (born in 2012) and W (born in 2013).

In 2016, the mother filed a claim in which she sought a divorce under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) (the "*Divorce Act*"); an order for parenting pursuant to ss. 40 and 41 of the *Family Law Act*, S.B.C. 2011, c. 25 (the "*Family Law Act*"); an order that the children relocate with her to Germany, pursuant to both the *Divorce Act* and the *Family Law Act*; and the division of property pursuant to the *Family Law Act*.

In 2018, there was a violent incident after which the father was ordered to pay $795,019.68 in civil damages. That judgment was under appeal.

The trial in the family action was heard over 40 days between September 2022 and April 2023, and the decision was released in July 2023. Most significantly, the trial judge allowed the mother to relocate the children to Germany.

The father sought a stay of several of the orders, including the relocation order, pending appeal. The mother argued that a judge of the Court of Appeal did not have jurisdiction to stay any of the orders that were made, citing s. 234 of the *Family Law Act* and Rule 22-1(7) of the *Supreme Court Family Rules*, B.C. Reg. 169/2009.

The first question, therefore, was whether Justice Hunter, a justice of the B.C. Court of Appeal exercising the statutory jurisdiction conferred by s. 33(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 (the "*Court of Appeal Act*"), had the jurisdiction to stay any or all of the orders made in the family judgment.

Section 33(1) of the *Court of Appeal Act* states:

> **33(1)** After an appeal or application for leave to appeal is brought, a justice may, on terms and conditions the justice considers appropriate, order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought.

However, stay applications with respect to family law matters, are specifically subject to s. 234 of the *Family Law Act*, which provides as follows:

> **234 Despite any other enactment**, if an order made under this Act is appealed, the order remains in effect until the determination of the appeal unless **the court that made it** orders otherwise. [**emphasis** added]

The effect of s. 234, it would seem, as confirmed by Justice Hunter, is that a justice of the Court of Appeal does not have the jurisdiction to stay any order issued under the *Family Law Act*. Only the judge who issued the order can stay it. [See also *Xu v. Chu*, 2021 CarswellBC 2708 (C.A.) at para. 17]

The father argued that a justice of the Court of Appeal has limited residual jurisdiction to issue a stay of a *Family Law Act* order in extraordinary circumstances — and that this complicated case represented such extraordinary circumstances to exercise such jurisdiction.

The father's argument was based on *Bennett v. Bennett*, 2002 CarswellBC 2432 (C.A. [In Chambers]). In *Bennett*, a trial judge had ordered equal division of assets under the *Family Law Act*, and had declined to stay the order. An appeal of the refusal to stay the order was filed, and a stay pending the appeal was sought. In the course of dismissing the application on its merits, Justice Donald offered the following comment:

> [12] I do not rest my decision on jurisdiction because there may arise a case in which this Court will have to act on an obviously wrong exercise of the Supreme Court's stay jurisdiction. This is not such a case. Here Mr. Justice Wilson gave careful consideration to the matter and concluded that he should not interfere with the liquidation of the assets. With the benefit of hearing eight days of trial he was well placed to decide that the parties could not afford to hold on to the assets pending the appeal because their creditors were closing in. Since the Act gives exclusive jurisdiction to the Supreme Court in this area, I do not think the legislature's intention should be finessed by means of an appeal of this kind. No extraordinary circumstances or egregious error have been shown to override the trial judge's decision to refuse a stay.

In a later case, *Stasiewski v. Stasiewski*, 2006 CarswellBC 312 (C.A. [In Chambers]), such circumstances (an obviously wrong exercise of the stay jurisdiction) were suggested to provide for a "sliver of jurisdiction." In *Stasiewski*, Justice Saunders held that the case before her was not "one of those cases described by Mr. Justice Donald as extraordinary, or demonstrating egregious error." (para. 11).

This line of authority was most recently referenced in *Kapoor v. Makkar*, 2020 CarswellBC 1157 (C.A.). There, Justice Abrioux considered that the reasons for judgment of the family law judge under the *Family Law Act* raised a real issue as to whether extraordinary circumstances existed, and issued a stay of the order pending the appeal. But a panel of the Court of Appeal then set aside the stay order on review (2020 CarswellBC 1881 (C.A.)) (after referring to *Bennett*):

> [37] In my view, the order for sale of the property took its statutory authority from the *Family Law Act*, as did the order for vacant possession that had the effect of negating the exclusive occupancy order made November 3, 2017. I conclude that s. 234 therefore precluded the stay of execution that issued from this court. . . .

Although there is no express statement that there is no "sliver of jurisdiction" to depart from the mandatory language of s. 234 — that is certainly the inference. However, in *J.T.P.*, Justice Hunter was not prepared to go so far as to actually find that the idea of a "sliver of jurisdiction" was gone. In his words:

> [20] . . . I conclude from this Court's judgment in *Kapoor* that either the residual jurisdiction referred to by Justice Donald and Justice Abrioux does not exist, or if it exists, the circumstances in which it may be exercised are very limited. At its highest, jurisdiction may exist where it is plain that the trial judge has committed an obvious or egregious error of law, such as making an order not authorized by the *Family Law Act* or without any consideration of a mandatory requirement of that *Act*.

Getting back to the case at hand, there was no basis for asserting that the trial judge here had made an obvious error in her orders under the *Family Law Act* that could meet the standard of extraordinary circumstances. If a "sliver of jurisdiction" still exists, the circumstances of this case were not extraordinary enough to use it.

Therefore, his Honour concluded he lacked jurisdiction to stay any of the orders made by the trial judge pursuant to the *Family Law Act*.

This then left the question of a stay of the relocation order, which the trial judge had been clear was made under the *Divorce Act*, on account of the Doctrine of Paramountcy, given that the parties were married. Accordingly, s. 234 was not an impediment to Justice Hunter's jurisdiction to consider a stay of that order.

Similar to s. 234, the mother also suggested that Rule 22-1(7) of the *Supreme Court Family Rules*, prevented the stay application (even with respect to orders under the *Divorce Act*):

> (7) If a **parenting order, a contact order, a guardianship order, an order respecting parenting arrangements or contact** with a child or a support order is appealed, the order remains in force until the determination of the appeal, unless **the court that made the order** otherwise directs. [**emphasis** added]

While there have been rulings saying that Rule 22-1(7) *does*, in fact, preclude the exercise of appellate statutory jurisdiction: *Xu v. Chu*, 2021 CarswellBC 2708 (C.A.); *Boleak v. Boleak* (1999), 3 R.F.L. (5th) 21 (B.C. C.A. [In Chambers]), these were rulings on motions, and a justice of the Court of Appeal is not bound by the motion decision of a single justice of the same Court of Appeal: *T.K. v. R.J.H.A.*, 2014 CarswellBC 3391 (C.A.) at para. 25.

However, Justice Hunter was not required to resolve the matter because the Rule, to the extent it applied to orders under the *Divorce Act*, only applies to the orders specified in the Rule, which do not include relocation orders. The mother's suggestion that "relocation" was an incident of "parenting" did not fly.

Therefore, neither s. 234 of the *Family Law Act* nor Rule 22-1(7) of the *Supreme Court Family Rules* precluded Justice Hunter's exercise of jurisdiction under s. 33(1) of the *Court of Appeal Act* to entertain a motion for a stay of the relocation order under the *Divorce Act*.

That then led his Honour to consider the test for a stay in such circumstances.

As noted by his Honour, the overarching question is whether the granting of a stay would be in the interests of justice: *Equustek Solutions Inc. v. Jack*, 2022 CarswellBC 3747 (C.A.) at para. 11, and to get there, courts generally consider the 3-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*. That is, the applicant must establish:

- that there is some merit to the appeal in the sense that there is a serious question to be determined;
- that irreparable harm would be occasioned to the applicant if the stay was refused; and
- that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

However, as a relocation order is based on the best interests of the children subject to that order, some modification of the *RJR-MacDonald* Test is generally appropriate: *K.O. v. T.O.* (2015), 67 R.F.L. (7th) 1 (Sask. C.A.); *Lefebvre v. Lefebvre*, 2002 CarswellOnt 4325 (C.A. [In Chambers]); *C.B. v. P.C.*, 2003 CarswellAlta 1543 (C.A.); *C.D. v. A.B.*, 2004 CarswellNB 435 (C.A.); *McAleer v. Farnell* (2008), 56 R.F.L. (6th) 1 (N.S. C.A. [In Chambers]); *Alleyn-Dornn v. Dornn*, 2011 CarswellMan 247 (Q.B.); *P. (D.H.) v. P. (P.L.)* (2012), 29 R.F.L. (7th) 89 (N.B. C.A.); *Mudry v. Danisch* (2014), 48 R.F.L. (7th) 176 (Ont. Div. Ct.); *Berry v. Berry* (2010), 7 R.F.L. (7th) 29 (Ont. C.A. [In Chambers]); *Baker v. Hunter*, 2015 CarswellAlta 1803 (C.A.); *Buccilli v. Pillitteri*, 2013 CarswellOnt 16731 (C.A.); *Zhang v. Guo*, 2019 CarswellOnt 14811 (Div. Ct.); *Vasilodimitrakis v. Homme*, 2020 CarswellOnt 5536 (Div. Ct.); *H.E. v. M.M.* (2015), 57 R.F.L. (7th) 12 (Ont. C.A.); *AR v. JU*, 2020 CarswellAlta 1738 (C.A.).

The first test is low; the applicant need only show that the issues on appeal are neither frivolous nor vexatious — or that it is a "serious", "genuine" or "arguable" issue. That said, in applying this test to family law appeals, an appellate court must be mindful of the *very* narrow scope of appellate review in parenting cases: *Barendregt v. Grebliunas*, 2022 CarswellBC 1293 (S.C.C.); *Elias v. Elias* (2008), 57 R.F.L. (6th) 53 (Sask. C.A. [In Chambers]); *Power v. Wiseman* (2012), 23 R.F.L. (7th) 282 (N.L. C.A.); *K.O. v. T.O.* (2015), 67 R.F.L. (7th) 1 (Sask. C.A.); *Froehlich-Fivey v. Fivey* (2016), 85 R.F.L. (7th) 301 (Ont. C.A.); *Bors v. Bors* (2021), 60 R.F.L. (8th) 36 (Ont. C.A.); *Tovmasyan v. Petrosian*, 2022 CarswellOnt 11283 (C.A.).

It is the irreparable harm test that generally requires the most modification when the issue relates to a relocation order, because the irreparable harm must relate to the children, not the contending parties. The Alberta Court of Appeal has adopted a modified test for stays in matters involving parenting and children, as set out in *YM v. DT*, 2021 CarswellAlta 2109 (C.A.):

> [6] The well-known tripartite test for a stay pending appeal is set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 334, 111 DLR (4th) 385. The applicant has the burden of showing that: (i) there is a serious question to be tried, an arguable issue that is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.
>
> [7] In matters involving parenting and children, the test is modified to consider, in light of the best interests of the child, if the child will suffer irreparable harm resulting from the granting or denial of the stay: *AR v JU*, 2020 ABCA 337, para 6; *Noel v Maj*, 2006 ABCA 393, para 3. The best interest of the child is not necessarily the best interest of the parents, or what the parents may like, or dependant on what their plans may be: *CLS v BRS*, 2013 ABCA 349, para 11. Irreparable harm to the best interests of a child is not found in mere disruption to the children's lives. There must be evidence of special circumstances that demonstrate potential harm to the child, or some harm that is "real and significant" and is more than a transitory disturbance: *Lloyd-Martinez v Martinez*, 2021 ABCA 13, para 15; *Millington v Millington*, 2021 ABCA 256, para 14; *Fossey v Fossey*, 2021 ABCA 285, para 15.

See also *A. (D.) v. K. (H.)*, 2014 CarswellAlta 1983 (C.A.); *Closner v. Closner*, 2019 CarswellOnt 1130 (Div. Ct.).

Justice Hunter adopted these principles.

Finally, the balance of convenience test requires the court to consider the effect of granting or refusing a stay in all the circumstances, recognizing that the burden of establishing that a stay should be granted is on the applicant. And, again, this test must be modified to measure the effect on the children — *not the parents* — if the stay is refused, against the effect on the children if the stay is granted.

Given the low threshold for assessing the merits of the appeal, notwithstanding the high standard of review, Justice Hunter accepted that the father met the "arguable merit" stage of the test.

But Justice Hunter was not remotely satisfied that refusing a stay would cause the children irreparable harm:

> [44] . . . The breakup of a marriage can be expected to have a negative effect on children, particularly when the parents will be living so far apart and the relationship with one parent will be significantly affected. In this case, the trial judge gave extensive reasons explaining why it was in the best interests of the children to reside with their mother, and why it was in the best interests of the children to have considerable physical separation between their parents. [Remember the "violent incident."]

In a similar vein, some degree of disruption to children will be present in every case — but simple disruption, in the sense of moving children from one stable and appropriate environment to another, has usually not been taken as evidence of irreparable harm: *Minister of Community Services v. B.F.*, 2003 CarswellNS 612 (C.A. [In Chambers]); *Roman-Manarovici v. Manarovici* (2022), 79 R.F.L. (8th) 473 (B.C. S.C.).

Some courts have also expressed the view that "children are resilient" and adaptable: *Stav v. Stav*, 2012 CarswellBC 3208 (C.A. [In Chambers]); *MacPhail v. Karasek*, 2006 CarswellAlta 1406 (C.A. [In Chambers]); *Reeves v. Brand* (2018), 8 R.F.L. (8th) 1

(Ont. C.A.); *G.R. v. C.M.*, 2003 CarswellAlta 1348 (C.A.); *Sopczak v. Gye-Sik*, 2011 CarswellAlta 145 (Q.B.); *Ekeberg v. Swan*, 2021 CarswellAlta 2150 (C.A.); such that it may not be such a big deal for children to move and perhaps have to move again.

And some courts have gone even further, suggesting that a stay of a custody order pending appeal requires *far* more than mere disruption — but actual potential danger to the child should the stay not be granted: *Noel v. Maj*, 2006 CarswellAlta 1658 (C.A. [In Chambers]); *Wiegers v. Gray*, 2007 CarswellSask 123 (C.A. [In Chambers]); *Gerski v. Gerski*, 2006 CarswellSask 389 (C.A. [In Chambers]); *Roman-Manarovici v. Manarovici* (2022), 79 R.F.L. (8th) 473 (B.C. S.C.). Respectfully, we think this overstates the test. One should not have to prove actual *danger* to children in every case to secure a stay of a decision that is problematic and susceptible to a successful appeal. The stronger the case on appeal, the less irreparable harm need be shown. This generally accords with the idea that the three parts of the test for a stay are not "watertight compartments." Strength in one can make up for weakness in another.

Here, the trial judge offered very thorough reasons, with reference to the "best interests factors" in s. 16(2) of the *Divorce Act* supporting the relocation — giving special emphasis to the fact that a relocation to Germany would offer the children the stability they had been missing for the last several years.

Justice Hunter also emphasized the trial judge's lengthy consideration of the relationship between the mother's well-being and the best interests of the children, as supported by the Supreme Court of Canada in *Barendregt v. Grebliunas* (2022), 71 R.F.L. (8th) 1 (S.C.C.):

> [423] In *Barendregt*, the Supreme Court also commented on the connection between a primary caregiver's emotional well-being and the best interests of a child. Justice Karakatsanis confirmed that a parent's need for emotional support is a relevant consideration in a relocation analysis as it relates to a child's best interests. She wrote:
>
> > [169] . . . A move that can improve a parent's emotional and psychological state can enrich a parent's ability to cultivate a healthy, supportive, and positive environment for their child. Courts have frequently recognized that a child's best interests are furthered by a well-functioning and happy parent . . .
> >
> > [Citations omitted.]
>
> [424] Additional support of family and community in a new location may also enhance a parent's ability to care for a child: *Barendregt* at para. 172.
>
> [425] I am satisfied that K.S.'s reasons for relocating are compelling and further the Children's best interests in this case.

This "Happy Parent Principle" — that a happy parent is a good parent — is well-supported in the case law: *Bjornson v. Creighton* (2002), 31 R.F.L. (5th) 242 (Ont. C.A.); *Woods v. Woods*, 1996 CarswellMan 343 (C.A.); *Swenson v. Swenson* (2006), 27 R.F.L. (6th) 265 (Sask. C.A.); *MacPhail v. Karasek* (2006), 30 R.F.L. (6th) 324 (Alta. C.A.); *Orring v. Orring* (2006), 32 R.F.L. (6th) 253 (B.C. C.A.); *F. (D.A.) v. O. (S.M.)* (2004), 4 R.F.L. (6th) 300 (Alta. C.A.); *P. (D.) v. B. (R.)* (2007), 44 R.F.L. (6th) 9 (P.E.I. C.A.); *Burns v. Burns* (2000), 3 R.F.L. (5th) 189 (N.S. C.A.); *Larkin v. Glase* (2011), 95 R.F.L. (6th) 326 (B.C. C.A.); *Porter v. Bryan* (2017), 6 R.F.L. (8th) 41 (Ont. C.A.); *Duggan v. White* (2019), 25 R.F.L. (8th) 44 (B.C. C.A.).

While the trial judge recognized that the relocation would negatively affect the relationship between the children and their father, she was satisfied that the mother's proposed parenting plan (including regular travel to Vancouver to see the father) would mitigate that issue to the extent reasonably possible. Ultimately, the trial judge determined, based on the evidence before her, and as directed by the Supreme Court in *Barendregt*, that it was in the children's best interests to move notwithstanding the impact on their relationship with the father.

Finally, weighing the balance of convenience, Justice Hunter was influenced by the strong findings of the trial judge that relocation was in the best interests of the children and his own conclusion that the children will not suffer irreparable harm with a relocation to Germany.

What Justice Hunter did not consider, however, was that a stay would prevent a possible second move if the appeal was successful: *Titus v. Kynock* (2021), 61 R.F.L. (8th) 1 (N.S. C.A.). However, this consideration would not likely have mattered in any case. The low chance of success, the high standard of review, the idea that "children are resilient", and Justice Hunter's concern as to whether the appeal would ever be heard (given the cost of appealing a 40-day trial) would surely have swamped this consideration.

Therefore, the balance of convenience also favoured the dismissal of the stay application. Considering all the factors brought to his attention, Justice Hunter was of the view that it was in the interests of justice, and in the best interests of the children, that the stay be denied.

Auf Wiedersehen.

Move Along, Move Along . . . Nothing to See Here

Senthillmohan v. Senthillmohan, 2023 CarswellOnt 6063 (C.A.) — van Rensburg, Huscroft and George JJ.A.

There has been a fair bit of press about *Senthillmohan*, which deals with the rights of a third-party creditor to proceeds of sale when a property that is jointly owned by the debtor and his or her spouse is sold. But, ultimately, the case is really much ado about nothing. As one would expect, despite the property being owned in joint tenancy, a creditor only has rights against ***the debtor's interest*** in the property. Phew.

The husband and wife were married. During the marriage the husband racked up significant debts to the appellant company, 2401242 Ontario Inc. (the "Company").

The husband and wife separated.

In January 2020, the wife sought an unequal division of the parties' net family property or, in the alternative, an equalization of net family property and sale of their matrimonial home, which was owned by the parties as joint tenants.

The home was ordered sold on January 28, 2021, and the net proceeds were ordered to be held in trust pending further agreement between the parties or court order.

In the meantime, the Company had obtained default judgment against the husband in a civil action, and a writ was filed in September 2021.

In October 2021, the husband and wife signed an Agreement of Purchase and Sale to sell the matrimonial home. The home ultimately sold for $1.9 million, and the net proceeds, after the discharge of secured encumbrances, totalled about $925,000.

In November 2021 (that is, after the Agreement of Purchase and Sale was signed), the wife brought a motion to sever the joint tenancy in the matrimonial home. That order, granted on consent, was silent as to the effective date of the severance.

Of course, the wife then, understandably, wanted her money, and in February 2022, the wife brought a motion for the release of her 50% share of the net sale proceeds (which led to the Order under appeal).

The Company argued that as the husband and wife were joint tenants when it got its default judgment (and when the writ was filed), it had priority over the wife's interest in the proceeds of sale. The motion judge rejected that argument, finding that the joint tenancy had been severed by the time the Company obtained the default judgment against the husband, because:

- When the motion judge made his order, he knew the Company was a creditor of the husband; and

- The husband and wife were already separated when the husband entered a debtor-creditor relationship with the Company, and there was "absolutely no way" that could defeat the wife's interest in the matrimonial home. He found the wife was entitled to her share of the net proceeds.

This was the Company's appeal of that Order.

In dismissing the appeal, the Court of Appeal summarized the situation succinctly: "Because a creditor cannot seize the interest of a non-debtor joint tenant, the appeal must be dismissed."

As this has always been the law, the Court of Appeal was of the view that the Company had fundamentally misunderstood the law of creditors' remedies as against jointly-held property, where only one of the joint tenants guaranteed the debt. That is, the severance of the joint tenancy was totally irrelevant, and the Company's arguments about the propriety of "retroactive severance" were pointless.

The Company argued that each joint tenant held an undivided interest in the entire property: *Zeligs v. Janes*, 2016 CarswellBC 1766 (C.A.) and *Royal & SunAlliance Insurance Co. v. Muir*, 2011 CarswellOnt 6852 (S.C.J.) (each joint tenant "holds everything and yet holds nothing"). They argued that as joint tenants are essentially one owner until a joint tenancy is severed, a creditor has the right to claim against the full interest. However, neither of those cases stood for the proposition that where the debt itself is not jointly held — the entire property is exigible.

It has long been the law that an execution creditor can execute against *the debtor's interest* in jointly held property. To accept the Company's position would render the words "the debtor's interest in," meaningless.

The Company also relied on a case from the Manitoba Court of Appeal that seemed to support its argument — the problem being that the Manitoba *Real Property Act*, C.C.S.M. c. R30 is different than the Ontario *Execution Act*, R.S.O. 1990, c. E.24 (the "*Execution Act*") — and the Ontario Court of Appeal happens to be located in Ontario. In Manitoba, before joint tenants are paid the net proceeds, encumbrances and liens (like a writ of execution) must be paid. But that ain't the law in Ontario.

In Ontario, s. 9(1) of the *Execution Act* provides that:

> 9(1) The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and **including any interest of the execution debtor in lands held in joint tenancy**. [**emphasis** added.]

That is, the process of seizure and execution on debts only contemplates the execution against *the debtor's exigible interest* in land held in joint tenancy.

Therefore, the wife was, indeed, entitled to her half-share of the net proceeds of the sale of the home. Good thing for the wife they did not live in Manitoba. Not that Manitoba isn't lovely. Except maybe in January. And maybe February. And maybe . . . well . . . we love Manitoba. (Really we do!)

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