

CANADA / JUDGMENT

Duong Van Hoa v. Tzou

2017 BCSC 2221

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Supreme Court of British Columbia

DECIDED

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2017 BCSC 2221 Duong Van Hoa v. Tzou

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duong Van Hoa v. Tzou,

2017 BCSC 2221

Date: 20171019

Docket: S154596

Registry: Vancouver

Between:

Franck Lam Duong Van Hoa also known as Franck Duong

Petitioner

And

Phoebe Tzou

Respondent

Before: The Honourable Justice Macintosh

Oral Reasons for Judgment

In Chambers

Appearing on his own behalf:

F. Duong Van Hoa

Counsel for the Respondent:

M.J. Cochrane

Place and Date of Hearing:

Vancouver, B.C.

October 16, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 19, 2017

[1] THE COURT: Ms. Tzou applies for the six orders plus costs as set out in her notice of application filed August 25, 2015. The third requested order, for a s. 211 report, has now been largely addressed because a Views of the Child report has now been filed. In her written submissions, dated October 16, 2017, Ms. Tzou also requests an order that she have all parenting responsibilities under s. 40 and s. 41 of the Family Law Act, S.B.C. 2011, c. 25. The primary order requested by Ms. Tzou reads as follows in the notice of application:

An order pursuant to s. 76 of the Family Law Act that the order of Superior Court Judge Nori Anna Walla in the Superior Court of Los Angeles, California, U.S., pronounced October 2, 2009 (the "U.S. order") as recognized by this court pursuant to the order made after application of Master Muir pronounced August 7, 2015, be superseded and varied to provide that the child of the marriage, Elkan Duong, born September 24, 2002 ("Elkan") will reside primarily in the care of the respondent [Ms. Tsou] with the petitioner [Mr. Duong] to have parenting time on a supervised basis only.

[2] The U.S. order referred to there is 12 pages. It gave primary custody of Elkan, the only child of the marriage, to Mr. Duong.

[3] Mr. Duong applies for an order intended to facilitate Canadian citizenship for Elkan. I will address that application toward the end of these reasons.

[4] In 2002, the parties married and Elkan, was born. The parties lived in France at that time. The family moved from France to Vancouver in 2004, but separated soon afterward. Ms. Tzou moved to Los Angeles to be nearer her family and friends. She took Elkan with her. The parties divorced in 2006. Mr. Duong has remained in Vancouver. Elkan is now 15.

[5] As I noted earlier, the U.S. order gave primary custody of Elkan to Mr. Duong. I am advised by Ms. Tzou's counsel that the order gave Ms. Tzou approximately 40% parenting time. (Ms. Tzou eventually moved to Bellingham, Washington, in order to facilitate Elkan being some of the time with Mr. Duong in Vancouver and the remainder of the time with her. Ms. Tzou being in Bellingham greatly reduced Elkan's travelling time between his parents.)

- [6] Many court orders in California and British Columbia and at least one court order in Washington State have been made addressing the parties' parenting time and other parenting rights and responsibilities concerning Elkan. I will refer only to those orders which I believe are relevant to the present applications.
- [7] Ms. Tzou complied for several years with the U.S. order, being the order made on October 2, 2009, and referred to above in para. 1. However, she kept Elkan with her on April 22, 2015, instead of returning him at that time to Mr. Duong in accordance with the U.S. order, because she believed that Mr. Duong was physically violent and psychologically abusive to Elkan. On April 20, 2015, two days before keeping Elkan with her contrary to the U.S. order, Ms. Tzou obtained a temporary restraining order in California and a custody order with no visitation rights to Mr. Duong. (On May 12, 2015, the temporary restraining order was extended to June 5, 2015. On June 5, it was stayed effective July 6, 2015.) On May 29, 2015, the California court ruled that British Columbia was the appropriate jurisdiction for the case subject to Mr. Duong commencing a proceeding in this province. The result was this proceeding.
- [8] On July 8, 2015, Ms. Tzou applied for a protection order in Washington State, but that court found it was without jurisdiction.
- [9] In this proceeding, on August 7, 2015, Master Muir of this Court ordered that the order of the California court, dated October 2, 2009, referred to above as the "U.S. order", would be recognized in this province.
- [10] On August 25, 2015, Ms. Tzou, therefore, brought the application which is before me now.
- [11] Madam Justice Brown of this Court heard several applications in this proceeding in September and October of 2015, and on July 7, 2017.
- [12] On September 8, 2015, she ordered that Dr. Elterman prepare a Views of the Child report. He did so. His report is dated September 17, 2015. I quote from it as follows:

Ms Tzou says that in April 2015 she obtained a Protection Order and took Elkan to her home in Bellingham. Elkan has not seen Mr. Duong since April 2015. Ms Tzou says that she has encouraged Elkan to seek his father but Elkan says that he is scared and has resisted seeing Mr Duong.

..

Asked about the allegation of the alienation, Ms Tzou says that Elkan tells her that he witnessed violence from his father to his father's partner [I insert here that his father's partner states in an affidavit that she has not experienced physical violence from Mr. Duong]. Elkan has told her that his father has said that it is his responsibility to help him to get Sonya [his father's partner] to move back to their bedroom. She says that Elkan has also said that his father threatened that he would "kill him" if he told his mother about the situation that had taken place at the father. Elkan has said that his father has threatened suicide on many occasions and that this had made Elkan

afraid. She says that it is these reasons rather than anything else that she has done that has now created this resistance in the child.

...

Asked about the incident with Sonya that Elkan refers to, [Mr. Duong] says that last winter there was a marital break-up and they had an argument. Elkan heard the argument and he did see it. Mr Duong says that there was no physical violence at all and that this is a fabrication by Ms Tzou. He says that she has been manipulating Elkan to say what he has said. There was no police involvement.

...

I asked Mr Duong whether he told Elkan not to talk about the argument with his mother. He says that he did because he know that Elkan tell his mother everything and he didn't want Elkan to report something that happened in his home. Mr Duong says that the basis of the child's statements is that the child is afraid of his mother. Asked whether he thinks that Elkan is also afraid of him, Mr Duong says that Elkan sees his authority. Asked whether he is afraid of his father's temper, Mr Duong says that Elkan knows if he says something then he doesn't argue. Asked how he uses his authority, Mr Duong says that he counts to 10 and when he gets to 10 nothing really happens.

...

Elkan told me that his father is Franck and he is a scientist and studies Biochemistry. I noted that Elkan became more hesitant at this point and he said that it makes him nervous to talk about his father. When asked why, he responded that his father is not nice to him and his brother Zachary. Asked for more details about this, he says that his father hacked into Sonya's email and he beat her up and now he is trying to keep the family together. Elkan maintains that he was present when his father beat up Sonya. He says that they had gone to Mexico and his father took some not "so appropriate pictures" of her and she saw them and they got into a big fight. Elkan maintains that his father was seen on top of Sonya and she could not breathe for a long time. He adds "I thought that she was going to die". He says that his brother Zachary was sleeping and it happened in the adults' room. He says that he heard them making noises so he went to see and then he saw this and went back to his bed and was crying. Elkan says that following the incident his father said that it was, in fact, Sonya who hit him but he saw his father hit her. He says that his father has been threatening him not to tell anyone especially his mom. He goes on to say that his father said "I am very serious, huh, I am very serious, huh". Elkan goes on to say that his father showed him some emails between Sonya and another man. Asked what it said, he says that he doesn't remember but it said something about "having your baby".

Elkan maintains that he has witnessed his father hit his stepmother before. He says that once it happened in the car that he hit her and then he drove very fast down the street. Elkan says that after his father hit his stepmother he was upset with himself and said that he wanted to kill himself. Elkan says that his father talks badly about his mother to the tutor and to Sonya. He says that his father called his mother "poisonous", "a snake" and "a bitch". I asked Elkan why he thinks his father is angry with his mother and he responds that it is because of "all the court things".

Elkan says that he has not gone back to his father because he is scared of him. Asked what he is afraid of, he says that he is afraid that his father will hurt him and that he will blame everything about the family falling apart on him. He says that his father calls him "Moosha" which means traitor in French. Asked if there is anything that he enjoys doing with his father, he says that they have enjoyed ice skating and swimming together. When asked what his father does to discipline, he says that his father will yell and tell him to stop. I enquired what advice he would give his father about being a better parent, he says that his father should show more love for them and not to say everything is their fault. He says that his father should not be violent. Asked if this had happened to him, he maintains that his father punched his chest and called him bad names in French.

I asked Elkan who in the family gets mad the quickest and he says this would be his father. The one who yells the most are equally his mother and father. The person who gives him most hugs and kisses is his mother. The one who helps him most with homework is his mother. Asked if anyone has hit or spanked him, he says that his father has hit him. Asked if his mother and father say mean things about each other, he says that his father says things about his mother but that his mother doesn't. He says that he would find it easier to approach his mother if he had a problem than if he had a problem at his father.

I asked Elkan whether he is happy with his life. He says that he is happy at his mom except when he is worried that he may have to go back to his father. Asked what is making him most unhappy, he says "worrying about the Court stuff". Asked what is going on in Court now, he says "we are trying to get a Protection Order". Asked to explain what this means, Elkan says that it is so that his father can't come close to him and he has to stay away a certain distance for a period of time. I asked Elkan why he thought this was needed, and he says that he is scared that he will do something bad to him. I asked Elkan how does he know what is going on in Court. He responds that after he told his mother about Sonya, she said that she has to take it to Court. I enquired how would he know what was happening in Court, he says that his mother would tell him if "we got what we want" because she doesn't want me to worry. I then asked Elkan what does his mother want. He responds "I want to live with my mom. I want to be safe from my dad".

I asked Elkan when did he find out that he was coming to talk to me. He says that his mother told him a few days ago. I asked Elkan what his mother had reminded him to tell me. He says that she told him "to be honest with you". He goes on to say "she told me I would speak to a counsellor about what happened". I asked Elkan then if his mother reminded him today to tell me anything and he responded that she didn't. I asked why was he so nervous to talk to me today? He says that he is always nervous when he has to talk to a counsellor. I finally asked Elkan what relationship

he sees with his father in the future. He says that he is not really sure. I asked him what would need to change for him to go back and he says "he would need to stop beating Sonya and be more loving and caring".

Conclusion.

... I am also aware that the Affidavit of Mr Duong's partner denies that there was any physical assault on herself by Mr Duong on the occasion that Elkan describes witnessing such an incident.

...

I am also in this case, aware that Elkan has been diagnosed with Autistic Spectrum Disorder and know from my own experience with this type of disorder that these children's ability to be influenced and suggestible are characteristics that I have previously found in other cases. In my interviewing of Elkan, he describes that the reason why he does not want to go back to live with his father is because he has witnessed violence from his father and he now says that his father has threatened to kill him if he tells. The reality that Elkan describes is a very different reality from the one that is described by Mr Duong who acknowledges that there was a verbal fight between himself and his partner, Sonya. From Elkan's perspective, it would not be surprising that Mr Duong would deny engaging in such behaviour and I note that Ms Cressman has said that they have worked out a way within in the home to have separate spaces in order to make the relationship work. I do not have enough information to conclude with any certainty whether the incident described by Elkan is accurate and true or whether Mr Duong is, for understandable reasons, denying that it took place. I am mindful of the fact that in the past other professionals have concluded that Elkan was influenced by his mother. At the same time there are characteristics of what Elkan says that are spontaneous and details are provided as afterthoughts that do not show a mere recitation of a rehearsed script.

[Emphasis added]

From the perspective of this evaluation being strictly a Views of the Child Report, Elkan has said that he does not want to go back to live with his father and that he wants to reside with his mother. He has not closed the door to a relationship with his father but voices certain things that he says would need to change. I note that when asked about things that he has previously, enjoyed with his father, Elkan is able to come up with a couple of examples and his presentation is not as absolute as one finds in many cases which have been termed alienation cases. There is, however, a somewhat disquieting element to the interview with Elkan to the extent that he has been brought into the case and provided details of the Court proceedings by Ms Tzou. I note in the words that Elkan uses, he will use words like "our case" when referring to the litigation between his parents. Elkan clearly sees himself as a part of his mother's case and something that he and his mother are trying to do in court together. On the one hand I can understand that Elkan is old enough and bright enough to see that if he wants to live with his mother, then it is something that they are both trying to do but he seems to present it verbally in the words that he chooses as something that they are doing jointly.

From the strict perspective of a views of the child report, Elkan is clear in saying that he wants to reside with his mother. I have also said that as a child with Autistic Spectrum Disorder, he may be more easily influenced and suggestible than the average child. He is a bright child and has a fair amount of insight and the reasons that he gives under normal circumstances, would be given weight particularly when he says that he witnessed violence and is now afraid of his father. As stated previously, I have not been able to get to the bottom of this particular issue given the limited scope of this referral.

[Emphasis added]

On the third element that is outlined as the task of a views of a child report, there is likely influence on Elkan based on the findings of the previous professionals. In my own interviewing of Elkan, I did ask him about what he had been told to tell me and what he had been reminded to say and I was satisfied with his answers that there had not been any direct coaching of Elkan prior to my interviewing of him in my office.

[Emphasis added]

In summary and in general, the picture presented is rather a mixed one as there is a clear indication from Elkan that he wants to now reside with his mother. The reasons that he provides if they are true and correct, would be valid in terms of not wanting to go back to live with his father. If they are not true, then it is clear that this is either the result of influence or Elkan has made up a story about domestic violence in order to justify why he wants to reside with his mother. While I understand that there is a larger context to professionals who have concluded that there has been influence on Elkan by the mother, in my own interviewing of him, I did not detect any sign of coaching on the face of his verbal presentation.

[Emphasis added]

[13] On September 21, 2015, Justice Brown ordered, among other provisions, that the parties retain a professional supervisor to oversee visits between Mr. Duong and Elkan; that commencing September 27, 2015, Mr. Duong have supervised visits with Elkan for a minimum of two to three hours on one day of each weekend for the following month:

The parties are to arrange the times and dates of the visits. Ms. Tzou is to bring Elkan to Vancouver from Bellingham for the visits. Mr. Duong's supervised visits with Elkan are to take place at or in the vicinity of Mr. Duong's residence in Vancouver.

[14] On October 9, 2015, Justice Brown ordered that the parties and Elkan were to commence counselling in the REACH Program coordinated by Dr. Susan Gamache, that the REACH team was to include a court-designate to provide feedback to the Court as required, that Elkan was to continue receiving treatment, for his autism spectrum disorder, in the behaviour interventionist program of Rachel D. Wagner in Bellingham, Washington, and that the parties were to appear before Justice Brown on October 30.

- [15] At the hearing on October 30, Justice Brown said that the Court was not prepared to make any changes to the current arrangements until the REACH Program was underway and had provided feedback. Mr. Duong asked to appear before Justice Brown in February of 2016 and, on March 7, 2016, the court registry communicated with the parties advising that Justice Brown had reviewed the matter and advised that Mr. Duong's application should wait until after the REACH report was received.
- [16] The parties and Elkan attended meetings and counselling within the REACH Program and the REACH Program produced an initial report on March 9, 2016, and a second report on October 21, 2016.
- [17] I quote here portions of the REACH reports. Turning first to the March 9, 2016, REACH report, from page 1:

The Honourable Madam Justice Brown has advised the parties in November 2015 that it would require a report from the REACH team in order to take further steps for this family.

"I am unable to make any decisions or parental plan until the Reach program understand the situation and report to me with a court designate . . . meanwhile I have to listen to "view of the child" established by Dr. Elterman."

...

Other challenging moment between father and son presented us with an opportunity to discuss different ways that Franck could parent a 13 years old child who has reported that he is afraid of his father. These discussions focused on the need for Franck to keep in mind the effects of his tone, manner, and earnestness on his son.

...

This ability to conduct himself in a functional manner was completely absent in the February 2, 2016 session that Sheila attended. Dr. Loncaric spent most of the next session (February 16) pointing out to Franck the possible consequences of his demonstrated dysfunctional behaviour with Sheila on his relationship with Elkan - if it surfaced in any of their meetings. Franck indicated that he understood my concerns. At the same time, he reiterated his concerns that Elkan needed support and counselling to help address his autism - a challenge which was further exacerbated by what he saw as Elkan's mother's alienating parenting style.

It is difficult to estimate or comment on the role that Elkan's present living environment has played, or may have played, in his interpretation of his father's behaviour. That challenge aside, Elkan would benefit from a well thought out and practiced approach to parenting on Franck's part - particularly while Elkan presents as distant from and reportedly afraid of, his father.

...

RECOMMENDATIONS

At this time, the REACH team makes the following recommendations

3. At least one additional meeting needs to be held with Franck, Dr. Loncaric and Ms. Lindfield to discuss Elkan's negative experiences, both in the supervised visits and prior to them, and to itemize what Franck is prepared to do to address them.

...

The Team strongly feels that Franck needs to take responsibility for the current state of the relationship between him and Elkan. Franck will need to demonstrate a change and show his ability as a parent to address Elkan's concerns. Franck will need to take direction from Ms. Lindfield and Dr. Loncaric.

The REACH team is prepared to update the Court again in three months or sooner as needed or requested by the Court or as directed by Elkan's needs.

We trust that this is of assistance to the Court.

[18] From the REACH report of October 21, 2016, I quote the following:

PARTIES' PARTICIPATION IN THE PROCESS**PHOEBE TZOU, the mother**

Ms. Tzou is cooperating with the REACH team process and continues to be supportive of visits between Elkan and his father, Mr. Duong. Ms. Tzou is not interfering with the father - child relationship negatively. Ms. Tzou is fearful of being labeled negatively and it is the REACH team's opinion that she is very accommodating rather than taking a protective position of Elkan out of fear of being seen as obstructive or interfering as has been her experience and portrayal in the past.

FRANCK DUONG, the father

Despite individual session with Dr. Mel Loncaric, joint sessions with the Child Therapist, Ms. Lindfield and Elkan, and joint sessions with Ms. Lindfield and Dr. Loncaric, the relationship between Elkan and his father remains problematic. The REACH team views this in large part as a result of Mr. Duong not following through with recommendations made by the REACH team. Despite a short brief window in the spring of 2016, where the relationship between Elkan and the father seemed to be improving, their relationship seems, once again, to be fraught with difficulty for Elkan.

...

ELKAN

Elkan has been clear and consistent in describing his experiences in his supervised access visits with his father to Ms. Lindfield. He reported through the summer of 2016 that his feelings of discomfort on the visits with his father were increasing. The scale on which he recorded his feelings provided further evidence of this increase. He also continued to indicate that he wanted the supervised access worker to stay right beside him at all times during visits.

...

Elkan stated to Ms. Lindfield in August of 2016 that he does not want to go on any more visits with his father. He stated that the person he would miss the most in his half-brother Zachary. Ms. Tzou assured Elkan that she will support a continuing relationship between Elkan and Zachary.

...

RECOMMENDATIONS

The REACH team finds that there is not a prospect of improving the status of the relationship between Elkan and the father. The current situation presents emotional risk to Elkan. The current oversight services do not protect Elkan. With the current dynamic we cannot recommend either a continuation of supervision by Link Supervision Services or any other supervisions services as Mr. Duong is not amenable to our intervention.

Should the Court require any further information, please do not hesitate to contact the REACH team.

- [19] As seen earlier, Justice Brown ordered the Views of the Child report, quoted in part above, and the work by REACH, summarized in the two reports from REACH, also quoted in part above.
- [20] As noted earlier, Elkan is now 15. He was 13 when he met with Dr. Elterman and 14 during most of the time he was meeting with the people from REACH. He was old enough to have weight attached to his views when he expressed them in 2015 and 2016. Elkan is unequivocal in wanting to be with his mother. The REACH staff have added that they do not see a way forward at this stage for improving Elkan's relationship with his father.
- [21] Elkan is well cared for by his mother in Bellingham. He has with her all the necessary support and love that a child can have in a single-parent house.
- [22] Although the REACH staff cannot recommend the continuation of supervised access by Mr. Duong, Ms. Tzou's position is that limited supervised access should continue. Mr. Duong agrees that any access he has should be supervised on the ground that a third party needs to be present when Elkan is exchanged between his parents in order to avoid acrimony.
- [23] Section 76(1)(a) of the Family Law Act provides that:

On application, a court may make an order that supersedes an extraprovincial order that has been recognized under section 75 [in this case, the Muir order] if satisfied that

- (a) the child would suffer serious harm if that child were to
- (i) remain with, or be returned to, the child's guardian, or
- (ii) be removed from British Columbia . . .

[24] In my view, s. 76(1)(a) has application here based on the conclusions I draw from the Elterman report and the REACH reports. On the evidence before, including those three reports, and the evidence found in Ms. Tzou's first affidavit, filed August 15, 2015, I find that Elkan would suffer serious psychological harm if he was compelled to live with his father. I cannot ignore, as well, that circumstances have changed materially since the U.S. order was made in 2009 and even since the Muir order in 2015. The opinions of Dr. Elterman and the REACH staff in themselves provide and constitute evidence of changed circumstances. Furthermore, Elkan was only seven when the U.S. order was pronounced. He was nearly twice that age when Dr. Elterman interviewed him and was 14 when the REACH staff interviewed him and worked with him. His increased awareness and capacity to form his own views are further evidence of material change and are, in any event, deserving of weight, as I noted earlier.

[25] Returning to the orders sought, I grant orders numbered one and two in Ms. Tzou's application filed August 25, 2015. Order 1 is quoted above in para. 1 of these reasons. Order 2 is that the parenting provisions of the U.S. order be suspended or stayed and that Elkan remain exclusively in the care of the Ms. Tzou until such time as this matter can be heard in its entirety.

[26] The requested order number 3 is largely moot. It requested a s. 211 report. Requested orders 4, 5, and 6 have to do with restraining and restricting Mr. Duong's movement in various ways. There is not sufficient evidence against Mr. Duong relevant to such orders to support those orders being made and I do not grant them.

[27] Ms. Tzou also requested full parenting rights under ss. 40 and 41 of the Family Law Act and I grant that request.

[28] The supervised access by Mr. Duong can continue on the terms now in place.

[29] Mr. Duong requests an order that Ms. Tzou present Elkan to the Canadian citizenship ceremony in Vancouver at the date and time specified by Citizenship Canada and that a monitoring service be present to accompany the child to the citizenship ceremony.

[30] At present, Elkan holds both a French and a U.S. passport. I am advised that if he does not attend the citizenship ceremony in Vancouver, he will lose the right to become a Canadian citizen, which right he has at this time. I am granting Mr. Duong's two requested orders provided they will not result in Elkan having to surrender his French or his American passports and citizenships.

[31] Success on these applications was divided somewhat, but was largely in Ms. Tzou's favour. I award Ms. Tzou one-half of her costs at Scale B.

"MACINTOSH J."

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