

CANADA / JUDGMENT

Duygun v. Shih

2023 BCSC 1693

COURT

Supreme Court of British Columbia

DECIDED

5 July 2023

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2023 BCSC 1693 Duygun v. Shih

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Duygun v. Shih,

2023 BCSC 1693

Date: 20230705

Docket: E191559

Registry: Vancouver

Between:

Emre Ibrahim Duygun

Claimant

And

Yen-Lin Shih

Respondent

Corrected Judgment: The cover page of the Oral Reasons for Judgment has been corrected on September 29, 2023.

Before: The Honourable Justice Fleming

Oral Reasons for Judgment

(In Chambers)

Counsel for the Claimant

(appearing via videoconference):

T. Stone

Counsel for the Respondent

(appearing via videoconference):

S.M. Kinney

Place and Date of Hearing:

Vancouver, B.C.

July 4, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 5, 2023

- [1] THE COURT: The claimant applies for an order permitting him to travel with the parties' children, Yvonne and Caiden, to Turkey for a two-week period this summer to visit his mother who lives in Istanbul, on terms that would require him to provide an itinerary, contact information, and proof of insurance coverage and require the respondent to provide the necessary travel documents.
- [2] The respondent opposes the application on several grounds. First, she argues that it should be dismissed because of his non-compliance with a child support order made by the Delaware Family Court on June 1, 2022, and arrears of child support of more than \$5,000 USD. Second, characterizing his application as a variation application, she argues the claimant has failed to establish a material change of circumstances since the Delaware Family Court made a final parenting order on February 9, 2018 ("Final Parenting Order"). Third, and most significantly, she argues the proposed travel is not in the children's best interests because of a significant risk the claimant will not return them; political and civil unrest in Turkey would also expose them to unnecessary risk; the claimant's serious anger management issue, and less oversight of his conduct in Turkey.
- [3] I have determined it is unnecessary to consider the disputed anger-management allegations related to the claimant's past conduct in resolving this application.

Overview

- [4] Married in Vancouver, the parties moved to Delaware after the birth of Yvonne in 2014 because of the claimant's employment. Caiden was born there in 2015. The parties separated in 2016 and were divorced that same year. The claimant and the children are citizens of Turkey and Canada. The respondent is a citizen of Taiwan and Canada.

- [5] Following a very high-conflict family law proceeding, the Delaware Family Court issued a lengthy decision in support of the Final Parenting Order which provides the parties with joint legal custody, the respondent with primary residence and permission to relocate the children to Vancouver and the claimant with specific visitation or parenting time depending on where he resided. In the event he did not relocate to Vancouver, once Yvonne was in Kindergarten, the order provides him with parenting time with the children during the winter, spring, and summer breaks from school, excepting the first and last week of the summer break. In the event he did relocate to Vancouver, is to have parenting time every other weekend and two week day dinner visits.
- [6] The Final Parenting Order also prohibits the children from travelling outside the US and Canada without the consent of both parties or further court order. Other terms include a requirement for the claimant to complete a class or program on child development and parenting young children and what are called contact guidelines about communication, exchanges, cancelled visitation, and written notice of a change of address or phone number, et cetera.
- [7] After the Final Parenting Order, in 2018 the respondent and the children relocated to Vancouver. In 2019, the claimant filed a notice of family claim and a without-notice application seeking to enforce his parenting time in the Final Parenting Order in this Court. The application was dismissed. He did not serve the respondent with the notice of family claim or the application.
- [8] The respondent deposes the claimant has brought numerous applications to change the Final Parenting Order since then without success.
- [9] The respondent also deposes that at the end of the claimant's summertime parenting time in Delaware in 2019 and 2021, he withheld the children from her and took steps contrary to the Final Parenting Order, which required her to bring urgent motions before the Delaware Family Court.
- [10] The claimant's email communications confirm this was certainly his intention. In an email dated August 16, 2019, the claimant advised the respondent that Yvonne had been accepted into a Delaware elementary school for Kindergarten starting at the end of August. He also wrote he wanted both children to stay with him at least through the fall semester, stating he believed it was in their best interest to spend time with him in Delaware. The claimant added he was happy to arrange some form of liberal visitation should the respondent wish to see the children in Delaware.
- [11] On August 20, 2019, he emailed the respondent that it was not in their best interest to be released to her based on a number of allegations. Let them remain in Delaware with the "stability" they deserve or he needed the court to address all of his concerns. He closed with "you might want to reconsider your travel plans."

- [12] The respondent went with the Delaware police to pick up the children from the claimant's residence before flying back to Vancouver with them.
- [13] In an exchange of emails starting August 27, 2021, the respondent advised the claimant she would be picking up the children as scheduled at the unusually early hour of 4:30 a.m. on August 30, 2021.
- [14] That same day the claimant told her that he was afraid for the children's welfare and their mental, emotional and physical when they are with her. He also stated there was no way he would allow them to stay with her unknown, "unchecked" boyfriend. Further, the children had psychiatry and dermatology appointments in Delaware, and she should support them in staying with him at that time.
- [15] In a subsequent email also sent August 27, 2021, he asked her to stay away from his residence and his car and to leave them in peace along with:

The children are fine. They need to get ready for school. Do not bother police. They are not interested and certainly do not bother us. Think about children's best interest. You asked for jurisdiction to be relinquished, and I think it was a big mistake on your part. We will look into arranging visits and Skype.

- [16] Two days later, on August 29, 2021, the claimant maintained this position, writing:

Stop with your threats. Stop contact he me about this. Stop using police. I spoke with them. Do not come at 4:30 a.m. I cannot release the children for fear of their safety and well being. You need to go to a different court. Talk to your lawyer in Canada. Stop your harassment. Do not come. We will work on Skype and visitation.

- [17] The respondent deposes that the same Delaware elementary school advised her that the claimant had again taken steps to enroll not only Yvonne but also Caiden. An email from the claimant to the school and the respondent supports this.
- [18] The respondent's urgent 2021 motion is in evidence. On August 30, 2021, Judge F.G. Kerr of the Delaware Family Court found as follows:

The petitioner already has an order. The order is clear that the children are to be returned to her to return to Canada one week before school resumes. Both parties are to comply with the existing court order. The father must return the children to mother at the end of the summer visitation, which ends one week before school resumes.

- [19] Rather than grant or deny the motion, she formally granted an order identified as "other" that reads:

Court does not need to enter an emergency order as there is already a clear order which is enforceable, including by police if necessary.

- [20] After receiving the order, with the assistance of the police, the children were returned to the respondent.
- [21] In response to all of this evidence, the claimant deposes he followed "the law and case law in Delaware". Noting the unreasonable hour of the intended 2021 pickup, the claimant also deposes that he was acting to protect the children, having discovered they were suffering from emotional and behavioural issues, including suicidal ideation, and hearing voices. He also refers to Caiden breaking Yvonne's arm and giving her a black eye.
- [22] Not long before the respondent's urgent August 2021 motion, on August 12, 2021, the Delaware Family Court dismissed his ex parte application/petition to modify the Final Parenting Order seeking custody of the children based on what the Delaware Family Court referred to as "bare allegations" that the respondent was a clear, present, and substantial danger to the well-being of the children. Finding BC to be a more convenient forum, the Delaware Family Court also relinquished jurisdiction.
- [23] Despite having filed a notice of family claim in this Court, the claimant appealed. On June 7, 2022, the Supreme Court of Delaware affirmed the decision to relinquish jurisdiction over custody to BC, but vacated the dismissal of the claimant's petition to modify the Final Parenting Order, remanding it to BC instead. The next day, the Delaware Family Court stayed the petition, ordered the claimant to promptly register the Final Parenting Order in BC and file a petition to modify, if he was seeking modification, in Canada. The order also confirmed the Delaware Family Court retained jurisdiction to enforce "the current order unless and until modified by the Canadian court."
- [24] On January 13, 2023, the claimant applied in this Court for an order allowing the children to travel with him to Turkey and Switzerland, along with an order recognizing the Final Parenting Order. His notice of application included the following at para. 6 of the factual basis:

Delaware Family Court relinquished jurisdiction over custody and relevant family matters for the BC Family Court. Father is well aware he is unable to receive fair and equitable treatment and any justice at the Delaware court. Father is willing to move the case to BC. In case the BC court is unwilling to take over the case and establish jurisdiction, there is a Turkish Family Court in Istanbul that is willing to establish jurisdiction over the children and custody matters on public policy grounds supported by citizenship.

- [25] In an affidavit filed in support of this application, the claimant deposes there are excellent resources for the children in Turkey, including a Canadian school located close to his mother's residence. He also deposes his plan in January 2023 was to travel to Turkey for the entire summer, and if the respondent had wished, the children could have attended the Canadian school to ensure they did not miss any educational opportunities while they were there.

[26] Not long before the January 2023 application, the parties engaged in troubling communications, which at a minimum indicates the relationship remains high conflict. In a text message exchange on December 16, 2022, regarding money the claimant had apparently given to the children, the respondent tells him to "fuck off." Much more concerning, however, is the claimant's email message to her on January 4, 2023, which he identifies as responsive. In my view it is reasonably interpreted as a threat. It reads in part:

DO NOT ever direct profanity at me. DO NOT call me names. Do not call me stupid in front of my children. I know everything. That has to stop. Do not push me. I have absolutely no problem spending the rest of my natural life in prison.

[Emphasis added.]

[27] He also wrote:

Do not aggravate and do not abuse my children and my relationship with my children. No one needs to put up with your heinous abuse. With the divorce, the family court charade you orchestrated, you and your family cost me \$200,000 that I can easily think of. I will get that money sooner or later. I want that money, and I need you to stop the child support now until I get situated either back in Canada or in the States.

Current Application

[28] The Final Parenting Order was recognized by this Court on April 13, 2023. In May 2023, orders were granted renewing the 2019 notice of family claim for two months.

[29] This application was filed on June 1, 2023. The parties have yet to attend a judicial case conference ("JCC"). Under Rule 7-1 of the Supreme Court Family Rules, applications are not permitted prior to a JCC, absent an order exempting the parties, subject to some exceptions. One of those exceptions is where the application is to change a final order.

[30] A JCC has now been scheduled for September 2023.

[31] Thus far in 2023, the claimant has exercised all of his parenting time in Vancouver. It has included the majority of the school holidays and regular weekly parenting time. Although, the schedule for his parenting time under the Final Parenting Order depends on whether he is residing in Delaware or in Vancouver, he has declined to confirm if he continues to have a residence in Delaware. He deposes to planning to relocate to Vancouver, but not yet having done so. He also deposes that he is unable to confirm his residence or country of residence because he is actively seeking work in both Canada and the United States.

[32] In addition to expressing ongoing concern about the claimant's alleged anger management issues as well as controlling behaviour, which he disputes, the respondent refers to an increase in what she characterizes as odd behaviour. She attaches emails from the claimant sent November 23 and 26, 2021, in which he alleges Yvonne had been trying to sexually touch him while they were asleep or almost asleep, along with demanding an RCMP

background check on her boyfriend and stating he wanted to speak to her boyfriend's ex-wife to determine why they divorced.

- [33] The respondent also makes a contested allegation that the claimant generally refuses to provide her with information about the children when they spend extended time with him. This occurred, she says, most recently over spring break.
- [34] Without specifying where, the claimant deposes that he and the children have travelled internationally since the separation, and there have been no issues with them not being returned. The respondent deposes that to her knowledge, the children have only travelled in Canada and the United States, she has always held their passports, and she has accompanied them on flights to and from Delaware.
- [35] Both parties' materials include travel advisories for Turkey issued by the federal government. In an advisory updated on June 16, 2023, the government advises exercising a high degree of cautious in Turkey due to the threat of terrorist attacks and the possibility of demonstrations throughout the country. The advisory also states that Turkish authorities have detained and prosecuted large numbers of people over social media posts criticizing the government, state officials, et cetera. Addressing women's safety, the advisory identifies a risk of sexual assault.
- [36] In support of his application, the claimant indicates that during the proposed trip, they would stay with his mother, who lives in a gated community with constant security, a playground, and a swimming pool. The claimant describes an ongoing relationship between his mother and the children that used to involve her visiting the United States but more recently had involved video communication. According to the claimant, his mother, who is now 85, is not well enough to travel. In addition to spending time with their grandmother, the claimant wants to expose the children to Turkish language and culture given their Turkish heritage.
- [37] Responding to the respondent's assertion that he has few connections to North America, the claimant deposes to living in the continent continuously since 1998, owning a condominium in Vancouver, which according to the respondent has always been rented and having retirement pensions in the US and Canada, as well as, an unidentified business incorporated somewhere in North America.
- [38] Regarding non-payment of child support, the claimant states he has been unemployed since in or about February 2021. Before that, he earned approximately \$114,000 USD annually working as a data analyst for the TD Bank in Delaware.
- [39] On July 10, 2018, he was ordered to pay \$1,959 per month in child support. On June 1, 2022, the Delaware Family Court reduced his monthly child support obligation to \$1,068 effective December 1, 2021. The order also provided that from February 1 until July 31, his obligation was reduced even further to \$635 per month.

- [40] The June 2022 support order is registered with the support enforcement agency in Delaware. As of June 16, 2023, his arrears of child support were \$5,333 USD.
- [41] The respondent deposes he has failed to pay full child support since his payment for December 2022, and he paid no support in March, April, or June 2023. The claimant denies violating any court orders, although he deposes child support may be delayed while he works towards obtaining a suitable job. Without identifying the amounts, he refers to making payments in January, February, May, and June 2023, stating this is the best he can do. Without providing any details, he also deposes he is actively seeking work, and he believes he will have a consistent long-term job later this year.
- [42] The claimant's vague evidence about actively seeking work is undermined by other specific evidence. Claimant's counsel advised that the claimant was flying to the US on May 5, 2023 for two weeks, to look for suitable work. In his affidavit, Mr. Marshall of his office provided similar evidence. The respondent's deposes however that the claimant was actually in Turkey. On May 13, 2023, he Skyped the children so they could wish his mother a happy Mother's Day. She was present on the call with him. The respondent also overheard the claimant tell the children he has been in Istanbul since May 7 and would be flying back to Vancouver on May 20. During that period, he also made video calls on his Turkish number, messaging both the respondent and the children. The claimant has not denied this evidence. Nor does he deny the respondent's evidence that he has travelled to France, Switzerland, and Turkey on another occasion in 2023.
- [43] He deposes that his mother is helping to pay for the proposed travel to Turkey.

Discussion

- [44] Addressing the parties' dispute about the proper nature of this application, although the Final Parenting Order is a final order, I agree with the claimant that absent consent, it contemplates and requires applications for orders permitting the children to travel outside of Canada or the US. Consequently, I am satisfied a material change of circumstances is not a threshold requirement for granting the travel order sought by the claimant. What this means, however, is that an exemption from the mandatory JCC was required before bringing this application. Although, I would not grant an exemption for proposed travel without exceptional circumstances or undisputed evidence demonstrating the travel was in the best interests of a child, having heard the application, I will consider the merits.
- [45] Turning first to the respondent's preliminary objection based on the claimant's non-compliance with the child support order and arrears of child support, while I accept the court may decline to hear an application in this circumstance, I prefer to assess whether the proposed travel is in the children's best interest pursuant to s. 37 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. As the respondent points out, s. 37(3) of the FLA provides that an order will not be in the best interests of the child unless it protects to the greatest extent possible their physical, psychological, and emotional safety, security, and well-being.

- [46] The claimant has not challenged the notion that failing to return the children in accordance with the proposed travel order or the Final Parenting Order would be contrary to their best interests.
- [47] Having considered the evidence, which I have attempted to outline in some detail, and the authorities provided by the parties, I am firmly of the view, the proposed travel would not be in the best interests of the children. Based on the evidence of the claimant's conduct, I am entirely satisfied there is a reasonable likelihood that he may not return the children as required by the proposed order or the Final Parenting Order.
- [48] I say this in part because, on the whole, the evidence leaves me with a significant concern about the claimant's bona fides. Also contributing to my views are his obvious disregard for the Final Parenting Order, the Delaware Family Court and the respondent's parenting role, his clear intention not to return the children to the respondent in August 2019 and 2021, his lack of meaningful ties to Canada and the US, including his now longstanding apparent lack of employment, his general lack of transparency, and his ongoing intense animosity towards the respondent.
- [49] Turkey is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983), and a return order may well be granted by a Turkish court in the event the claimant refused to return the children. However, the time and uncertainty involved in pursuing a contested return application where the claimant could be expected to raise the grave risk of harm exception in a country where the respondent does not speak the language, would not protect the children's best interests as determined by the Delaware Family Court and reflected in the Final Parenting Order.
- [50] In addition to my view the proposed travel is contrary to the children's best interests, I agree with the respondent that the time the claimant has proposed to spend travelling to Turkey with the children should be spent either searching for or engaging in earning income to address the outstanding arrears and to comply with his ongoing support obligation. The claimant's failure to comply with the child support order, his outstanding arrears, the vague nature of his evidence regarding his pursuit of gainful employment and with the respondent's evidence of his overseas travel in 2023 points to, not only his failure to appreciate the fundamental importance of complying with court orders, but also the fundamental importance of his child support obligation. Child support is the right of his children. The claimant has a legal obligation to earn as much as he reasonably can to support them.
- [51] Accordingly, the claimant's application is dismissed.

(SUBMISSIONS ON COSTS)

[52] THE COURT: Given the respondent's success on the application and my view that it really should not have been brought, I award the respondent her costs, and fix those costs at \$2,000 plus \$400 for disbursements. I am not going to order that those costs be payable forthwith largely for the reason suggested by Mr. Stone, that is, the claimant's outstanding arrears of child support, which should be his priority.

"Fleming J."

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