

CANADA / JUDGMENT

Shih v. Shih

2020 BCSC 2194

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 2194 Shih v. Shih

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shih v. Shih,

2020 BCSC 2194

Date: 20201126

Docket: E141017

Registry: Vancouver

Between:

Vanya Karmalita Laurie Shih aka Karli Shih

Claimant

And

Rick Tzung-Hao Shih aka Rick Shih

Respondent

Before: The Honourable Madam Justice Ahmad

(appearing by teleconference)

Oral Reasons for Judgment

In Chambers

Appearing on her own behalf by teleconference:

K. Shih

Counsel for the Respondent appearing by teleconference:

J.W.C. Wong

Respondent's Written Submissions Received:

November 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 26, 2020

[1] THE COURT: This is the respondent, Mr. Shih's application for an interim without prejudice order to suspend his obligation to pay child support retroactive to August 1, 2020, and continuing until his underlying application to vary his support obligations can be heard. The application is made by way of written submissions pursuant to the court's COVID Notice Number 14 dated April 27, 2020, as revised July 20, 2020.

Background

- [2] Karli Shih and Rick Shih were married in 2006 and separated in January 2014. They have two children: J.S. born in August 2007, who is 13 years old, and A.S. born in April 2009, who is 11 years old.
- [3] These family law proceedings have a long history. By final order dated November 18, 2015, Justice Warren made numerous orders in the family law proceeding. Her reasons for judgment are indexed at 2015 BCSC 2108. Subsequent applications followed that final order.
- [4] The final orders included an order made pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) requiring Mr. Shih to pay child support to Ms. Shih in the sum, after set-off, of \$1,643 per month for the two children. In the reasons for judgment, Justice Warren based the amount of child support on two factors: the first factor was the parties' agreement to a shared parenting arrangement where the children were to reside with each of them roughly 50 percent of the time; the second factor was the income of the parties.
- [5] Ms. Shih's income was \$101,900 per year. Mr. Shih was not employed. However, finding that Mr. Shih's decision to quit his job was unreasonable, Justice Warren imputed income to Mr. Shih of \$232,700, which was his average income over the previous three years.
- [6] Despite the shared parenting arrangement agreement, J.S. has resided exclusively with Mr. Shih since May 1, 2020. Issues surrounding that residence were canvassed in the reasons of Justice Basran indexed at 2020 BCSC 1675.

- [7] Since the date of the final order, Mr. Shih obtained employment as the regional vice-president of Western Canada of a company called Oracle, selling technology products to large enterprises, including airlines and companies that work in the oil and gas industry. Mr. Shih asserts his employer was affected by the economic downturn resulting from the global pandemic and he was terminated effective July 27, 2020, as a result. He has been unemployed since that time.
- [8] Relying on those two events, by way of letter dated August 25, 2020, and application material served on August 9, 2020, Mr. Shih advised Ms. Shih of his application to retroactively vary his child and spousal support obligations. To date, the parties have not been able to agree or secure a date for hearing, and Mr. Shih's application to vary has not been heard. Given the difficulty in obtaining long chambers dates, he is uncertain when that application can be heard.
- [9] He brought this application seeking an interim order to suspend the obligation to pay child support on a without prejudice basis until the main application can be heard.

The parties' positions

- [10] It is Mr. Shih's position that J.S.'s exclusive residence with him since May 1, 2020, and the loss of his employment constitute changes in circumstances that would justify the variance or suspension of the child support order pursuant to ss. 17(1) and (4) of the Divorce Act. He says that he has met the test for interim relief suspending child support pending the full hearing of that application.
- [11] Ms. Shih, on the other hand, opposes this application for an interim order on both procedural and substantive grounds. I will address those specific objections in these reasons.

Analysis

- [12] Before turning to the substantive issues, I will address Ms. Shih's procedural objections.

Procedural Issues

- [13] As noted, this application for interim relief was brought by way of written submissions. Ms. Shih is opposed to proceeding in that manner on three main bases.
- [14] First, she says that matter is too complex in terms of substance and length of materials to be conducted in the two weeks' notice she has been given to provide her written response.

- [15] I do not disagree that the nuances and the importance of the issue of child support can be complex. It is important to understand, however, that the application is made on an interim basis. It has been said of interim orders they are summary in nature and provide "rough justice at best". Interim proceedings can not be bogged down and traditionally have never been bogged down with the merits of the case: *Newson v. Newson* (1998), 65 B.C.L.R. (3d) 22 (C.A.) at para. 11, citing *B.(R.) v. B.(M.)* (1989), 19 R.F.L. (3d) 92 (Ont.H.C.J.).
- [16] The parties will have the opportunity to set this matter for a longer oral hearing at which the issues, including evidence and the law, can be more fully canvassed. I understand that it is the intention to do so.
- [17] In the meantime, however, the fact that Mr. Shih is seeking interim relief on a sole issue makes this matter suitable for determination by way of written application. I note there is precedent for hearing and granting an application to suspend a support order by way of application by written submissions: *Goodwin v. Goodwin*, 2020 BCSC 1161.
- [18] In addition to the potential complexity of the matter, it is Ms. Shih's view that she is available for hearing and has provided Mr. Shih's counsel with dates for availability for a full hearing in December 2020. Given that availability, she says there is no need to grant relief in this summary way.
- [19] Notwithstanding Ms. Shih's availability, Mr. Shih's position is that it has been difficult to secure a date and there is no certainty that a date can even be secured for January 2021. This matter has been outstanding since October 9, 2020, when the application materials were filed.
- [20] The purpose of interim orders are to bridge the gap to the time when the court can fully consider the issues raised and make a decision on the merits: *X.(R.L.) v. X.(J.F.)*, 2002 BCSC 1222 at paras 60 - 61.
- [21] In my view, it is appropriate that the application be heard to, at the very least, determine if it is appropriate to bridge the gap until this matter can be heard fully on its merits.
- [22] Finally, Ms. Shih argues that Mr. Shih does not come to court with clean hands and she says, in her words, he should be held to the standard of fulsome sworn evidence. I will address the principle of clean hands in my substantive analysis to follow.

Substantive Issues

- [23] I will address the substantive issues raised on this application.
- [24] Section 17(1) and (4) of the Divorce Act authorizes the court to vary or suspend a support order if there is a change in circumstances which, if known at that time, would likely have resulted in different terms: *Willick v. Willick*, [1994] 3 S.C.R. 670.

[25] Section 15.1(2) and (4) of the Divorce Act allows the court to make an interim support order on terms it thinks fit and just. In *Roberts v. Roberts*, 2020 ONSC 2935, the court adopted the test for interim variation as articulated in *Raaflaub v. Gonosch*, 2020 ONSC 1578, at paragraph 7 as follows:

[7] . . . for there to be a temporary change in support, the moving party must address four issues:

1. Is there a good prima facie case for a variation of support;
2. Would continuation of support result in a hardship to the payor?
3. Is the matter sufficiently urgent to vary support on a temporary basis; and
4. Does the moving party come to court with clean hands?

[26] I will consider each of those factors.

Is there a good prima facie case for a variation of support;

[27] To succeed on the main application to vary child support, Mr. Shih will have to show evidence of a material change in circumstances which, if known at the time of the initial order, would likely have resulted in different terms. To succeed on this application for interim relief, Mr. Shih must show a good prima facie case he will be able to succeed on that application.

[28] I will discuss each of the changes Mr. Shih relies on in turn.

Parenting Time

[29] Firstly, as noted, J.S. has resided exclusively with Mr. Shih since May 1, 2020. That was not the case when Justice Warren made the order for child support in 2015. At that time, Mr. Shih and Ms. Shih shared parenting of both J.S. and A.S. on a 50/50 basis. From paragraph 195 of her reasons, it is clear that the shared parenting arrangement was a predominantly deciding factor in Justice Warren's decision for the amount of child support payable.

[30] As Ms. Shih notes, the agreement for parenting time has not changed. She argues that she continues to incur expenses for housing, clothing, and extracurricular items for J.S.. In effect, she argues that unless the order for parenting time changes, the order for child support based on that parenting time should not change. I do not agree with that analysis.

[31] Section 3 of the Federal Child Support Guidelines sets out the ordinary rule that the parent who is the primary caregiver to the children is entitled to child support from the other parent in the amount set out in the applicable table next to the Guidelines: *Uren v. Reambeault*, 2010 BCCA 332 at para. 7.

- [32] In this case, regardless of the parenting agreement that the parents made in 2015, the reality is, is that Mr. Shih has been the primary caregiver to J.S. on a full-time basis since May 1, 2020. Had that been the case at the time of Justice Warren's order, the order for the amount of child support payable would have been different. It is difficult, if not impossible, to say with certainty the exact amount of child support that would have been payable and by whom in those set of circumstances.
- [33] However, using the incomes imputed to the parties at the time of the initial order, that is Justice Warren's order, if J.S. had been living exclusively with Mr. Shih and the parties shared parenting time for A.S., the Guidelines indicate that child support of approximately \$100, not \$1,643, may have been appropriate.
- [34] Mr. Shih has argued that on a variation application determined now, based on an annualized income of \$24,000, being the amount the government is providing as income support during the pandemic, and based on Ms. Shih's income of \$101,900, Ms. Shih should pay him \$1,547 per month in child support for J.S. and A.S.. Whether that argument stands up with the fullness of evidence and argument is unknown. However, in my view, the change in J.S.'s living arrangements since May 1, 2020, is enough for Mr. Shih to establish a prima facie case for variation of the child support order.

Change in Employment Status

- [35] In addition to the change in J.S.'s residence, Mr. Shih's employment status has also changed. In particular, since the date of Justice Warren's order, he has obtained and then lost employment with Oracle. Mr. Shih argues that the termination of his employment is the second basis on which the support order should be varied.
- [36] Ms. Shih, on the other hand, argues that regardless of the termination of this employment, he should continue to pay child support on the basis of the income imputed to him by Justice Warren. Ms. Shih argues that the child support was ordered when Mr. Shih was unemployed. His current unemployment should not change anything. However, that argument fails to consider the circumstances of the unemployment.
- [37] At the time of the final order, Mr. Shih was not working by choice. It was his intention at that time to become involved in a tech start-up, rather than pursue an employment position. The choice to remain unemployed was a factor in the imputation of income to him. Justice Warren noted at para. 193 of her reasons that:
- [193] . . . Mr. Shih's decision to quit his job on the eve of trial was unreasonable and, more likely than not, motivated by a desire to minimize his support obligations. . . .

- [38] The situation is different now. Firstly, since the date of the final order, Mr. Shih took steps to and did obtain employment. Secondly, there is no evidence that the current unemployment is voluntary. Although the letter of termination from the employer does not set out the basis for the termination, it appears that the decision to terminate employment was made by the employer. It was not something Mr. Shih did by choice.
- [39] Also, unlike the situation when income was imputed to him, Mr. Shih has sought out alternative employment, applying to 15 roles based out of Seattle for which he has obtained four interviews. Despite those efforts, to date he has not been able to obtain employment.
- [40] In my view, the circumstances of Mr. Shih's current unemployment differ sufficiently from the circumstances of his unemployment at the time the initial child support order was made. While it is difficult to ascertain the extent to which that change in circumstances would have affected the order, I am satisfied that Mr. Shih's loss of employment and inability to find alternative employment does give rise to a prima facie case for variation.

Would continuation of support result in a hardship to the payor?

- [41] I turn to the next factor: would continuation of support result in a hardship to the payor?
- [42] Mr. Shih has filed F8 financial statements in support of this application. Although he has savings in an RESP and an RRSP account, the F8 discloses a nil balance in his only cash account. Given the termination of his employment, he currently does not have any employment income. Although it appears that he may be owed eight weeks' severance pay and has a claim to \$90,000 in commissions, it is uncertain when those monies will be paid to him. The income he derives from real estate rentals is insufficient to meet the rental expenses. Although Mr. Shih does have a significant amount of equity in real estate, he says that given his unemployment, he is unable to obtain a loan.
- [43] I am satisfied that, for the purposes of this interim application, and given the loss of his employment and nil bank balance, continuation of the payment of child support will result in an immediate hardship to Mr. Shih.

Is the matter sufficiently urgent to vary support on a temporary basis?

- [44] I will next address the issue of urgency, the third factor on the test for interim relief.
- [45] As previously set out, I am satisfied that the evidence discloses that Mr. Shih has no liquid assets and no current source of income. I am also cognizant of the fact that J.S. currently resides with Mr. Shih on a full-time basis and A.S. on a shared basis. In those circumstances, and given the possibility that child support may be reduced, I am satisfied that there is sufficient urgency to determine this matter on an interim basis to ensure that Mr. Shih is able to provide for J.S. and A.S..

Does the moving party come to court with clean hands?

- [46] A final consideration of whether an interim order should be made is whether Mr. Shih comes to court with clean hands.
- [47] Ms. Shih says he does not. She sets out the conduct that she says reflects that assertion at paragraph 1(c) of Part 4, and in the factual basis of her application response filed on October 28, 2020. I have reviewed that conduct.
- [48] Notably, all of the conduct referred to by Ms. Shih has been considered and addressed by the court in the numerous applications that have been heard prior to now. Although much of that conduct cannot be condoned, if any, it has been addressed and Mr. Shih has faced the consequences of that past conduct. There is no evidence before me to indicate that Mr. Shih has continued in conduct that would come within the clean hands doctrine.
- [49] In my view, to decide this issue on the basis of Mr. Shih's past conduct that has been addressed by the court would be harmful to the children who are the ones who are entitled to the child support at issue.

Conclusion

- [50] Having considered all of the above factors, I am satisfied that this is an appropriate case on which to grant an interim order to suspend the child support order on a without prejudice basis.
- [51] Mr. Shih has asked that the order be made retroactive to August 1, 2020, and to continue until his underlying application to vary support obligations can be heard. I am not prepared to extend the order for that period of time. As I understand that Mr. Shih has continued to make support payments, an order retroactive to August 1 would result in an immediate overpayment to Ms. Shih. Having to repay that overpayment may result in an immediate hardship to her.
- [52] The interim order to suspend the child support order on a without prejudice basis will be made effective on today's date and continue until the earlier of the hearing and determination of Mr. Shih's application to vary the support obligations and February 28, 2021.
- [53] I direct that the parties make efforts to obtain the earliest available hearing date for the application. If the parties are unable to obtain a date prior to February 28, 2021, Mr. Shih will be at liberty to seek an extension of the suspension.
- [54] Costs of this application will follow the determination of costs on the main application for variance.
- [55] Are there any issues that I should address further in these reasons?
- [56] MS. WONG: Nothing from Mr. Shih.
- [57] THE COURT: Thank you. Ms. Shih?

[58] KARLI SHIH: Nothing from me, thank you.

[59] THE COURT: Okay, thank you, those are my reasons. Thank you to the parties for attending today by telephone.

"Ahmad J."

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