

HONG KONG / JUDGMENT

BPL v. BNP formerly known as PN

[2021] HKFC 168

COURT

Family Court

DECIDED

18 August 2021

CASE / FILE NUMBER

FCMC11207/2020

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bjbj FCMC 11207 / 2020

[2021] HKFC 168 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NO. 11207 OF 2020

BETWEEN BPL Petitioner and BNP Respondent formerly known as PN

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public). Date of Hearing:
24 May 2021 Date of Judgment: 18 August 2021

J U D G M E N T (Maintenance Pending Suit/Interim Maintenance)

Introduction

AUTONUMOUT This is an application by a Respondent wife dated the 9 February 2021, for maintenance pending suit pursuant to section 3 of the Matrimonial Proceedings and Property Ordinance Cap 192 (MPPO) and for interim maintenance for the only child of the family, a little girl A, who was born on the XX July 2017, and is now 4 years old, under section 5 of the same ordinance. The main issues AUTONUMOUT The only issue to be determined, at this stage, is how much should the husband pay to the wife for her interim provision and that of A?

3. The wife seeks HK\$25,000 per month as interim maintenance for A and a further HK\$10,000 per month for herself. She also asks that the husband do pay for A s school fees, Extra Curricular Activities (ECA

- s) and all other related expenses and that he continue to maintain medical insurance for her. In counsel s written submission she broke this request down further as HK\$18,000 per month for rental, HK\$7,000 per month for the wife herself (including household and personal expenses) and HK\$10,000 per month for A or HK\$35,000 per month in total.
4. The husband for his part maintains that the parties reached an agreement in mid-2018 whereby it was agreed that the wife s monthly expenses were in the region of HK\$30,000 per month and that he would contribute towards half of those or HK\$15,000 per month. He says that he has been contributing that sum ever since. In addition, he has paid for A s school fees and for one ECA per month (originally an Indian Bollywood class) and he has also maintained health and other insurances for her. In total he says that historically he has been contributing in the region of HK\$28,000 per month towards the wife and A s expenses. I accept what he says in this respect.
5. Going forward the parties have agreed that A should attend a well-known international school with effect from later this month. The school fees for Reception are said to be in the region of HK\$16,000 per month and the husband is willing to undertake to pay for these and for one ECA per month going forward. He has already paid for the school debenture. He is also willing to maintain the child s medical insurance. Thus it appears that on the face of it the parties are not very far apart and that this is an application that can and should have settled.

Background

6. The focus until recently has been on the arrangements for A and staying access in particular had become a sticking point. On the 14 July 2021 the court handed down a short Memo with respect to the arrangements for A over the school summer holiday and a further Children s Dispute Resolution hearing is scheduled for 2 September 2021.
7. In so far as the background to the marriage generally is concerned reference may be made in part to the opening submission of Mr Li, counsel for the husband, where he stated inter alia as follows: Relevant Background
8. The parties married on XX June 2014. On 9 June 2020, H filed a petition for divorce.
9. Both parties are working parents. H is 41 years old; he is a businessman in the jewelry trading business and earns around HK\$19,000 per month: [A/44]. W is 35 years old, she is a part-time teacher employed by the British Council as well as a private tutor [A/53/1] with allegedly fluctuating income. In W's amended Form E, she claims to earn HK\$3,725 per month:[A/89].
10. There is no dispute that the parties started living in separate households shortly before the birth of A[20/7/2017] They gave different versions as to why. H says arguments endured between the parties as well as between H's mother (who lived together) and W and the separation was to gauge the value of their marriage with a view to salvage the same.

[B/464/19] W says she was often physically sick during pregnancy and thus she wanted better care under her maiden family. [B/481/15] It is not disputed that since then, they never lived together again leading up to the divorce.

12. W and A had been residing (and still do) at a rented flat located at Flat XX, GC Court, Nathan Road, Tsim Sha Tsui, Kowloon. ("TST Flat") since September 2018. Prior to that and since birth of A, Wand A had been residing with the maiden family. The current rent of the TST Flat is HK\$18,000, having decreased from HK\$21,000 due to the pandemic.
14. It is H's case that the decision for Wand A to move out of the maiden home and to move into the TST Flat in September 2018 was made jointly by the parties since the parties wanted to avoid confrontation with the maiden family during his frequent visitations of A at their home. This moving out was the result of mediation in 2018 through Integrated Mediation Office of Hong Kong in trying to resolve visitation issues. It was agreed that W and A would live separately with the help of employing a domestic helper, and that H would continue to provide assistance to the care of A by daily visits. Financially, they estimated that the monthly expenses of W and A would be around HK\$30,000 per month and that they agreed that H would pay half of it - this is why H's case at this hearing is that he will continue to pay his half share being HK\$15,000, in addition to his various direct payments for A's education, health and insurance. This has been the arrangement in place for almost the past 3 years. [B/464-5/22] 15. In gist, H has been a hands-on father since A s birth even though they live apart and that H visits A almost on a daily basis consistently at all material times. It has always been W s contention that A is too young to go out thus there are ongoing issues concerning access. H has been forced to do access at the TST Flat and the situation deteriorated with the outbreak of COVID-19.
8. It is of note that it is currently the wife s case that she is a full time housewife and mother although she accepts that she will need to return to work in due course. In order to do so she will need a full time helper. This is seemingly accepted by the husband. The wife had a full time helper previously.
9. A number of issues remain outstanding at this stage including the status of the former matrimonial home and whether or not it is wholly and beneficially owned by the husband. In addition, the wife claims that the husband has under reported his financial resources and refers in particular to the following:
27. From the Petitioner's Form E filed herein on 12 August 2020 and his Answer to the Respondent's Questionnaire to Petitioner's Form E filed on 12 August 2020 dated 25 January 2021 ("Answer"), it can be shown that he has spent and/or transferred to third party accounts around HK\$1,700,000 from June 2019 to June 2020 of which only approximately HK\$215,000 was for the benefit of A and myself and HK\$230,000 for mortgage instalments for the Former Matrimonial Home. This allegation is vigorously denied by the husband. Further it is the wife s case that she has only survived to date by borrowing from family and friends.

10. The husband for his part points out that following the birth of A, that the wife returned to work, and that he would visit her home most days in order to help care for A. He says that it was never agreed or contemplated that he would pay for all of the wife's outgoings and that instead they have always proceeded on the premise that he would contribute towards 50% of her monthly costs. He says that the wife had also accumulated some savings during the course of the marriage.
11. Both sides now claim to be struggling financially at present, due in part to the fallout from Covid. The husband maintains that his salary has reduced from HK\$35,000 to HK\$19,000 per month and the wife says that she is currently not working as a result of the situation surrounding Covid and the fact that it has been difficult to find a job when she is also, on her case, primarily responsible for A's care.
12. Other issues include the fact that the husband complains, and with some justification it seems to me, about the lack of documentary evidence to support the wife's alleged levels of expenditure currently. The law Maintenance pending suit
13. The law is well known and not in dispute. Section 3 MPPO Cap192 states that the only governing principle is that the court shall make such order as it considers reasonable in all of the circumstances of the case. Consequently, applications such as these are approached on a broad-brush basis. A detailed examination of the parties means may be examined at a later date at a full ancillary relief hearing if there is no agreement in the meantime, when there is then every opportunity to achieve fairness by means of set off. In other words, if there is any overpayment or underpayment that can normally be rectified at a final ancillary relief hearing.
14. Reference may also be made to the Court of Appeal decision in *HJFG v KCY* (CACV 127/2011, 28 October 2011, where the following principles were reiterated with respect to maintenance pending suit/interim maintenance applications: The sole criteria to be applied in determining the application is reasonable which is synonymous with fairness. A very important factor in determining fairness is the marital standard of living. In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure, more aptly to be considered on a final hearing. Where the affidavit or form E disclosure by the payer is obviously deficient, the Court should not hesitate to make robust assumptions about his ability to pay. The Court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such situation, the Court should err in favour of the payee. How much maintenance should the husband pay to the wife as maintenance pending suit for herself and interim maintenance for A? The reasonable needs of the wife
15. The wife says that she needs in the region of HK\$35,000 per month broken down in the five months prior to her application as follows: Present Situation and Expenses

22. My total household expenses (including A) per month are presently no less than HK\$34,000 and may increase in the future, a brief breakdown of the past 5 months is as follows:- Sep-20 Oct-20 Nov-20 Dec-20 Jan-21 Rent 18000 18000 18000 18000 18000 Domestic Helper (salary and return air ticket) 3000 4700 4700 4700 6000 Food 7700 6600 8000 10500 10900 Household/ General Expenses/Others 7300 9800 3400 3100 4400 Utilities (including electricity, wifi, water, gas, landline phone, mobile etc.) 2221 1161 Total 38221 39318 34631 37126 40461 Of those expenses it is acknowledged, as set out above, that currently she has no domestic helper, so that even on her own case her most recent expenses are HK\$34,461 per month (i.e. HK\$40,461 HK\$6,000 = HK\$34,461). She does not further itemize those expenses.
16. In her original Form E dated the 6 August 2020 she states that she has General Expenses of HK\$38,410, personal expenses of HK\$11,600 and expenses for A, including school fees and ECA s (which we now know the husband pays for) in the sum of HK\$16,000 per month. These figures are adjusted slightly in the wife s 2nd Form E dated the 7 December 2020 to HK\$38,000 for her General expenses, HK\$10,800 for her personal expenses and HK\$7,400 per month for A, excluding school fees.
17. It is very difficult to ascertain on what basis the wife is seeking these costs. As pointed out by Mr Li in his submission,
16. Procedurally, the parties' Form Es were filed in August 2020. W later requested to file an 'Amended Form E' in December 2020, claiming she was acting in person beforehand. Leave was given and thus the Court has two Form Es from W within a short period. It is noted here as insofar as this hearing is concerned, even when W filed her amended Form E under legal representation, no supporting documents were attached in relation to W and A's expenses.
17. The above explains why W had two questionnaires to answer, one for each respective Form E. Again, in neither of her Answers, (i) Answer dated 21 January 2021: [A/53]; nor (ii) Answer dated 18 March 2021: [A/406], had she provide any further information in relation to the alleged expenses.
18. Arguably speaking, the only piece of documentary evidence from W was found in H's Affirmation where a hand-written list of alleged expenses, in the form of photos sent to H, illegible, was exhibited. These figures covered a time period between October 2018 and April 2019 - i.e. not even anywhere close to the present timeline but this is what H is left to consider by W. [E/1057-1064]
19. In filing his affirmation in opposition, H not only 'done all her work' in setting out the details of all calculations (to the best of his knowledge), but once again alerted W that she has not provided H with any proof of the alleged expenses, save and except rental receipts which was never in issue. [B/474/42] Yet, still from W's Reply Affidavit, nothing was exhibited in relation thereto.
20. In any views, with W being the applicant bearing the burden of proof, this is rather extraordinary. With respect I tend to agree. The wife s earning capacity

18. In addition, the wife says that she has found it very difficult to find new employment. However, with effect from the beginning of the new school year later this month, A will be at school from about 8:00 am to 3:00/3:15 pm daily. Consequently, there should now be an opportunity for the wife to return to work and to restart her career. Thus I am approaching this matter on the premise that the wife does have a reasonable earning capacity going forward and that she should be able to contribute towards her own expenses and those of A in due course. The husband's ability to pay
19. In his affidavit dated the 10 May 2021 the husband says this of his current ability to pay: My Ability to Pay I currently have had a reduction in my earning due to the COVID-19 pandemic as well as being completely engulfed in the preparation of documents and materials relevant to the divorce. Secondly, I prefer to give as much of my time to the care of the Child as allowed by the Interim Access Order, as these are the most important years of her life in nurturing the right values to her. Despite that, I have continued to fulfill my financial responsibilities and commitments and have been taking out of my savings, more so over the last year, since my income has drastically reduced. My income has not increased in the few years since the Child's birth but my expenses have doubled. I am currently looking after my share of the mortgage of my home, my own expenses, my parent's expenses, the Child's schooling including any debentures that have been paid, health, medical and insurance expenses as well as some of her food, clothing, shoes and diapers, on top of providing \$15,000 to the Respondent as her monthly maintenance. That does not include the substantial legal costs already incurred and to be further incurred. in these proceedings. The breakdown of these can be found in my Form E and in my answers to the Respondent's Questionnaire. For ease of convenience, I repeat my Form E expenses as at 12 August 2020 at the table below:- Part 4.1 Item Amount Rent Mortgage instalments 9,435 Utilities (electricity, gas, rates, telephone & water) Management fees 1,125 Food 5,000 Household expenses 3,000 Car expenses Insurance premia 2,600 Domestic helper(s) Other(specify) RATES AND GOVERNMENT RENT Total monthly household expenses HK\$22,602 Part 4.2 Item Amount Meals out of home 3,200 Transport 1,000 Clothing/Shoes Personal grooming (including haircut and cosmetics Entertainment/presents Holiday 1,000 Medical/Dental 2,000 Insurance premia Interim maintenance 15,000 Contribution to parents 10,000 Dependent family members Others (specify) Total monthly personal expenses HK\$33,750 Part 4.3 Item Amount School fees 7,589 Extra tuition fees School books and stationery Transport to school Medical/Dental Extra Curricular Activities Entertainment/presents Holidays Clothing/Shoes Insurance premia Lunches and pocket money Other Transport Child-minding fees Uniform Others (specify) MISCELLANEOUS EXPENSES ON CHILD Total monthly expenses for children HK\$10,589
31. I am currently looking after the Child on the basis under the Interim Access Order. However, I want to increase my time with the Child and look after her as I believe it should not be the sole responsibility of the mother only to look after the Child but is equally as much of the responsibility of a father. Similarly, I believe it should also be the responsibility of both parents to look after the Child financially especially in today's world and in a place like Hong

Kong where expenses are really high. The Respondent has also always emphasized this equality. Generally, it is of note that the husband also acknowledges that his outgoings exceed his income. On his own case he will be paying in excess of HK\$28,000 per month for the wife and A's monthly expenses (once the increase in school fees is taken into account). In addition, he has his own General Expense to meet in the sum of approximately HK\$22,600 per month plus personal expenses of HK\$8,750 (i.e. HK\$33,750 less the current maintenance of HK\$15,000 per month and HK\$10,000 as a contribution to his parents). Clearly the husband is unable to do all of this on an income of HK\$19,000 per month. He says that he has had to rely on savings in the short term. There is also a question mark over other possible financial resources that may be available to him, as suggested by the wife.

Conclusion

In some cases, where the parties are earning a similar amount it is reasonable for the parties to split the expenses for a child on a more or less equal basis or on a percentage basis depending on their relevant incomes/financial resources. However, in this instance the wife is not currently earning an income, although it is anticipated that this situation will need to be rectified shortly. In such circumstances I accept that the husband shall be responsible for all of A's expenses in the immediate to short term. The wife shall also be responsible for her own expenses going forward. She asks for HK\$25,000 per month for A and for a continuation of the husband's agreement with respect to the school fees, ECA's and medical insurance. This is accepted i.e. the order is made on the premise that the husband shall be responsible for half of the rent at HK\$9,000 per month, all of A's expenses at say HK\$10,000 per month and the cost of a domestic helper at HK\$6,000 per month = HK\$25,000 per month in total. The wife's request for an additional sum of HK\$10,000 per month for herself is not accepted.

22. In conclusion then I will make an order that in total the husband do pay the wife HK\$25,000 per month as maintenance for A. In addition, I will accept his undertaking to continue to pay for A's school fees and other expenses as set out in paragraph 5 above. For the avoidance of doubt, I shall not order the payment to be backdated as it seems to me that this could place an intolerable burden on the husband's shoulders at this time and was not requested in any event. This is less than the wife requested and more than the husband says that he can afford to pay. I am though satisfied that the husband should be able to pay this sum. It should also enable the wife to return to work in due course. Costs
23. Neither party has been wholly successful in this application. There was also an issue with respect to both parties disclosure. In particular, I accept that the burden was on the wife to produce evidence to support her application, which she has failed to do. In such circumstances I shall make an order nisi to be made absolute in 14 days time that there shall be no order as to costs. Order
24. Consequently I shall make an order as follows: UPON the Petitioner undertaking to continue to pay for A's school fees and extra-curricular activities (limited to one per month) and medical insurance costs. IT IS ORDERED THAT: The Petitioner shall pay interim

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