

HONG KONG / JUDGMENT

C, OKA v. R, MTP

[2019] HKFC 155

COURT

Family Court

DECIDED

17 June 2019

CASE / FILE NUMBER

FCMP180/2017

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bjbj FCMP 180 / 2017

[2019] HKFC 155 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION FAMILY COURT MISCELLANEOUS PROCEEDINGS NO. 180 of 2017

IN THE MATTER OF R, EA, a girl born on the XX March 2011(the Minor) And IN THE MATTER
OF Section 10(1) and 10(2) and Section 23 of the Guardianship of Minors Ordinance. Cap. 13

Between C, OKA Applicant and R, MTP Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing:
15 April 2019 Date of Applicant s written submission: 18 April 2019 Date of Respondent s written
submission: 28 May 2019 Date of Ruling: 17 June 2019

RULING

(Access)

Introduction

AUTONOMOUT On the 3 December 2018 the court handed down its judgment on relocation, custody, care and control and access. In summary it granted the Respondent father leave to relocate to Japan with the minor child, A, a little girl who is now 8 years of age. I did not give leave for the father to leave immediately but ordered instead that he should leave with A, not before the 21 April 2019, which was after the first week of the Easter school holiday. The reason

for this is that I wished to try to get access back on a more stable footing before the father left Hong Kong. In addition, I ordered that the parties have joint custody of A, with care and control to the father. I then set out detailed arrangements for access in the immediate to short term. In addition, I directed that the parties appoint a Parental Co ordinator to assist them inter alia with the practical arrangements for access going forward. It seems that that part of the order has not been complied with by either party.

2. In addition, I am told that it is not now the father's intention to leave Hong Kong until after the end of the summer school term, as he wishes A to enjoy a full year of school. She is currently attending the X International School and prior to that she was home schooled.
3. One of the main issues to be determined during the trial was whether or not the mother drank to excess and in that event whether she posed a risk to A. This had been an ongoing concern since the litigation began and attempts had been made previously for access to be supervised either by a third party or at the Parent and Child Contact Centre. It would be fair to say that the mother had been largely resistant to all forms of supervision and that there had been ongoing difficulties in this regard and with access generally. Reference should be made to paragraphs 9-17 of the judgment where the background to this is discussed in more detail. Another point of contention is that the mother seemed unable or unwilling to abide by her undertakings not to drink alcohol when A was in her care. In essence the father was and remains concerned about the risks associated by the mother's alleged alcoholism and the mother's complete denial of the same.
4. When discussing the mother's character, I said at paragraph 51 of the judgment as follows:
 51. I have no doubt that the mother loves A very much and that she wishes to play a significant role in her daughter's life going forward. This is to be encouraged. However suitable safeguards will need to remain in place, certainly in the short to medium term, to ensure that this is done appropriately. If there are no difficulties in this respect, then those safeguards can be reduced over time.
 5. In so far as the mother's alleged alcoholism was concerned I accepted that the mother certainly appeared to have had an alcohol problem previously and I agreed with the father that the mother's hair and alcohol tests could not be relied upon. I added that
 53. It is not clear to what extent the mother is still relying on alcohol, if at all and whether or not that remains a significant problem in her life. It goes without saying that if she breaches her undertaking not to drink when A is in her care, that access will once again be suspended. I also wish to make it very clear. The mother has undertaken not to drink alcohol at all when A is in her care. Reference is made to her being a social drinker and to her wish to drink socially and not to excess. It is a matter for the mother what she does when A is not in her care, however she must not drink alcohol at all when A is with her.

6. I then made a detailed order with respect to access. The intent was to introduce staying access gradually and that this, and the day access also, should be subject initially to regular breathalyser testing. It is of note that the mother had originally suggested that this was a good way to monitor the situation. The mother was ordered to produce a breathalyser test at the beginning and end of short periods of access; for whole day access she was ordered to produce a clear test prior to access commencing, once at 2 pm and again at the end of the access period. Similarly, during overnight staying access she was ordered to produce a clear test prior to access commencing and at 9 am after the overnight and at 2 pm and then at the end of the access period. The hope was that if this went well and trust between the parties was re-established, that it might then be possible to lessen the reliance on the breathalyser tests and to revert to a more normal form of access whereby reliance on the mother's undertaking not to drink was sufficient.
7. Post relocation I had also ordered as follows: Access post relocation
62. Once the relocation has taken place the mother shall continue to have remote access by telephone, Skype or FaceTime every Monday and Thursday evening commencing at a time to be agreed between the parties. In addition, during term time weekend access shall take place once per month, on the first weekend of the month unless by agreement between the parties. The parties shall take it in turns to travel, with the mother visiting Japan in the first instance in the month of May and the father visiting Hong Kong with A in the month of June. The mother shall have remote access on Sunday's on the weekends that she does not have direct access. Each party shall be responsible for their own costs associated with facilitating the access arrangements. The mother shall continue to provide breathalyzer tests during the access period, which will be from either Friday evening or Saturday morning until Sunday evening at 5:00 pm. The current situation
8. The mother filed an application for leave to appeal on the 17 December 2018. This was refused by this court on the 31 January 2019. On the 18 January 2019 the father filed a summons in which he claimed, inter alia that the mother was breaching the court order and drinking alcohol when she had access to the child. Further he said that the mother was not producing the breathalyser tests as ordered. The father further alleged that the mother was producing fake reports. On the 26 February 2019 I suspended all access pending receipt of further affidavit evidence from the parties. In the mother's affidavit of the 27 February 2019 she admitted that she had only partially complied with the court order and gave a number of reasons for that. She did not respond to the statement from the father that she had drunk alcohol in front of the daughter, or that some of the reports were fake in any event.
9. The father also made the following proposal in his affidavit dated the 10 April 2019:
 - c) The applicant is using a breathtest device that doesn't have any contract with the supplier. The supplier (BACtrack www.backtrack.com) had been clear with me, the usage of the device without any reading process linked with their servers is not accurate and cannot confirm if the user is providing any reliable measures or not. The supplier strongly

suggested the applicant to apply for a monthly service contract that will allow the applicant to keep track the measurements and have possibility to share those results. In addition, the supplier reminded me usually a third party is requested to have access to their measurements in order to control if the user of the device is complying to the court order in case of usage would be linked to a court case. So, the applicant should add me as monitor user.

- d) The supplier also reminded me each device has to be cleaned and maintained and recalibrated once a year (the supplier of the device requested such service in order to keep the accuracy of the device). <https://www.bactrack.com/products/breathalyzer-calibration?variant=318369077> To summarize my thoughts, I think the applicant should: Get a monthly contract with the supplier to ensure the breathtest will be kept and accessible to show a good will and ensure she is doing the test on time, The applicant should make tests on time, not 1, 2 or 3 hours before or later and of course, not forget the test or fake any of them as she did many times, The applicant should stop saying she did the test but didn't have time to send them to me. It's all about the tests and their reliability that make the court order respected or not. The applicant should perform a recalibration of her device to ensure the breathtest to be more accurate, at least once a year as requested by the supplier, The applicant should add me as monitor user for I could check if she did perform the test on time as she claimed many times. Breathtest should be added to avoid the applicant will drink in the time hole like she did few times already in the presence of A. It takes around 3 hours for a woman to reduce her alcohol blood level after having consumed several glasses of alcohol and H.H. the judge Melloy that it takes less than 15 seconds to make the breathtest, and, of course, it involved no complicated process.
10. In the mother's submission dated the 18 April 2019 she said that there was no evidence of a positive test result and proposed as follows: the calibration and the respondent has to bear half of the cost. The respondent failed to follow the court order to share cost of any tests I have had. To ensure that the respondent does bear half of the cost, it will be deducted automatically from the monthly maintenance.
3. I respected that your Honor provided a reasonable time frame I have to submit the breath test report. Providing test reports every three hours impacts my daily life especially when I am in a social setting with our daughter, I honored the judgment of your Honor to keep the court order regarding the time frame to submit report as stated in court order dated 3rd Dec, 2018 as abovementioned. The law
11. For the avoidance of doubt, and as stated previously, the law in relation to matters concerning children is as set out in section 3 of the Guardianship of Minors Ordinance, Cap 13, which says as follows: GENERAL PRINCIPLES
- (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-

- (a) in any proceedings before any court (whether or not a court as defined in section 2) the court -
- (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to - (A) the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; Decision
12. The father will relocate to Japan with A after the end of the summer school term. The child's habitual residence will then become Japan. I accept that the mother has not complied with the court order with respect to the clear breathalyser test results and that it is likely that she has breached her undertaking and drunk alcohol whilst she has had access to A. In such circumstances, and in the absence of any agreement between the parties with respect to the breathalyser test, the order as set out in paragraph 7 sub paragraph 62, shall be varied as set out below. Once the relocation has taken place the mother shall continue to have remote access by telephone, Skype or FaceTime every Monday and Thursday evening commencing at 7 pm Hong Kong time. In addition, during term time, weekend access shall take place once per month, on the first weekend of the month unless by agreement between the parties. The parties shall take it in turns to travel, with the mother visiting Japan in the first instance in the month of September 2019 and the father visiting Hong Kong with A in the month of October 2019. The mother shall have remote access on Sunday's on the weekends that she does not have direct access by telephone, Skype or FaceTime at 7:00 pm Hong Kong time. Each party shall be responsible for their own costs associated with facilitating the access arrangements. The access shall be supervised either by the Respondent or by a third party to be agreed between the parties and shall be day time access only. The school holidays shall generally be split between the parties equally, but the mother's share of the holidays shall be day time access only and such access shall also be supervised.
13. I should add that it is not possible for the courts in Hong Kong to monitor breathalyser test results. Consequently, unless there can be agreement between the parties with respect to their use going forward, it seems that any further orders or directions in this respect are unlikely to assist. It is not known whether the courts in Japan would be able to monitor access *inter alia* through a breathalyser device.
14. For the avoidance of doubt it is further ordered that copies of all judgments and orders may be shown to the authorities in Japan.
15. There shall be no order as to costs including all costs reserved. (Sharon D. MELLODY)
District Judge The parties both appeared in person s}s}s} okokokgk h}&' h}&' h}&' h7|Y h}&' }
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