

HONG KONG / JUDGMENT

C v. L

COURT

Family Court

DECIDED

28 August 2007

CASE / FILE NUMBER

FCJA1467/2001

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bjbj FCJA No. 1467/2001 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION JOINT APPLICATION NO. 1467 OF 2001

BETWEEN 1st Applicant 2nd Applicant

Coram: Deputy District Judge K.W. Wong in Chambers (not open to public) Date of Hearing: 5th
and 20th July 2007 Date of Handing Down of Decision: 28th August 2007

DECISION

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1. This is an application of the 1st Applicant husband (Husband) against the 2nd Applicant wife (Wife) by summons dated 3rd August 2006 for an order that two maintenance orders in favour of the Wife respectively dated 8th April 2002 and 12th December 2002 be varied or suspended or discharged variation summons).

Background

2. On 26th July 1985, the Husband and the Wife married. The Husband was then and is still a civil servant. After the marriage the Wife was a housewife. There is one child of the marriage, SY, who was born on 21st January 1986.
3. In January 1993, the relationship broke down. The parties separated, having living together for 7 years.

4. After about 8 years of separation and on 21st November 2001, they made a joint application for divorce. It was the application of the parties that the custody of SY, then aged 15 and studying in UK, was given to the Wife. It was also stated in the joint application that the Husband would pay upon divorce \$25,000 and \$5,000 respectively as the maintenance of Wife and SY and a further sum of \$5,000 as SY's education expenses.
5. A decree nisi of divorce was granted on 8th February 2002.
6. The parties were then unrepresented. By an order of the Court dated 8th April 2002, custody of SY was granted to the Wife. It was also ordered, inter alia, that the Husband do pay the Wife as from 1st May 2002 a total sum of \$30,000 per month, being periodical payment of respectively \$25,000 and \$5,000 to her and SY as maintenance. The periodical payment to SY has to be made until SY attained the age of 18 or completion of full time education, whichever was later (1st Order).
7. Three days later and on 11th April 2002, the Husband was adjudged bankrupt by the bankruptcy court.
8. The decree nisi was made absolute on 18th April 2002.
9. After the Husband was adjudged bankrupt, the Official Receiver and the Wife came to an agreement that the maintenance for her and SY be reduced to a total of \$20,000 per month during the validity of the Husband's bankruptcy order.
10. The Husband married his second wife on 19th August 2002. In fact, prior to the divorce application and on 21st January 2001, a boy, CY was born to the Husband and his second wife.
11. Despite the agreement to reduce, the Husband still defaulted in payment of the periodical payment. A judgment summons was issued on 14th November 2002 with a view to compel payment. It was then not in dispute that the Husband was entitled to claim education allowance from the Hong Kong SAR Government on a reimbursement basis. Their arrangement was that the Wife would first of all settle the education expenses of SY and sent the receipts to the Husband for reimbursement from the government. It is also not in dispute that the Husband was only entitled to partial reimbursements from the government. He would then return to the Wife all reimbursements he received from the government.
12. On 12th December 2002, upon the acknowledgement of the Husband that he owed the Wife a sum of \$210,200, being reimbursed education allowance which he failed to return to the Wife, outstanding maintenance and costs, and his undertaking to repay the same by 12 monthly installments, the Court suspended the maintenance payable under the 1st Order during the validity of the said bankruptcy order and varied the Wife's monthly maintenance downward to that agreed between the Wife and Official Receiver until further order (2nd Order). Of the \$20,000 payable, \$5,000 was for maintenance of SY and \$15,000 for the Wife. An attachment of income order was also granted.

13. It is the unchallenged evidence of the Husband that his bankruptcy order was discharged four years later on 11th April 2006.
14. On 3rd August 2006, the Husband took out the variation summons. It is the Husband's contentions that SY has completed full-time education and the wife should be self-supporting by now. No periodical payment should be payable to the Wife and SY. At trial he made an open offer to pay the Wife's maintenance at a rate of \$7,500 per month on the top of a monthly sum of \$5,000 being repayment of his debt acknowledged under the 2nd Order.
15. On 14th February 2007, the Court made an interim order on the Wife's maintenance and varied the same to \$7,500 as from 1st March 2007 until disposal of the Husband's variation summons. The attachment of income order was also discharged.
16. On 21st May 2007, the Wife fought back by taking out a summons to commit the Husband to prison on the ground of his failure to honour his undertakings to the Court to pay the outstanding totalling \$210,200 embodied in the 2nd Order (committing summons).
17. On 21st June 2007, the Court ordered that the committal summons be adjourned to be heard until after the disposal of the variation summons. The Applicable Principles
18. There is no dispute that the application is made under section 11(1) and 11(7) of the Matrimonial Proceedings And Property Ordinance, Cap 192 (MPPO) which stipulates that:
 - (1) Where the court has made an order to which this section applies, then, subject to the provisions of this section, the court shall have power to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended. .
 - (7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates and, where the party against whom that order was made has died, the changed circumstances resulting from his or her death.
19. These provisions empower the Court to vary the periodical payment to a party in divorce proceedings having regards to all the circumstances, including any changes of circumstances in matters set out in section 7 of the MPPO which the Court is required to have regard when making the original maintenance order.
20. In *S v Y* (unreported) FCMC 8775/1998 21st June 2007, the learned Deputy District Judge Levy has helpfully summarized some of the relevant principles governing variation application that can be derived from authorities as follows:
 - (1) The court is to have regard to all circumstances of the case, including a regard to the circumstances de novo;

- (2) A duty to make full and frank disclosure, a breach of which duty by a party may lead to an adverse inference being drawn by the court;
 - (3) A financially dependent wife should be reasonably expected to find a means to be self-sufficient in order to achieve financial independence;
 - (4) When a husband has remarried, a court in considering the financial circumstances of this husband is required to take into account the circumstances of his new family, including the financial resources of the new spouse as well as his obligation to such a family. A court should not threaten a husband with an excessive order in exchange for his agreement to continue maintaining a former spouse;
 - (5) There is no room for defaulting husbands for using a financial hardship induced by them as a change of circumstances; and
 - (6) The exercise of a court's power is wide and unrestricted including a power to terminate periodical payments as well as to back-date an order of variation and, the overall objective is to achieve a fair outcome.
21. Although not all the above principles are relevant to the present case, I shall, whenever relevant, apply these principles to the facts of the present case. The Application and Issues
22. Despite the jurisdiction of the Court to backdate the variation of a maintenance order, Mr. Wu, solicitor for the Husband, only seeks to vary the Wife's maintenance as from 3rd August 2006, the date on which the Husband took out the variation summons. Although it is also not in dispute that SY, now 21 of age, has already ceased full-time education, there is dispute as to when she stopped her full-time education. Issue as to whether the Wife has been overpaid arisen. The Husband alleged that SY had stopped full-time education in England since December 2005 and had since been working. He claimed that maintenance should have been stopped as from December 2005. As such there has been overpayment to the Wife of SY's maintenance in the sum of \$75,000 (15 months from December 2005 to February 2007). Such sum needs be set off against the sum of \$210,200 due and owing to the Wife, leaving a balance of only \$135,200. However, it is the Wife's contention that SY only ceased full-time education after August 2006 after the Husband had taken out the variation summons.
23. Mr. Wu also did not seek an order to remit the outstanding sum of \$210,200 which the Husband has acknowledged and undertaken to pay to the Wife under the 2nd Order. However, the Husband admitted that he did not have money to pay the same in one lump sum. In any event he promised to repay by monthly installments of \$5,000 until full payment.
24. The grounds of the Husband's application can be summarized as follows:
- i) he has remarried and now has a new family with a son aged 6. His financial situation has changed since the 2nd Order. His future financial responsibility towards the family will increase when his son grows older. He has not the ability to maintain his new family as well

as the Wife; ii) he is now 49 and is going to retire at the age of 55, some 6 years later. His income will be descending upon his retirement. His pension has to be reserved for support of his new family; the Wife is at working age and should be self-supporting by now. There is no reason why she should not work and be dependent on him for ever; the Wife liabilities and health are not as bad as what she has described; the Wife purchased a landed property in 2005 and has sufficient assets to support herself; the maintenance is meant for the Wife's reasonable requirement and not for her to pay off the mortgage of the landed property; and SY is working and will be contribution to the household expenses and mortgage loan of the Wife.

25. The Wife opposed the application but makes an open offer to accept a downward adjusted sum of \$10,000 per month, which was rejected by the Husband. As stated above, on the second date of trial, the Husband told the Court when testifying in the witness box that he was willing to pay maintenance of \$7,500 a month to the Wife in addition to a monthly payment of \$5,000 until any outstanding is fully repaid. This proposal obviously did not receive favourable response from the Wife.
26. The Wife's contentions can be summarized as follows. Her health was poor. Her depression, deteriorating hepatitis B and other chronic diseases prevented her from working. Secondly, SY has just become an insurance agent having monthly earning of only about \$1,000 to \$3,000, which is insufficient even to support herself. Thirdly, the Husband was able to maintain his new family in the past with his income less the maintenance of \$20,000 for the last 4 years. There is no reason why he cannot make it now. He should have sufficient income to maintain her and to repay the outstanding debt to her. Fourthly, there is no change of circumstances as CY and the Husband's second marriage all took place before the 2nd Order. Fifthly, having regard to the fact the family living in a unit in Heng Fa Chuen of about 930 square feet prior to the divorce, it is reasonable for her to own her own property.
27. As set out in the above, in a variation application, the Court is obliged to have regards to all circumstances, including doing the assessment de novo in order to achieve a just and equitable result. The Court will look at the application on the basis of the parties means and liabilities at the time the case is before it. In the circumstances of this case I consider it unnecessary to evaluate or criticize the 2nd Order, which is a consent order and then restrict the consideration to whether there has been any change of circumstances since that order. I consider the issues that fall to be determined in the particular circumstances of this case are:
 - i) whether the Wife should be credited with an earning capacity such that a notional income should be attached to her even if she is not working now; ii) the financial resources of the Husband and his liabilities; the reasonable need of the Wife in the circumstances; and when SY stopped her full time education whereby the maintenance in her favour should be coming to a stop; and whether, and if so, how much the Wife has been overpaid;

28. The Husband filed three affirmations (including Form E) in support of his application while the Wife has filed a total of 4 affirmations (including Form E) in opposition. Earning Capacity of the Wife
29. The Wife was 41 when divorced and is now 46. She received only primary education. Although it is common ground that the Wife was basically a housewife prior to divorce, there is some evidence showing that she might have undertaken at least some part-time or temporary jobs during the marriage. In part 5.3 of the Form E affirmed by the Wife on 25th September 2006 which she confirmed to be true and correct, she described the standard of living enjoyed by the family prior to divorce. Apart from stating that she used to live in a residential unit of 980 square feet, she was also saying that she used her own earning to support her daughter for overseas vacation once a year, as well using the same to hire a domestic helper. In any event, it is not in dispute that after divorce, she has gone out for work, at least since March 2003 as a sales promoter earning an average of \$6,421.10 per month.
30. She stated in the same Form E that she was suffering from hepatitis B that required treatment by medication. It was also stated therein that she had kidney problem, asthma and a recent infection of nerve that had not yet fully recovered. She also claimed that she was suffering from loss of appetite and insomnia caused by depression. She was now in the course of applying for disability allowance from the government.
31. It is also her evidence that when she wanted to purchase an insurance policy in early 2007, her application was rejected by the insurer on ground of her abnormal liver function. According to her doctor, the drug she used to take could not control her hepatitis B recently. There was some change in her liver enzyme level. She felt tired easily because of this change and a new drug had been prescribed to control her condition. As her health deteriorated, she was advised to and did resign from her work in February 2007. She produced two medical certificates dated February and March this year advising that she should take rest of respectively six weeks and two to three months. She was also referred to consult psychiatrist.
32. She produced receipts for payment of new drug which cost her \$1,818 per month as from May 2007.
33. In her second opposing affirmation filed in February 2007 (page 188 of Bundle A) she claimed a medical report from Pamela Youde Nethersole Hospital would be available in April 2007 regarding her liver problem. However, up until now no such report is produced as evidence.
34. I have observed the Wife giving evidence in the witness box for two days. She was moody and obviously, has not yet recovered from the trauma and pain brought about by the divorce despite the fact that it took place some 6 years ago. However, she appears to be more generally in good health and was articulate. It is true the Wife has to take care of SY during the separation period and therefore may not be able to go to work when SY was still young.

However, it was not in dispute that SY went to study in England in or about 2000. The Wife was then aged about 40 and should be able to work without any difficulty with a view to be self-supporting. However, given her education background and lack of full-time employment experience, I accept that she may only be able to find jobs at the lower end market with a poor salary and may not be able to maintain a life comparable to that enjoyed by her prior to separation.

35. I find her a lady who is not unwilling to work, but who may have been troubled by the Husband's recent application and become very worried, particularly in light of her recent deteriorating health condition. However, unless there is medical evidence confirming that her health and medical condition are such that she is permanently unfit for any type of employment, which evidence is lacking at least for the time being, I consider the Wife having an earning capacity. But since there is unchallenged medical evidence advising her to rest for a short period of time, I am prepared to accept that her liver condition may have partially affected her in her work. She may have to work part-time or cannot stay in her job for long and therefore may not be able to secure a continuous employment. Her last salary is about \$6,400 (see page A39). I attach a notional income of \$4,000 per month to her earning capacity, which is roughly two-third of her last salary, for the purpose of assessing the quantum of her maintenance. Financial Resources and Obligations of the Husband
36. The Husband, now aged 49, is a civil servant since 1978. According to his evidence in Court, his latest salary after the recent upward adjustment is about \$47,000 per month. Before the adjustment, his salary was only \$44,965 which was reduced from \$47,506 over the past three years and since the 2nd Order was made. He was made bankrupt on 11th April 2002. His son of the second marriage, CY, was born a few months before his bankruptcy and his second marriage a few months after.
37. He is now living with his second wife (aged 28) (page A165) and CY (aged 6) (page A166) in a residential unit in the Lo Wu District of Shenzhen across the border (Shenzhen Property). This property was about 110.9 m (above 1,200 ft) and was purchased in or about October 2003 at a price of RMB840,000. He alleged the initial expenses and deposit of about RMB200,000 were all paid by his second wife. The balance was raised by a loan of RMB670,000 secured by a mortgage in favour of a PRC bank. The loan is repayable in 20 years ending October 2023 with a monthly installment of about RMB5,000 at the time of trial (RMB4,600 according to page A115). The said property was registered in the name of his second wife (page 218 of Bundle A). It is the Husband's contention that this Shenzhen Property belongs to his second wife and he has no interest in it.

38. It is the Husband's case that his second wife was a trader of cosmetics before marriage. The deposit of his Shenzhen matrimonial home of about RMB200,000 was paid by her using profit she derived from her cosmetic trading business. After marriage his second wife ceased working. The mortgage payment was paid by him out of the household expenses he handed to his second wife. He claimed that he had no idea of the profit made by his second wife in her cosmetic trading.
39. Despite the fact that he lives in his Shenzhen matrimonial home and therefore needs to travel across the border almost 26 working days per month, he maintains another 2-bedroom quarter of about 700 square feet in Heng Fa Chuen. It costs him about \$3,132 per month for rental and other utilities. The Husband said that his second wife and CY usually visited Hong Kong two to three times a month to spend their holidays and seeing his mother, who was now aged 76. The family of three would stay in his quarter while they are in Hong Kong otherwise he may end up paying a hotel bill which is more expensive. There is therefore a need to maintain this second household in Hong Kong.
40. In his 1st affirmation filed on 4th August 2006, he set out in details the monthly expenses of himself, his wife, his two households and CY in the total sum of \$45,562. He said in paragraph 10 of the same affirmation that by reasons of his expenses, he could hardly find any money to support the Respondent [Wife]. In the Form E filed by him on 27th September 2006 (page A109), he listed out his total current expenses are \$45,562. There are also boxes in Form E for him to put in his anticipated future expenses (section 4.4). However, when cross-examined by Mr. Chan, solicitor for the Wife, he admitted that the listed particulars in the aforesaid affirmations are not in fact actual expenses. He said that in the years when he was required to pay \$20,000 to the Wife and SY as monthly maintenance, he was forced to compress his spending to \$22,719 (see page A167) or even to about \$15,000 after tax (when being cross-examined). The actual living expenses are abnormal and unreasonably low for a family with that income level. Many activities which his son CY ought to have joined such as learning to play piano have not been joined due to his financial constrain. Those listed in the two affirmations are spending which he ought to have spent had his liability to maintain the Wife been extinguished. In the cross-examination he admitted that for at least four years prior to the interim order reducing the maintenance to \$7,500, he and his new family managed to live on a sum of about \$20,000 odd, being his salary of about \$45,000 less the \$20,000 maintenance paid to the Wife.
41. I am in fact very surprised by his above answers. It has been stated in those affirmations that they are his current expenses and not anticipated expenses or expenses reasonably expected to be incurred by a family of that income level. Now that the Husband confirmed what he has said is not what it appears to mean. Mr. Wu for the Husband did not see fit to cover the actual expenses when the witness was in the box. The Husband simply failed to disclose most of his actual expenses. I therefore have to do an assessment of his reasonable expenses without assistance of his actual expenses.

42. Furthermore, I find it difficult to believe that the Husband has no idea of the financial capability of his second wife, or the amount of profit she has made in her cosmetic trading business. The Husband's second marriage and birth of CY came about at his most difficult time in 2002, at least financially, when he was adjudged bankrupt. All his assets were then vested in the trustee in bankruptcy. His only source of income is his monthly salary. It must be a time of financial crisis to the Husband. It is therefore reasonable to expect this new couple to seriously consider each other's financial position and capabilities before deciding any asset acquisition. The Shenzhen Property was purchased with an initial payment of RMB200,000, which is not insignificant to this new family. The family has to further commit about \$5,000 monthly as mortgage payment, which amounts to about one-third of the family's monthly disposal income. I find the Husband's allegation that he did not know the profit of his second wife, who was then only 23 but could come up with RMB200,000 because there was no written record, totally unbelievable. Obviously he was avoiding telling the truth to the court.
43. Although there is no direct evidence to suggest that this RMB200,000 comes from the overseas educational allowance which he failed to reimburse the Wife, I tend to believe that either the Husband has undisclosed financial resources at the time of the bankruptcy sufficient for him to pay the down payment of the Shenzhen Property, or his second wife has reasonably good financial resources and can contribute towards the acquisition of the Shenzhen Property as well as to his present household expenses. Although it is established that a second wife's income cannot be taken into account as part of the husband's income available for distribution to the former wife and children, in so far as the husband's ability to provide maintenance for his first wife is affected by his second wife's contribution to the new family, it is relevant to consider the extent to which the second wife is able to contribute to the new family out of her own resources: see *Whitfield v Whitfield* (1986) 1 FLR 99 as per Sir John Arnold P. I consider that the Husband has not made full disclosure of his and his second wife's financial position. I am prepared to draw an adverse inference that his second wife has contributed at least partially to his present household expenses.
44. Turning to the reasonable expenses of the Husband listed in Form E, I have the following observations: Hong Kong Quarter I accept it reasonable to maintain the Hong Kong quarter but consider its expenses in the region of \$2,800 (rental inclusive of rates and management fee of \$2,182 plus utilities and other household expenses). According to the Husband's evidence, he lives in the Shenzhen Property and uses this for holidays only two to three times a month; His personal Expenses The Husband's breakdown for expenses for meals out of home is arrived at as follows: (Breakfast \$20 + Lunch \$40 + Dinner \$50) x 30 days. According to the Husband he returned to his Shenzhen home everyday after work and hence incurs \$4,170 as his transportation expenses. I would expect that he will be having dinner at home some time of the week. I therefore allow his out of home meals expenses a sum of \$2,400 arrived at as follows: (\$20+\$40) x 30 + \$40 x15; Clothing expenses of \$1,000 per month be adjusted down to \$500; Entertainment expenses are reduced from \$2,000 per month to \$800. The Husband's evidence is that it is mainly for gifts to colleagues and meals with

colleagues and expenses when family members are in Hong Kong; The Husband claims expenses of \$1,800 per month for cigarettes and newspapers. That is based on a daily consumption of two packs of cigarette. In cross-examination he admitted because of his tight financial situation in the past four years, he sometimes consumed half to one pack per day. It is reasonable to have this expenses cut to \$450; It is the Husband's evidence in the answer to questionnaires that he has two brothers. His mother is living with his eldest brother. The maintenance to his mother should be adjusted downward to \$1,000; Shenzhen Household The mortgage payment should be adjusted up to \$5,000 instead of \$4,600 as documentary evidence now stands; As his second wife is not working and is a full-time housewife, the expenses of \$1,000 for domestic helper can be saved; It is reasonable to adjust the food and household expenses to \$2,000 and \$800 respectively; The second wife Expenses for out of home meal for the second wife should be adjusted downward to \$800 from \$1,800 because I have allowed a sum of \$2,000 as food expenses for the household; Clothing, personal grooming, and entertainment for her should be reduced by \$1,000, 100 and \$500 respectively to \$500 for each item; The monthly holiday expenses for his second wife are \$2,000 which amounts to \$24,000 annually. The Husband explained this amount represents the expenses for his family to visit his mother-in-law in Heilongjiang Province twice a year. I think it is reasonable to reduce it to \$700 per month, which is about \$8,400 annually; CY I accept that the school fee for the coming term should be \$1,413 instead of \$950. I do not intend to reduce the expenses of any of the items for CY.

45. An estimate of the reasonable monthly expenses of the Husband is as follows: Amount Total
 Hang Fa Chuen Quarter \$2,800 \$2,800 His personal expenses -meals out of home \$2,400 -
 transportation \$4,170 clothing \$500 -entertainment/presents \$800 -tax \$5,000 -dependent
 mother \$1,000 -cigarettes and newspapers \$450 \$14,320 Shenzhen Household -mortgage
 \$5,000 -utilities \$400 -management fees \$460 -food \$2,000 -household expenses \$800 \$8,660
 His second wife -meals out of home \$800 -transportation \$500 -clothing \$500 -personal
 grooming \$500 -entertainment \$500 -holidays visiting parents \$700 -medical/dental \$400
 \$3,900 -school fees \$1,413 -extra tuition fees \$600 -transportation to school -medical/dental
 \$400 -clothing \$500 -other school activities \$400 \$3,363 Total \$33,043 Rounded down to
 \$33,000
46. Taking into consideration of the Husband monthly salary of \$47,000, he should have at least about \$14,000 available for maintenance of the Wife, if such need arises. It must be born in mind that the Husband confirmed under oath that in the past four years he has been able to compress his spending to not more than what has been left from his salary after deduction of \$20,000, i.e. about 25,000 or even less. In terms of disposable income i.e. by taking tax of \$5,000 off the above sum, the amount arrived at in the preceding paragraph represents a 40% increase in the Husband's spending ($[\$33,000 - \$25,000] [\$25,000 - \$5,000]$). The increase is substantial at any rate.

47. The husband has just been discharged from bankruptcy. He said in the Form E that he had no debts for the time being, save and except the said sum of \$210,200 to the Wife, less any overpayment that the Court may find. He also confirms that he will be retiring at the age of 55, i.e. around February 2013. It is estimated that he will be receiving a lump sum of about \$2,740,000 and a monthly payment of about \$16,300. He said by then his second wife will be aged only 34 and CY about 12. They still need his support, and for CY at least for another 10 years before he finishes his tertiary education. He has to top up the monthly payment to meet his family expenses of about \$45,000 per month. It is his estimate that the lump sum will all be used up before his son finishes university. He alleged that this lump sum should in any event not be available to the Wife upon his retirement.
48. The Husband establishes his new family mid-life. It must be within his contemplation that he cannot stop working at the age of 55, unless he has other sources of income. His expectation to retire at 55 is unrealistic. He must continue to work for some years beyond 55 otherwise he may not have enough for a comfortable retirement when CY finishes education. His second wife is still young and has to work too, if need arises. In any event, a man at the age of 55 is still full of energy and is not too old to work. Furthermore, I have come to a level which is only \$34,000 and not \$45,000. Even assuming he would retire at the age of 55, it would be reasonable to assume the Husband doing what a reasonable and prudent retired person would do, i.e. to take reasonable step to invest and manage his assets. In that light I cannot see how this lump sum will be fully depleted in 10 years time as alleged by him.
49. I notice that the solicitor for the Wife has proposed the periodical payment be converted to a lump sum upon the Husband's retirement. It will not be appropriate at this stage to say whether the Wife is entitled to share his pension as no formal application has been made and the parties are not been given an opportunity to fully argue this matter. Financial Resources and Reasonable Needs of the Wife
50. I have already considered that the Wife should be attached with a notional earning capacity of \$4,000 per month.
51. I accept that she needs to incur \$1,818 as expenses on drugs for her liver problem. These drugs were prescribed by government doctors. They are not subsidized drugs and therefore she has to pay for them. In the cross-examination, she admitted that she has been maintaining five insurance policies covering accident, medical (including hospitalization), life and retirement which cost her \$2,339 a month, which is quite substantial compared with her earning capacity. I have briefly gone through the brief policies information annexed to her Form E. The retirement insurance is basically an investment plan maturing on a future date. The others are for her added protection in case of emergency. Some will only benefit her estate. However, the Wife is now receiving her psychiatric and liver treatment from government clinics and hospitals. She relies on medical service provided by the government. I do not think these policies reasonable requirement in the circumstances of her case and would therefore disallow them. I also disallow \$690 being insurance premium

for SY's six insurance policies.

52. In her Form E affirmed on 25th September 2006, she claimed a sum of \$5,252.3 for maintenance of SY. However, it was her evidence that SY quitted her study after August 2006 in view of the Husband's present application and received training as an insurance agent now earning between \$1,000 and \$3,000 a month. I accept her evidence in this respect. SY is now 21 and is working. Although given her income level she may not be able to make any contribution towards the household expenses, she is obviously self-supporting and all the expenses incurred on her behalf will be disallowed.
53. It is not in dispute that the Wife purchased a residential unit in Ching Lai Court in Kwai Chung (Ching Lai Property) in May 2005 at a price of \$1.05 million. She paid an initial deposit of 5% amounting to \$52,500 and the balance of slightly less than 1 million was raised by way of mortgage with the Standard Chartered Bank repayable in 20 years with a monthly installment of initially \$5,835.94, now rising to \$7,065 because of upward adjustment of interest rate.
54. During cross-examination, she was seriously questioned on why she needed to purchase a landed property instead of applying for public housing. She explained that since 2002 she had changed her living places 4 times because the rented premises were undesirable. She felt so unsecured. She had tried to apply for public housing but was told that she was not qualified because she was receiving a regular maintenance of \$20,000 monthly. She therefore purchased her own property in order to avoid moving again. It is a 2-bedroom flat of about 500 square feet. She admitted that the monthly rental for a comparable flat is around \$6,000.
55. Although I accept her explanation for purchasing the Ching Lai Property, I will only allow \$6,000 for her accommodation (inclusive of management fee), as the monthly mortgage payment comprises a payment of capital in nature. In the circumstances of the parties financial situation I do not consider it appropriate for any capital accumulation to her, at least for the time being. I would also allow \$1,177 as her utility expenses. This is a sum suggested by Mr. Wu in the cross-examination and accepted by her.
56. In relation to her other expenses, I have the following views: I would disallow \$480 for a part-time domestic helper; While I consider that one has a moral obligation to maintain one's parent, there is no duty on the Husband to maintain the mother of the Wife. Accordingly I disallow the payment of \$834; Donation to charities of \$250 is also not permitted.
57. The reasonable expenses of the Wife are therefore as follows: General Expenses Total - accommodation \$6,000 -utilities \$1,177 -food \$1,500 -general household expenses \$500 \$9,177 Personal Expenses -meals out of home \$1,000 -transportation \$600 -personal grooming \$500 -entertainment/gifts \$200 -holidays \$400 -medical/dental \$265 -special drugs for hepatitis \$1818 \$4,783 Total: \$13,960 round up to \$14,000

58. There is also dispute as to whether the Wife is indebted to her relatives, including her mother and SY's boyfriend. The Wife said that since the husband failed to return to her the overseas education allowance reimbursed from the government in 2002, she had since then not sent the receipts to the Husband for further claiming. She said she had borrowed some \$250,000 from her mother for SY's UK education. A sum of \$150,000 is still outstanding. In 2007, since she was unable to work due to health reason, coupled with the fact that her maintenance has been reduced to \$7,500 and that she had to raise fund to pay her legal fees, she had borrowed a total of \$109,500 from her relatives and SY's boyfriend. The Husband was unable to find evidence to rebut such debts, save and except putting the Wife to strict proof of these facts. After hearing the evidence from the Wife and reading the documents exhibited, I accept her evidence that she is now in debt of \$259,500. When SY Stopped Full-time Education
59. It is the Husband's case that after this variation application has been taken out, he learned for the first time from the Wife during one of the Court hearings that SY had returned from UK in December 2005. As such he would like to claim overpayment of maintenance for SY at the rate of \$5,000 per month from the Wife as from December 2005 up until February 2007 (both months inclusive).
60. In the cross-examination, he did not deny that he now did not enjoy as good a relationship with SY as some years ago. SY did not give him any call despite the fact that he issued mobile phone card to her. His evidence was that for about 2 years he had not even heard her voice. He even admitted that at the hearing on 14th February 2007, he mistook SY to be a clerk of the solicitors acting for the Wife until SY took the initiative to talk to him.
61. On the other hand, Mr. Chan on behalf of the Wife produced certificate that SY had completed courses organized by the Vocational Training Council (). According to the evidence of the Wife, SY attended courses on hotel, catering and tourism organized by VTC from January up to end of August 2006. These were full-time courses because it ran from 9:00 in the morning up until 5:00 in the evening.
62. I have no hesitation to accept the Wife's evidence that SY had received full time education up until August 2006. The fact SY has returned to Hong Kong does not mean that she has ceased full-time education. I do not intend to speculate why the Husband does not enjoy a good relationship with SY. The fact that he cannot recognize his daughter is self-evident of his poor relationship with her daughter. Suffice it to say that he simply does not have any knowledge of what SY is now doing. His allegation that SY has since her return from UK ceased full-time education is only guesswork and is unreliable.
63. In any event, according to the 1st Order his maintenance to SY should cease after August 2006. As such he has overpaid the Wife a total of \$30,000 (6 months at \$5,000 from September 2006 to February 2007). The Reasons For Defaulting Payment of \$210,200

64. The Husband explained that in or about 2000 he suffered loss in his investment in the stocks and properties. He was then heavily in debt to banks and finance companies. Initially he did not want to go bankrupt as it might affect his chance of promotion. That was why when he received reimbursement of the overseas education expenses, he applied the money to pay off part of his debt instead of pay the same to the Wife. His debt was so heavy that he was adjudged bankrupt in April 2002.
65. At the hearing on 12th December 2002 when the 2nd Order was made, he was unrepresented. He said that originally he thought he could borrow money from relatives and friends to settle his outstanding maintenance, education allowance and legal costs to the Wife. That was why he gave an undertaking to pay the same by instalments. However, the Official Receiver later warned him that he being a bankrupt should never raise any loan during his bankruptcy. He said that he had every intention to pay but he simply has no means to satisfy this debt.
66. He also alleged that when he realized he was not in a position to pay the Wife the outstanding sum, he had talked to the Wife who made an agreement with him that as long as he punctually paid his maintenance of \$20,000 per month she would not chase after him for payment.
67. This allegation was denied by the Wife. She said that she had over the phone chased after the Husband for payment but to no avail. The Husband even asked her for loans on those occasions. She therefore felt that pointless to chase further. However there was no waiver of her right for such sum.
68. It is unnecessary for me to consider whether there is waiver of right to the debt because the Husband is still agreeable to repay, subject to deduction of any overpayment. In any event I find the alleged agreement incredible. The Wife was then able to secure her monthly payment by an attachment of income order. She could receive her monthly payment through autopay without any difficulty. I fail to see why in the circumstances the Wife had to accede to such request to waiving or suspending her right in exchange for something which she has already secured to get.
69. However, I am prepared to accept his explanation that he did not have proper legal advice when he gave the undertaking contained in the 2nd Order. On a balance, I accept his explanation that he did not appreciate that he, being a bankrupt, would be subject to stringent restrictions on borrowing and therefore gave such undertaking to repay by instalments in ignorance of the limitations to which he was then subject. The Quantum
70. I have considered all the circumstances of this case, including the considerations elaborated above, my conclusions are: the Husband has financial capability to maintain the Wife, up to a maximum amount of \$14,000 per month; the Wife requires a sum of \$10,000 per month for her reasonable maintenance, being \$14,000 reasonable requirement less her notional earning capacity expenses of \$4,000; the Wife has a debt of \$259,500; the Wife has got overpayment of SY s maintenance of \$30,000; and the Husband has a substantial pension

which will be available to the Husband in or about February 2013.

71. The Husband only seeks to vary the monthly maintenance as from the date of the variation summons, i.e. 3rd August 2006 at which time the monthly maintenance to the Wife was \$15,000. As such, there has been an over-payment of \$5,000 per month from and inclusive of August 2006 up to and inclusive of February 2007, amounting to \$35,000 (\$5,000 x 7).
72. On the other hand, by the interim maintenance order the Wife's monthly maintenance has been temporarily reduced to \$7,500 per month as from March 2007. Accordingly, the Husband has to top up the same by \$2,500 per month up to this judgment, i.e. August 2007, amounting to \$15,000 (\$2,500 x 6).
73. The debt due and owing by the Husband to the Wife as at today is reduced to \$160,200 (\$210,200 - \$35,000 - \$30,000 + \$15,000).
74. I therefore make the following order: the maintenance order made on 8th April 2002 relating to the periodical payment for the Wife be suspended and substituted by a reduced sum of \$10,000, payable by the Husband with effect from 1st August 2006 until further order; the amount of arrears of maintenance, education allowance and agreed costs referred to in the undertaking of the order dated 12th December 2002 be reduced to \$160,200 after taking into consideration of the overpayment of periodical payment by the Husband to SY for the period from September 2006 to February 2007, that to the Wife from August 2006 to February 2007 and underpayment of periodical payment to the Wife from March 2007 to August 2007; and the net amount of the said arrears of \$160,200 be repaid by the Husband to the Wife at the rate of \$5,000 per month as from 1st September 2007 until full payment or further order.
75. I notice that after the monthly payment of \$10,000 to the Wife, the Husband is left with about \$4,000 available for repayment of his debt to the Wife. In making the order in (iii) in the preceding paragraph, I have taken into account my inference that the second wife has financial resources to contribute to her new family. I do think in the circumstances, it is not unreasonable to infer that his second wife contributes \$1,000 per month to the family given the fact that she could come up with \$200,000 in the down payment of the Shenzhen Property.
76. I understand in the course of the proceedings the parties have without prejudice correspondence on the matter. As the Wife's committal summons has not been disposed of, I would therefore invite the parties to restore a hearing before me with 3 hours reserved with the first half an hour in chambers for argument on costs of this application and the remaining two and a half hour in court for the committal summons. WONG King-wah (Deputy District Judge) Mr. Wu of Tso & Associates, solicitors for the 1st Applicant (Husband) Mr. Chan of Deca Lin & Partners, solicitors for the 2nd Applicant (Wife) *Lewis v Lewis* [1977] 3 All ER 992 *Baker v Baker* [1995] 2 FLR 829 *W v W* [2005] 1 HKFLR 53 *Grainger v Grainger* [1954] 1 WLR 1270 *Ballenden v Satterwaite* [1948] 1 ALLER 343 *Wakeford v Wakeford* [1953] 2 All ER 827 and *Howard v Howard* [1945] P.1 G v S (2001) 4 HKCFAR 419 *Thomson v Thomson* [1991] 2 HKC 119 *Rayden & Jackson on Divorce and Family Matters* (18 ed.) para.18.25 *White*

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