

HONG KONG / JUDGMENT

C v. L

COURT

Family Court

DECIDED

11 December 2008

CASE / FILE NUMBER

FCMC10306/2005

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FCMC 10306/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MATRIMONIAL CAUSES

SUIT NO. 10306 OF 2005

BETWEEN

C Petitioner

and

L Respondent

Before : HH Judge Bruno Chan in Chambers

Date of Hearing : 3 September, 24 November and 1 December 2008.

Date of Judgment : 11 December 2008.

J U D G M E N T

AUTONUMOUT

This is the Respondent Wife

s application for maintenance against the Petitioner Husband upon the dissolution of their relatively short marriage for their only child of the family, a son now 5 years old and whose custody has been granted to her. She makes no claim for herself, not even for a nominal order as the parties have agreed that there should be a clean break between them.

The Wife is a mainlander without any right of abode in Hong Kong but has been granted legal aid to launch this application, while the Husband is a Hong Kong resident who used to work as a slope maintenance worker but is said to have since late 2004 been unemployed after an industrial accident and has allegedly been relying on the resultant damages and compensation received for his injury as well as on his family and borrowings.

At issue is therefore the Husband

s earning capacity and his means and ability to contribute towards the needs of his son born out of this marriage, I say this because he has another son born out of a previous relationship with another woman prior to this marriage who is residing with and supported by him.

Introduction

The parties first met in about 2002 through the introduction of their families which happened to be related by marriage. Soon they started to cohabit in a small flat in Shenzhen rented by the Husband, and it appears that the Wife was then also supported by him as she was said to be unemployed at that time. They later solemnised their relationship by registering their marriage on 11th December 2002 in Hong Kong.

It was a typical cross-boarder marriage as the Wife would remain living in the said rented flat in Shenzhen which became their matrimonial home, and the Husband would continue to work in Hong Kong, while visiting each other on weekends in either place.

According to the Wife

s evidence as set out in her 1st Affirmations of 23rd August 2007 which were never disputed by the Husband either in his affirmation in reply or at the trial, things started to change for the worse in early 2003 after she informed him of her pregnancy of the said child and his visit then became less frequent, until one day in July 2003 when he went to the matrimonial home in Shenzhen in the absence of the Wife and without her prior knowledge or notice removed all his belongings and terminated the tenancy of the flat. Thereafter he just told her to return to reside with her family in Guangdong without making any further financial provision for her.

Not surprisingly the Wife a few weeks later came to Hong Kong with her father to meet with the Husband with a view to save the marriage but to no avail when he even questioned the paternity of the child who was subsequently born in Hong Kong on 13th September 2003. After staying in Hong Kong for several weeks during which the Husband refused to accept the child as his own or to have any financial responsibility for him, the Wife then returned with the child to China to stay with her parents at Luk Fung, Guangdong, and became dependent on them and her brothers.

On 29th October 2004 the Husband fell from a truck while at work and sustained injury to his back, fracturing the right transverse processes of 3 of his lumbar vertebrae. He was discharged from the hospital on the same day with follow-up treatments for back pain. As a result he was given long sick leave up to July 2006 and was paid a total sum of \$843,555 by way of damages for the injury(\$400,000) and Employees Compensation(\$443,555) with the assistance of Legal Aid. He claims to have since been living on these payments and on borrowings from friends and relatives as his back injury has prevented him from carrying out the same job as before.

On 14th September 2005 he filed for divorce in these proceedings on the basis of separation with the Wife since June 2003. However in his petition he did not disclose the said child or make any financial proposal for the Wife, and instead claimed in his affirmation not to know her whereabouts or how to contact her or her family for the purpose of serving the divorce papers on her. As a result he obtained an order for substituted service by publishing a notice of the proceedings in the local Oriental Daily News.

Not surprisingly the notice never reached the Wife in China and on 9th June 2006 the marriage was dissolved by the court granting the decree nisi which was subsequently made absolute on 11th August 2006 without any of her knowledge or participation.

I should also mention that in fact in July 2006, before the decree nisi was made absolute, she came to Hong Kong with the child to meet with the Husband at his home in North Point to request him for financial arrangement for the child

s education as he had reached the age

for schooling, during which the Husband never mentioned anything about his divorce proceedings but did pay the Wife \$1,500 for the child with a promise of similar payments in future. The Wife and child then stayed the night at his home and in the next morning were given a ride by his friend to the train station for their trip back to Shenzhen.

It was only in August 2006, according to the Wife, when she telephoned the Husband for further payment for the child and when he refused, she decided to seek help from the Legal Aid Department and only then that she learnt of the divorce proceedings, and eventually took out an application for the child

s custody and for his maintenance which is now before me.

Unfortunately, despite the foregoing, not only did the Husband fail to make any further financial proposal for the child, he even disputed his paternity until the resultant DNA testing report confirmed that he is indeed the biological father, and accordingly on 3rd January 2008 an order was made granting the Wife custody of the child, with the question of maintenance adjourned for argument pending the disclosure of financial information by the parties.

The Law

As both parties are legally represented, it is not necessary for me to go into the law and principles applicable to this application, suffice it to say that the court is required by section 7(2) of the Matrimonial Proceedings and Property Ordinance, Cap.192 to consider all the circumstances of the case including all those matters mentioned therein

and set out in details in the Wife

s Closing Submission. I shall start with her financial situation.

The Wife

s Financial Situation

15. The Wife is now aged 33 and is said to be unemployed as she claims to have to look after the son and is therefore financially relying on one of her younger brothers who pays for her present accommodation in Shenzhen after she moved out of her family home in Luk Fung in late 2006 to make room for her other newly wedded brother and his new family, as well as her living expenses in the total amount of about RMB1,500 per month, which she says is a very tight budget but is the best her brother can do, although it is also her evidence that in May 2007 she once worked for 19 days in a supermarket in Shenzhen and earned RMB41.67 for that period, and that it is her intention to return to employment when her son is older and in full-time schooling.
16. The Husband however alleges that she has in fact a much greater earning capacity than merely as a part-time supermarket employee, as he believes that she once worked as a qualified medicine dispenser and had operated her own boutique in Shenzhen before the marriage, that she was able to live mainly on her own resources after the marriage despite limited financial provisions from him, and that she has had great financial support from her family which owns a shop selling motor-cycle parts as he stated in his affirmation of 28th March 2008.
17. The Wife does not deny that she had once attended a course in medicine dispensation and worked as a trainee in some drug store in the late 1990s but which she subsequently abandoned due to changes in the local legislations making it more difficult and stringent to qualify for that profession. Thereafter she says she worked for about 2 years in one of her brothers

tiny shop selling street clothes which she says could hardly be called a boutique which was subsequently closed down due to poor business prior to her marriage.

She however denies that she had any resources of her own, nor does she have any great financial support from her family which she says in fact lives on the meagre income from a small bicycle shop used to be owned by her father but now being run by one of her younger brothers after his death. She claims to have absolutely no interest in the business which sells cheap bicycles for transportation at RMB110

150 each and which barely makes enough to sustain her mother and her brother's family.

Having heard and seen the Wife in evidence, which I find to be firm, clear and straightforward, I have no difficulty in concluding that she has told the truth about her financial position, and she is clearly not looking for any free ride from the Husband for herself but is only asking him to face up to his responsibilities towards his son. I agree that she does have the capacity to earn her own living but given the present age of her son and in the absence of any family support in Shenzhen to assist her in looking after him, she would not be able to go out to work until her son gets older and in full-time schooling. I shall next consider her son

s needs.

The Child

s Needs

The Wife set out her monthly expenses, including those of the child, in her Form E at RMB2,550 being RMB1,540 for general household including rental, RMB510 for her personal and RMB500 for the child (PB1 : 30-31), which were not challenged in the main as they appear to me the very basic minimum for an adult and a small child. At the hearing the Wife updated her expenses somewhat by claiming that the rental has since gone up by RMB200, but more importantly, it transpired that there is a much more urgent matter over the child

s education needs which requires the court

s immediate attention.

As aforesaid the child is now already 5 years of age, but according to the Wife, instead of being already in the second or third year of kindergarten like every child at his age, he has not been attending any school in Shenzhen as he was born in Hong Kong and is therefore regarded as a foreign student there and hence is not eligible for local schools which are government subsidized with no or little charges, but he cannot afford to go to the much more expensive international schools catered for such students either as according to the Wife they charge more than RMB2,000 per month just for school fees, such as the one in her neighbourhood which she intends to enrol her son, the monthly school fees would cost RMB2,470, which was the reason why she approached the Husband for assistance on that occasion in July 2006 when the child was

reaching the age for kindergarten, and which she says her family simply cannot afford without the Husband

s help.

22. While I agree with Mr. Leung for the Husband that the Wife could have easily produced some documentary evidence on the amount of school fees charged by international schools in Shenzhen, which she conceded that she could have but didn

t think it was necessary to bring to the trial since it was never an issue until then, I see no reason to doubt her evidence that these schools do charge a much higher fees, nor do I see how it is feasible, in the absence of any evidence or information before the court, for her to apply to the relevant authority to switch the son

s residency from Hong Kong to Shenzhen as suggested by the Husband. Certainly it would be a preferable option for the Wife in the long run if indeed it is possible to do so, but until then it is clear to me that the child has an urgent need for financial provision from the Husband, whose financial means I shall consider next.

The Husband

s Financial Position

The Husband is now aged 38 and used to earn \$13,000 per month as a slope maintenance worker just before his accident some 4 years ago. He claims to have since been unable to find work in the same field due to his inability to lift heavy load or carry out other heavy physical duties, the details of which he explained in his said affirmation of 28th March 2008.

He now lives with his parents, his brother and his family, and his other son who is now in Primary 6 and whom he says he has to look after until he enters secondary school next year, when he can then start looking for jobs which he thinks he can manage such as security guard at \$7,000 - \$8,000 per month given his limited education and lack of other skills. As aforesaid he also claims to have now spent all his compensations on his living expenses and repaying various loans, and is now relying on his family and borrowing from friends and relatives.

His explanations for not having a job not surprisingly are not acceptable to the Wife who argues that his alleged inability to work in his former job is not supported by his own medical report, while his claim that he has to look after his son cannot be justified given the fact that he has his parents available to assist.

The medical report referred to by the Wife and produced by the Husband was dated 10th December 2006 for the purpose, I believe, of his compensation claims and hence was a comprehensive assessment of his injury and its impact or effect on his earning capacity by 2 specialists in orthopaedics and traumatology of the medical assessment board.

The report revealed that the Husband was earlier in January 2006 assessed by the board to have a 5% permanent loss of earning capacity for sprained back with pain and stiffness, that he was granted sick leave up to 6th July 2006 with no further orthopaedic follow-up, and that he was scheduled for another review by the medical assessment board on 10th December 2006 which produced this report.

According to this report, the Husband was then still complaining of, inter alia, on and off back pain, increasing neck pain, weakness in his lower limbs and inability to carry 30

40 lbs of weight for long duration, and was assessed for the purpose of his Employees

Compensation Claims to have a 8%

10 % loss in his earning capacity. Nevertheless the board was of the opinion that he could resume his pre-injury job but with some reduction in capacity and efficiency, and while he might have some difficulty lifting very heavy objects, it recommended that he could shift to ground level construction work, such as casual jobs in construction site and interior decoration.

That was then and 2 years later today and in the absence of any further evidence, medical or otherwise, it would not be unfair to assume that the Husband has since become physically fit to return to work, and I find it hard to accept his explanation that he is still without a job because he has to look after his son when he has available other members of his family including his parents who used to assist him in doing so in the past.

In fact, when it comes to the Husband

s credibility, Mr. Chan for the Wife submits that he was vague, evasive and contradictory in the witness box in particularly when being cross-examined over the whereabouts of the rest of his compensation payments and his alleged expenses. I have to agree that it was also my observation.

In his said affirmation of 28th March 2008, the Husband explained how and when he received these payments : of the Employee Compensation, \$293,555 were paid on monthly basis of about \$13,000 each from the time of the accident to July 2006, a total of about 22 months which he said all spent on living expenses during that period, while the balance of \$150,000 were paid to him in one lump sum on 27th September 2007, of which \$137,000 were used to pay off his debts due to his parents and friends.

Of the damages for his personal injury claim, \$160,000 were paid to him a month later on 24th October 2007, another sum of \$30,000 on 3rd December 2007, with the balance of \$210,000 being held by Legal Aid Department as its first charge pending the resolution of his legal costs in respect of his claims for those payments, the outcome of which unfortunately remained unclear at the time of this hearing, but there is no evidence to suggest that this sum of \$210,000, or the bulk of it will not eventually be returned to him, as he himself claimed in his said affirmation that he

would wholly rely on the balance of compensation monies to be received from DLA to support my family expenses

. Meanwhile, his evidence over what he did with the 1st sum of \$160,000 was the same : that he had paid \$147,000 towards his debts, leaving the balance of \$13,000 for the support of his family.

Not surprisingly, the Wife disputes these alleged repayments of debts totalling \$284,000 which she argues as the Husband

s fabrication in order to mislead the court and to put them beyond her reach.

While the Husband has been able to name in his said affirmation all his alleged creditors, as well as the date and the amount of repayment to each of them, and the latter can be verified by his bank account records, but which the Wife argues could be for anything else in the absence of any more direct evidence such as IOUs, loan agreements or acknowledgement by creditors, her main issue however is that with the monthly EC payments of \$13,000 payable to him right from the time of the accident, why would it still be necessary for him to borrow so much money from these people?

While I accept that there was a gap of 14 months from August 2006, when the monthly EC payment stopped, to September 2007 when the 1st sum of damages was paid, during which the Husband might have to rely on borrowing to meet his living expenses, but even on the basis of his alleged expenditure as set out in his Form E at \$13,000 per month, which the Wife dispute as excessive, the total of which for 14 months would still only amount to \$182,000, some \$100,000 less than the alleged total debts repayment, which bags the obvious question of why did he borrow so much more than what he needed for his living expenses, to which he has no satisfactory answer or explanation.

To find the answer it would be relevant to look more closely at his alleged monthly expenditure, which I propose to do next.

The Husband

s Needs and Expenses

In his Form E filed on 14th December 2007, the Husband put his general household expenses at \$1,900 including his contribution of \$1,300 towards the rental expenses; his personal expenses at \$7,700 including \$3,000 for meals out of home, \$2,000 for travelling, \$1,000 for supporting his parents, and \$1,000 for renting another apartment in Shenzhen; and \$3,605 for his elder son s expenses, totalling as aforesaid \$13,205 per month.

With the exception of his son

s expenses, the Wife takes issue with almost all the other mentioned items, starting with his renting of an apartment in Shenzhen, of which he only disclosed under her cross-examination that it was for his present girlfriend and where he would stay with her during his weekly visit over the weekends, which also explains the relatively high rate for his travelling expenses. In addition he also revealed that he has been paying \$1,000 or so per month for her living expenses there.

These revelations not surprisingly gave the Wife cause to question the truthfulness of the Husband

s Form E in which he clearly stated that he was not cohabiting with any person and had no intention to do so when in fact he was then, and still is, already having a relationship with this girlfriend in Shenzhen, and for which she argues that he should have given those payments to support her son rather than his girlfriend, whom he has admitted of being self-sufficient with a job prior to their relationship.

As for his other expenses, the Wife argues that he should not have to contribute to the rental expenses given his alleged unemployment while his brother is gainfully employed, that it is not necessary for him to pay maintenance for his parents as he has many other siblings who can better afford to do so, and that he should not be spending so much for meals out of home if indeed he is not working. While I agree that the Husband

s evidence on some of his alleged expenses was vague, inconsistent and unsatisfactory, but if he is indeed working or should be doing so as what the Wife insists, then proper provisions for his meals out of home and travelling to and from work would be necessary and should be allowed, although may not be as much as alleged, but a total sum of \$3,500 would in my view seem reasonable given his other obligations. But still I am no closer to an answer as to why he had to borrow so much more than what he claims to be his living expenses, if indeed he did borrow.

Conclusion

Certainly the Husband appeared healthy to me in court without any residual sign of his injury. His medical report clearly shows that he should be fit and able to return to his former job or other construction/decoration work despite a slight loss in strength. There is no doubt in my mind of his earning capacity, albeit perhaps with a slight loss of 8% - 10% according to his medical report, which would still put his earning at more than \$11,000 per month, well over the amount which he claims he could only earn as a security guard.

Although the Husband has never treated the child as his own, there is no dispute in law of his obligations and responsibilities towards him which would mean, in the reality of this case, financially only. It is also clear from his behaviour towards the child, and the Wife as well for that matter, both prior to and during these proceedings and which I can only describe as shameful, that he has no intention to face up to such obligations, and was, as pointed out by Mr. Chan for

the Wife, prepared to do anything to avoid them, including concealing from her his true financial position, as he did with his divorce, for which the court should readily draw adverse inferences against him.

Even if it is true that he is at present unemployed as alleged and is relying on borrowings, I still fail to see why he cannot make similar provisions for the child instead as he has for his girlfriend, to whom he has no similar obligations and who is in fact capable of maintaining herself, as the court do recognise the ability to borrow as part of a person

s resources to be taken into account, and that if he could borrow for himself he must likewise borrow for his wife or child : per Hodson LJ in *J-PC v J-PC* [1995] P 215, 239, CA, and in this context I need not go any further than to echo what Lord Merrivale said in the old English ecclesiastical case of *N v N* [1928] 44 TLR 324, 327 :

The ecclesiastical courts showed a degree of practical wisdom

They were not misled by appearance

they looked at the realities

The court not only ascertained what moneys the husband had, but what moneys he could have if he liked, and the term

faculties

describes the capacity and ability of the respondent to provide maintenance.

Furthermore, as aforesaid there is still the balance of the compensation held by the Legal Aid Department which will soon be released back to the Husband, if it has not already been so, from which he can no doubt make provisions for the child irregardless the truth about his unemployment situation.

In conclusion, I am satisfied that the Husband has both the means and the ability to provide reasonable maintenance for the child, and I find a monthly sum of \$2,500 to be his fair and appropriate contribution towards the child

s needs including his school expenses, to commence from 1st December 2008, with the 1st payment within the next 7 days, and thereafter on the 1st day of each month until the child reaches the age of 18 or completes full time education, or until further order.

Lastly, on the question of costs, as both parties are on legal aid, I will make no order between them, reluctantly I may say given my comment about the Husband

s conduct in these proceeding, other than their own costs to be taxed in accordance with the Legal Aid Regulations, which is an order nisi to be made absolute at the expiration of 14 days. .

(Bruno Chan)

District Judge

Mr. Leung of Messrs. Joseph Leung & Associates for the Petition

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