

HONG KONG / JUDGMENT

CCYM v. PWH

COURT

Family Court

DECIDED

2 February 2015

CASE / FILE NUMBER

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bjbj FCMC 1544 / 2013 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION MATRIMONIAL CAUSES NUMBER 1544 OF 2013

BETWEEN CCYM Petitioner and PWH Respondent

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing: 4 and 5 November 2014 Dates of written closing submissions: 25 and 26 November 2014 Dates of written replies to closing submissions: 2 and 6 December 2014 Date of Judgment: 2 February 2015

J U D G M E N T (Ancillary Relief)

Introduction

AUTONUMOUT This judgment follows a 2 day trial to determine the issue of final ancillary relief. AUTONUMOUT Central issues in this case have included the values to be attributed to a family run pharmacy and another small business run by the husband, together with the issue of separate finances, non matrimonial property and each party s respective earning capacity. The issues are not difficult and this is a case that can and should have settled. Unfortunately, although both well educated, the parties are not legally represented and they were unable to come to terms. It is therefore left to the court to adjudicate on these matters.

Background

AUTONUMOUT The parties married in December 2005 and separated in May 2012. This was then a marriage of approximately 6 and a half years. Both parties spent significant periods of time in Canada, the husband having emigrated there as a child and the wife relocating there in her late 20

- s. The parties later returned to Hong Kong and the husband began working in the pharmacy business established by his father many years ago. The wife for her part originally worked in the finance field. In June 2006, following the parties marriage, the only child of the family, G was born. In October 2010 the mother gave up work in order to concentrate on bringing up G. AUTONUMOUT The divorce petition was issued on the 1 February 2013. Mediation was attempted early on in the proceedings but unfortunately this was not successful. In so far as the daughter was concerned the parties were able to eventually come to terms and on the 20 July 2013 an order was made for joint custody and shared care. The child is in the care of the husband on Tuesday and Thursday s from after school until 8:00 pm. He also has her from after school on Friday evenings until Saturday morning at 8:30 am and all day on Sundays from 10:00 am 8:00 pm. The child is in the care of her mother otherwise. The husband is able to take such an active role in the upbringing of his daughter because he is basically self employed. AUTONUMOUT In so far as finances are concerned the wife issued a summons for maintenance pending suit on the 3 May 2013. Agreement was reached at court on the 26 September 2013 and upon the husband undertaking to reimburse the wife for the cost of certain extracurricular activities for G (swimming classes and piano and flute lessons) it was ordered by consent that the husband pay the wife HK\$22,000 per month for herself and the daughter. The husband has consistently said that this is too much and that he cannot afford to pay such a large sum longer term. AUTONUMOUT There was a Financial Dispute Resolution hearing before a sister judge on the 25 June 2014 which was unsuccessful and consequently the matter was adjourned for trial before me.

Issues

AUTONUMOUT It seems to me that the following issues now need to be determined by the court: Are any of the assets to be regarded as non matrimonial property? How should the property in Canada be regarded? Should the wife s inheritance from her father be included in the matrimonial pot? What approach should be taken to the husband s businesses? What value should be attributed to them? Given the above what is the computation of assets available for distribution? What are the financial needs of the parties? Should this be regarded prima facie as a sharing case or a need s based case? How should the assets be divided bearing in mind the principles identified in the Court of Final Appeal s decision in LKW v DD FACV 16/2008, the four step approach and the section 7 factors? What is the income and earning capacity of each party? How much maintenance should the husband pay to the wife for herself and the child of the family going forward? The law on Ancillary Relief AUTONUMOUT In the Court of Final Appeal s decision LKW v DD (FACV no 16 of 2008) the higher court sets out the approach that the lower courts should now take when determining the issue of final ancillary relief. The Four Principles AUTONUMOUT Mr Justice Ribeiro PJ stated in that case that there are four underlying principles that permeate ancillary relief proceedings namely fairness, the absence of discrimination, the upholding of the concept of the yardstick of equality and the rejection of a need for a minute retrospective investigation of the parties finances. These four principles apply in all ancillary relief applications and this case is no exception. AUTONUMOUT In addition he identifies a four

step approach to be adopted in all ancillary relief trials namely: The identification of the assets
 An assessment of the parties financial needs Whether or not the sharing principle should be
 adopted? Whether or not there is a good reason to depart from an equal division of the assets?
 AUTONUMOUT The s 7 factors are largely dealt with within this general framework. They are:

- (1) It shall be the duty of the court in deciding whether to exercise its powers under section 4, 6 or 6A in relation to a party to the marriage and, if so, in what manner, to have regard to the conduct of the parties and all the circumstances of the case including the following matters, that is to say-
 - (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
 - (c) the standard of living enjoyed by the family before the breakdown of the marriage;
 - (d) the age of each party to the marriage and the duration of the marriage;
 - (e) any physical or mental disability of either of the parties to the marriage;
 - (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;
 - (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. AUTONUMOUT In so far as G is concerned the court is also asked to look at the financial position that the child would have been had the marriage not broken down. I should add that it is normally accepted that inevitably each party s standard of living will reduce on a divorce. This also means that a child s standard of living will come down as a matter of practical reality. The parties open proposals The wife s proposals AUTONUMOUT The wife set out her open proposals in her opening submission as follows: Requests to the court: I would like to seek the following requests from the Court: Housing and education savings Needs
34. Respondent should contribute a lump sum of HK1.3 million to serve dual purpose of house purchase and education savings for the child.
35. Given the child will study in the Happy Valley area in the coming 4 years, the petitioner would like to purchase a flat there. Taking into consideration the petitioner is out of workforce and difficult to borrow, the Respondent should share in a down payment for such purchase.

36. The child should be allowed to pursue education as much as she would like and complete master degree at an institution likely in Canada. An education savings plan need to be set up and segregated from asset of the Respondent in trust with the mother to guarantee the funds will be readily available in the long term.
37. The lump sum serves to secure a shelter for the daughter as housing is the most expensive item and personal development in the long run. At a rental rate of HK\$19K, the Petitioner s savings will be depleted on housing alone in 8 years time which is a short timeframe and the daughter will still be young. It will be best to protect the interest of the child by obtaining a lump sum upfront to serve housing and education needs. Monthly payment to support living costs
38. Respondent should provide a monthly figure higher than the current amount of around HK\$28,000 inflation adjusted to cover the basic needs on either rent or mortgage payment (if a property has been purchased), food and household items, utilities, private car expenses, domestic helper costs; education, tuition and extra-curricular activities for the child (with one sport and one art at all times), travelling, branded clothing and perks reflecting the standard of living of the marriage.
39. He should also contribute to the monthly mortgage payments on the property going forward. Based on bank statement he has accumulated HK\$1.6 million savings in 2012 (p19). With current annual expenses at HK\$660,000, he should still have at least HK\$1.3 million left given his annual income is bringing in an estimate of 900K per year.
40. Such payment should be adjusted on anniversary date of based on the average annual inflation rate published by the Hong Kong Census and Statistic department.
41. After the P s sold their car, my car serves to maintain the status quo for my daughter. I use it for driving my daughter around and pick up after school activities and at her father s home every sat mornings.
42. At the school that G currently attends, it is very common for parents to drive their daughters to school by private vehicles. I prefer using private car than public transport like taxis, as the latter generally have the smell of cigarettes in their cabins.

Conclusion

43. Given the 2 businesses of the respondent are profitable with good growth prospect, the Respondent has the financial means to support the daughter and the mother as proposed. He is running a family business with long history that is capable of generating a steady future income stream.
44. Based on the above observation, the Respondent does have sufficient income to maintain the daughter and the mother.

45. The monthly household expense during the married years should be higher than HK\$22,000 and closer to HK\$30,000. The Respondent has not taken into account items such as dining, entertainment, internet, phone costs out of his pocket and travel costs deducted from the joint account.
46. The respondent was not able to put the family's interest at the foremost over his own. He has yet contributed a fair share of the gains made in his business during the years of the marriage. The family had not benefited from the fruit of the business profits and thus should be compensated.
47. Based on the contributions made to the family, cited contingent reasons and the need to care for a young child, the petitioner should be fairly compensated based on age and employment factors as stated.
48. I therefore pray your Honourable Judge would make a fair decision by taking into consideration the above facts and grounds by granting the wishes of the petitioner accordingly. The husband's proposals AUTONUMOUT The husband submitted his open proposals as follows: Asset distribution We never sign any prenuptial agreement during our marriage. Thus, it is fair for us to include all of our assets for assets distribution purpose. Since I have 2m and Ms C has 3.7m, therefore Ms C should give me HK\$800,000. Maintenance It was all along Ms C's decision to leave our home and signed the lease for the Happy Valley flat on her own terms. I never ask Ms C to leave our home. I never want Ms C to take our daughter, G, away from me. I always want G to stay with me. There is NOT a need to move from our home to the Happy Valley flat. We have been living in our home (which is Block B of E House) for six years together. My parents live in Block A, help out some daily routine of our family. (ie cooking, babysit G when needed). In addition, Ms C's mom also lives in Block C for more than 4 years. Thus, both of our parents have been living in E House for more than few years. Our daughter, G, has lived in our home since her birth. She has enjoyed good health and growth during her first 6 years. But Ms C insisted to move out and sign the lease on her own without my consent. Therefore, she should bear the financial consequences for her action. All along, Ms C wants me to buy a house which I am not financially capable of. When she realized there would be no new house, she decided to leave and filed for divorce. Thus, my open offer for our case is: I will pay for our daughter's education, medical and reasonable costs (ie extra-curricular activities). On top of that, I will subsidize \$5,000/month to the Petitioner for expenses incurred by G. I will keep paying the \$5,000/mth until G reaches 18 years old. Discussion Are any of the assets to be regarded as non matrimonial property? How should the property in Canada be regarded? AUTONUMOUT The wife argued that since she had accrued some savings prior to marriage by virtue of her work in the finance field that certain sums should be excluded from the asset schedule on that basis. Consequently she took the bank balances and balances from other securities statements from 2005 as her base and deducted those sums from the figures in her most up to date statements to arrive at what she said was a figure that did not include her pre marital assets. During the trial I explained that it was not possible to approach the

issue of the assets in that way. As Mr Justice Ribeiro PJ states at paragraph 71 of LKW v DD: The first step in the exercise is to ascertain the financial resources of the parties calculated as at the date of the hearing. AUTONUMOUT In any event the wife calculated her assets as follows: CASH IN BANKS TOTAL \$1,035,710 SECURITIES TOTAL \$743,019 \$1,778,729 PRE-MARITAL ASSETS BANK \$380,744 SECURITIES \$307,812 \$1,090,173 PROPERTY \$1,066,167 VALUABLE PERSONAL ITEMS \$47,000 PENSIONS \$127,888 \$2,331,228 In other words she still deducted what she considered to be pre marital assets. If however one includes those assets the total is HK\$3,019,784. AUTONUMOUT The wife argued at trial that the court should not include either the savings accrued by her prior to marriage in the sum of HK\$380,744, or the securities in the sum of HK\$307,812, or the property in Canada that was purchased by her during the marriage. The law on non matrimonial property AUTONUMOUT In Miller v Miller, McFarlane v McFarlane [2006] UKHL, 24, Lord Nicholls of Birkenhead said, when discussing the concepts of matrimonial and non-matrimonial property A complication rears its head at this point. I have referred to the financial fruits of the marriage partnership. In some countries the law draws a sharp distinction between assets acquired during a marriage and other assets. In Scotland, for instance, one of the statutorily prescribed principles is that the parties should share the value of the "matrimonial property" equally or in such proportions as special circumstances may justify. Matrimonial property means the matrimonial home plus property acquired *634 during the marriage otherwise than by gift or inheritance: HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111156696&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split" \t "_top" Family Law (Scotland) Act 1985, sections 9 and 10 . In England and Wales the HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0292575419&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split" \t "_top" Matrimonial Causes Act 1973 draws no such distinction. By HYPERLINK "http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&DB=121177&SerialNum=0111178322&FindType=Y&AP=&fn=_top&rs=WLW8.04&mt=WestlawUK&vr=2.0&sv=Split" \t "_top" section 25(2)(a) the court is bidden to have regard, quite generally, to the property and financial resources each of the parties to the marriage has or is likely to have in the foreseeable future.

22. This does not mean that, when exercising his discretion, a judge in this country must treat all property in the same way. The statute requires the court to have regard to all the circumstances of the case. One of the circumstances is that there is a real difference, a difference of source, between (1) property acquired during the marriage otherwise than by inheritance or gift, sometimes called the marital acquest but more usually the matrimonial property, and (2) other property. The former is the financial product of the parties' common endeavour, the latter is not. The parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose. As already noted, in principle the entitlement of each party to a share of the matrimonial property is the same however long or short the marriage may have been. 23. The matter stands differently

regarding property ("non-matrimonial property") the parties bring with them into the marriage or acquire by inheritance or gift during the marriage. Then the duration of the marriage will be highly relevant. The position regarding non-matrimonial property was summarised in the White case [2001] 1 AC 596, 610: "Plainly, when present, this factor is one of the circumstances of the case. It represents a contribution made to the welfare of the family by one of the parties to the marriage. The judge should take it into account. He should decide how important it is in the particular case. The nature and value of the property, and the time when and circumstances in which the property was acquired, are among the relevant matters to be considered. However, in the ordinary course, this factor can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property." 24. In the case of a short marriage fairness may well require that the claimant should not be entitled to a share of the other's non-matrimonial property. The source of the asset may be a good reason for departing from equality. This reflects the instinctive feeling that parties will generally have less call upon each other on the breakdown of a short marriage.

25. With longer marriages the position is not so straightforward. Non-matrimonial property represents a contribution made to the marriage by one of the parties. Sometimes, as the years pass, the weight fairly to be attributed to this contribution will diminish, sometimes it will not. After many years of marriage the continuing weight to be attributed to modest savings introduced by one party at the outset of the marriage may well be different from the weight attributable to a valuable heirloom intended to be retained in specie. Some of the matters to be taken into account in this regard were mentioned in the above citation from the White case. To this non-exhaustive list should be added, as a relevant matter, the way the parties organised their financial affairs. AUTONUMOUT The courts in Hong Kong have routinely adopted this approach when dealing with ancillary relief cases. In this instance it should be noted that this was a short to medium length marriage of some 6 and a half years that produced one child, a little girl called G and that the parties had largely maintained separate finances throughout the marriage. Separate finances AUTONUMOUT The wife argues, that as the party s maintained separate finances that the Canadian property which she purchased with her own funds, should also be excluded from the matrimonial pot. The issue of separate finances per se is not something that the court is required to take into account by virtue of section 7 Matrimonial Proceedings and Property Ordinance, although it can be considered as one of the circumstances of the case in the preamble to section 7. It is though a concept that often goes hand in hand with other arguments relating to non matrimonial property. AUTONUMOUT In relation to this reference can also be made to another English case that is routinely relied upon in Hong Kong, namely Rossi v Rossi [2007] 1 FLR. In that judgment Nicholas Mostyn QC as he then was, sitting as a Deputy Judge said as follows:

[24] Doing the best I can to draw the various threads together I think that the following principles can be deduced: 24.1 The statute requires all the assets to be valued at the date of trial. 24.2 For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will forcefully apply the value of assets brought into the marriage by gift and inheritance (other than the former matrimonial home), together with passive economic growth on those assets, should be excluded as non-matrimonial property. 24.3 Assets acquired or created by one party after (or during a period of) separation may qualify as non-matrimonial property if it can be said that the property in question was acquired or created by a party by virtue of his personal industry and not by use (other than incidental use) of an asset which has been created during the marriage and in respect of which the other party can validly assert an unascertained share. Obviously, passive economic growth on matrimonial property that arises after separation will not qualify as non-matrimonial property. 24.4 If the post-separation asset is a bonus or other earned income then it is obvious that if the payment relates to a period when the parties were cohabiting then the earner cannot claim it to be non-matrimonial. Even if the payment relates to a period immediately following separation I would myself say that it is too close to the marriage to justify categorisation as non-matrimonial. Moreover, I entirely agree with Coleridge J when he points out that during the period of separation the domestic party carries on making her non-financial contribution but cannot attribute a value thereto which justifies adjustment in her favour. Although there is an element of arbitrariness here, I myself would not allow a post-separation bonus to be classed as non-matrimonial unless it related to a period which commenced at least 12 months after the separation. 24.5 By this process the court should, without great difficulty, be able to separate the matrimonial and non-matrimonial property. The matrimonial property will in all likelihood be divided equally although there may be deviation from equal division: (a) if the marriage is short; and (b) part of the matrimonial property is non-business partnership, non-family assets (or if the matrimonial property is represented by autonomous funds accumulated by dual earners). 24.6 The non-matrimonial property is not quarantined and excluded from the court's dispositive powers. It represents an unmatched contribution by the party who brings it to the marriage. The court will decide whether it should be shared and, if so, in what proportions. In so deciding it will have regard to the reality that the longer the marriage the more likely non-matrimonial property will become merged or entangled with matrimonial property. By contract, in a short marriage case non-matrimonial assets are not likely to be shared unless needs require this. 24.7 In deciding whether a non-matrimonial post-separation accrual should be shared and, if so, in what proportions, the court will proceed diligently with the claim; whether the party who has the benefit of the accrual has treated the other party fairly during the period of separation; and whether the money-making party has the prospect of making further gains or earnings after the division of the assets and, if so, whether the other party will be sharing in such future income or gains and if so in what proportions, for what period, and by what means. AUTONUMOUT In this instance and as explained to the parties in court, the savings and securities accrued by the wife prior to marriage will not be deducted from the matrimonial pot at this stage. I accept however that this is something that may be

considered afresh when looking at needs, the division of assets and any reasons for departing from the yardstick of equality. How should the property in Canada be regarded? AUTONUMOUT In this instance it is accepted that during the marriage each party contributed the sum of HK\$11,000 per month which was paid into a joint bank account, to cover joint family expenditure. Initially the parties had each deposited HK\$250,000 into this account and it is accepted that a further HK\$300,000 each was deposited after marriage. This account was closed by the husband post separation and he transferred the remaining sum of HK\$82,000 into his own account, without prior discussion or agreement with the wife. This is a point of some contention between the parties. Other than that each party maintained separate finances. Thus the wife purchased the Canadian property in her sole name. She chose it, provided the down payment and was solely responsible for the mortgage. Therefore she remains strongly of the view that the husband should have no claim against it. With respect however, it seems to me that prima facie the property must be included in the computation of assets available for distribution. Again the fact that the property was purchased with the wife's own autonomous funds (see *Rossi v Rossi*) may be a reason to depart from the yardstick of equality at the end of the day. How should the wife's inheritance from her father be treated? AUTONUMOUT It transpired during the hearing that the wife has recently inherited a 1/3 share of a property from her father who sadly died in 2013 after the parties had separated. There is a certain mystery surrounding the value of this inheritance but it is thought to be worth in the region of HK\$3 million to the wife. The husband has indicated that he will not claim against the inheritance but points out that it will provide the wife with greater financial security and he asks the court to take this into account when considering the issue of maintenance. I accept in the circumstances that it is appropriate to exclude the Wife's inheritance from the computation of assets and that prima facie the inheritance should be regarded as non matrimonial property. I accept however that it is a financial resource that she will have access to going forward. What approach should be taken to the husband's businesses? What value should be attributed to them? AUTONUMOUT The husband owns two businesses the first is a pharmacy. This is a small family run business first established by the husband's father about 40 years ago. The husband owns 50% of the shareholding and his brother the other 50%. Both brothers are directors of the pharmacy and the husband's father has no further involvement in it. The husband's brother is mainly responsible for running the business and the husband says that he currently works there about two days per week. In addition the husband is the sole owner of a second company called TWC. This is a small enterprise dealing in things like cough syrup. The husband works for the remainder of the time in this company. As set out above he also cares for G on a regular basis and is a hands-on father. The wife is responsible for the daughter's care otherwise. AUTONUMOUT The husband values his shareholdings in the companies at HK\$1,330,000. This is challenged by the wife who says that this does not reflect their true value. She says that the companies should be valued on a willing buyer value or on an acquisition value. The difficulty with the wife's approach is that small companies of this nature are generally only worth what someone is willing to pay for them. The husband only owns a 50% share of the pharmacy in any event and there is no intention to sell. A 50%

shareholding may be worth very little. The other company is operating as a small business and the husband is effectively a sole proprietor. AUTONUMOUT Rayden (18th edition) says this when discussing small limited companies: Valuations 17.61 The most common recourse to expert evidence in ancillary relief cases is for the valuation of property and other assets, in particular a shareholding in a private company. In some cases, an accurate valuation of a particular asset (such as the matrimonial home) is crucial: in others, a broad assessment of the value of an asset is often sufficient. Pre White v White it had been said that while it may be necessary to obtain a broad assessment of the value of a shareholding in a private company, it was inappropriate to undertake an expensive and meaningless exercise to achieve a precise valuation of a private company which will not be sold. In some cases post White v White, such as short marriages, that approach will still be relevant, however in cases involving long marriages where the business was built up during the marriage, and where an equal, or near equal, division of the assets appears to be appropriate, an order for a valuation of a shareholding, even a minority one, might well be necessary in order for the court to be able to achieve a fair outcome. The court must be realistic in dealing with figures for valuations: they are not in all cases the equivalent of cash, and in some cases the court must recognise that it may be impossible with any reasonable precision to place any value on a shareholding. AUTONUMOUT This theme is developed further in the family law book Butterworths Family Law Service where it says in the commentary at p 834: There have been an increasing number of judicial calls for practitioners and accountants to take a commercial and realistic view of businesses. Practitioners should look beyond simple valuation exercises and should also look at the commercial reality of the situation, including whether there is a ready market for the shares or any business assets, how money could be raised by any of the businesses and the impact that would have on companies as going concerns. Proper account should also be had for capital gains tax and costs of sale AUTONUMOUT With respect I agree. In this case the reality of the situation is that the husband owns a share in a family business that was established many years before the parties marriage and is most certainly a pre marital asset in any event. There may be an issue concerning the increase in value of that business during the course of the marriage but I was not addressed on this point during the trial. In any event the value of the pharmacy is not equivalent to cash and it cannot be realized. There is no intention to sell. That is the commercial reality. Similarly the husband s own business is very small. Although it was set up during the course of the marriage, it is not by any stretch of the imagination a big business. I accept that it may not be worth very much and that the value of each company lies primarily in its income producing ability. Given the above what is the computation of assets available for distribution? AUTONUMOUT Thus I accept that the computation of available assets is prima facie as follows: Wife s assets CASH IN BANKS 1,035,710 SECURITIES 743,019 1,778,729 PROPERTY 1,066,167 VALUABLE PERSONAL ITEMS 47,000 PENSIONS 127,888 \$3,019,784 Husband s assets CASH IN BANKS 278,688 SECURITIES 84,731 VALUE OF THE COMPANIES 1,330,000 PENSIONS 273,013 1,966,432 GRAND TOTAL HK\$4,986.216 AUTONUMOUT There was some argument during the trial about other possible assets none of which amounted to very much. For example the husband alleged

that the wife had an undisclosed insurance policy. It later transpired that this was a critical illness insurance plan only with little tangible value at present. Likewise the wife accused the husband of having undisclosed assets in Canada. This was largely found to be incorrect. The wife also alleged that the husband should have saved more and there was the suggestion that he had undisclosed assets in that respect (see paragraph 14 B(39) above) although there was no evidence of the same. Consequently I am proceeding on the basis that prima facie there is approximately HK\$4,986,216 in the pot available for distribution. In doing so I have simply accepted the husband's estimated values for the two companies although I accept that these may not be accurate. As indicated above I do not think that they necessarily need to be. I have also included the wife's so called pre marital assets and the property in Canada. However I have excluded any inheritance that she may receive. The parties are also in agreement that certain funds should be put to one side and retained for G. What are the financial needs of the parties? Should this be regarded prima facie as a sharing case or a need's based case? AUTONUMOUT In *LKW v DD*, Ribeiro PJ reiterated that after determining the asset base of the parties the next stage is to assess the parties financial needs, generously interpreted. In this case the wife makes her case on the basis of need. She says that she needs a lump sum of HK\$1.3 million from the husband in order to contribute towards the down payment of a property and the daughter's long term educational needs. The difficulty with that approach is that the wife currently has more assets than the husband. Even if I accepted that the husband's companies were worth more than the HK\$1,330,000 claimed, they cannot be sold. The husband has very little else in the way of liquid assets. The wife's request would mean that she would retain/receive approximately HK\$4.3 million plus she would keep her father's inheritance of approximately HK\$3 million. Whereas the husband would be left with just over HK\$650,000. This is clearly inequitable in the circumstances. The husband for his part argues that this is a sharing case and asks that the assets be split on a 50:50 basis. AUTONUMOUT How then to approach this case? I accept the fact that the wife brought approximately HK\$688,556 in savings and securities to the marriage and that likewise the husband brought the value of the pharmacy business to the marriage. AUTONUMOUT In so far as needs are concerned I accept that in broad terms both parties need somewhere to live and sufficient money to live on. G also needs to be provided for appropriately. I do not accept that the wife needs to purchase a property in which to live. The parties always lived in rental properties during the course of the marriage and money by the wife's own admission was always quite tight. Likewise I do not accept that there is any basis here for setting up an educational trust for the child. G is presently attending a good local school. The husband has indicated that he would like to put aside money for the daughter's future education but he cannot afford to do so at present. I accept that to be the case. Both parties will need to provide for their daughter's future educational needs as and when they arise from their own resources. How should the assets be divided bearing in mind the principles identified in the Court of Appeal's decision in *LKW v DD* FACV 16/2008, the four step approach and the section 7 factors? AUTONUMOUT Thus I agree with the husband that it would be more appropriate to approach this case on a sharing basis. I accept however that prima facie the wife should retain the sum of HK\$688,556 that she brought into

the marriage and that likewise the husband should retain the value of both businesses. I also accept that the wife should retain the property in Canada. If each party retains what each now has then the wife will retain about 3/5 of the asset base and the husband 2/5. I accept that in the circumstances of this case that a departure from equality to that extent is fair and reasonable in the circumstances. I have also taken into account the fact that the husband's estimates of his companies may not be accurate. Thus on a broad brush basis it seems to me that each side should simply retain those assets held in their sole names and that neither should make any payment to the other save that the husband shall pay the wife the sum of HK\$40,000. This represents roughly half of the monies transferred by the husband from the parties joint account to his sole account without the wife's consent. This payment shall be in full and final settlement of the wife's claims against the husband for capital ancillary relief. There shall also be a dismissal of the husband's claims for all forms of ancillary relief.

Section 7 Factors AUTONUMOUT Although I have largely dealt with the section 7 factors when discussing the different issues as set above, for the avoidance of doubt I will go through this section here and I will highlight any other matters of relevance. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; What is the income and earning capacity of each party? AUTONUMOUT In this case the wife chose to give up work in October 2010 when G was already over 4 years of age and presumably attending kindergarten. She has not worked in a paid capacity since. She says that she is a full time housewife and mother and that she also helps to manage her own mother's affairs. Her mother has dementia. The husband says that he reluctantly agreed to this but that his understanding was that the wife would return to work in due course and not that she had retired at that point in time. The difficulty is that the wife is a very capable woman who has worked in both Canada and Hong Kong in the finance field. Her last salary was HK\$47,600 per month plus bonus. The wife produced notification to the Inland revenue confirming her salary as at October 2010. According to that document she earned HK\$341,072 for a 7 month period or HK\$48,725 per month (rounded up). She says that it would be difficult for her to go back to work given the four and a half years out of the work force and her age. She is now 46 years old. On that basis the wife seeks full and ongoing financial support from the husband for both herself and G. The husband for his part says that this is not sustainable and that the wife should return to work. AUTONUMOUT The husband for his part receives two salaries HK\$12,000 per month from the pharmacy and a further base salary of HK\$19,000 from the TWC. In his Form E he said that on average he received HK\$22,000 per month from TWC. In the witness box he also confirmed that his rental is paid for by TWC, plus some entertainment expenses, if related to the company. His mobile telephone bill is also paid for by TWC. Thus the husband's income is in the region of HK\$34,000 per month plus his rental of c HK\$16,500 per month. Thus in broad terms he has an income of over HK\$50,000 per month. AUTONUMOUT It seems to me therefore that the wife does have an earning capacity and one that she will need to realize going forward. For the record it should be noted that the onus for providing for G lies with both parents. I appreciate that the wife would like to spend more time at home and in an ideal world she had hoped to continue to be a full time

mother. Unfortunately given the present financial situation it seems to me that that will not be possible especially if she wishes to buy a property and put money aside for G's long term educational needs. In such circumstances there may be no alternative but for her to return to work at least in a part time if not eventually in a full time capacity. I am therefore of the view that longer term each party should each be able to maintain themselves and that each should be able to contribute equally towards G's expenses. AUTONUMOUT In so far as financial resources are concerned the husband will continue to maintain his interest in both companies and the wife will also have recourse to her inheritance.

- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future; AUTONUMOUT Clearly both sides have an ongoing financial responsibility towards the child. The wife also has a responsibility towards her mother. She presently manages her mother's financial affairs.
- (c) the standard of living enjoyed by the family before the breakdown of the marriage; AUTONUMOUT According to the wife money was always quite tight during the marriage and the parties regularly spent more than the HK\$22,000 per month put aside to cover household expenses. In her view the parties probably spent closer to HK\$30,000 per month on household expenses. The wife also says that she left the husband because he did not agree to purchase a property nearer G's school. I accept that the standard of living enjoyed by the parties reflected the fact that they were both working and earning reasonable but not overly high salaries.
- (d) the age of each party to the marriage and the duration of the marriage; AUTONUMOUT The husband is now 37 years old and the wife is almost 10 years older. I accept that the parties were married for approximately 6 and half years and that they have been separated for a further 2 years. This was then a short to medium length marriage that produced one child. G is now 8 and a half years old.
- (e) any physical or mental disability of either of the parties to the marriage; AUTONUMOUT Thankfully this is not in issue.
- (f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; AUTONUMOUT For the avoidance of doubt I accept that each party has made and continues to make a valid contribution both financially and otherwise to the welfare of the family including the upbringing of G. I do not accept that either party has made a greater contribution than the other.
- (g) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring. AUTONUMOUT This does not appear to be in issue. How much maintenance should the husband pay for the wife and the child of the family going forward? AUTONUMOUT The wife seeks HK\$28,000 per month and the husband offers HK\$5,000 per month for G plus payment of her education

medical and other reasonable costs such as payment for her extracurricular activities.

AUTONUMOUT The wife's case on maintenance during the trial was a little confused. The husband was able to show that in fact the wife had spent in the region of HK\$8,300 per month in the period from February 2012 to August 2013 post separation. He queried in such circumstances how the wife could even pay the rent of HK\$19,000 per month. The wife was able to explain some of the discrepancy because a) money from her mother's account had been wrongly deposited into her account, b) she drew down money from a line of credit in Canada and transferred it to her account in Hong Kong and c) she invested in foreign currencies in order to make short term gains. In addition the mother said that her budget was very stringent at times of necessity because the husband initially refused to contribute very much towards G's expenses and he had unilaterally closed down their joint account which she had been relying on to pay for some expenses. The wife's case later was that she was spending in the region of HK\$24,360 per month although she later changed this figure to HK\$28,000 HK\$29,000 per month. AUTONUMOUT Thus on the face of it, the inevitable conclusion was that either the wife had other cash or other assets at her disposal than disclosed or she was spending far less than claimed or perhaps she was making more money on the foreign exchange transactions than originally appeared to be the case. When the wife was challenged on this she could not provide any other explanation save that she reiterated that she had no other income and that this was how she had managed to date. In such circumstances I tend to accept that the wife was both spending less than originally claimed and that she was able to make more money by investing herself primarily in foreign exchange transactions. I accept that she does not have any other undisclosed assets. I also accept that her very stringent budget post separation is not necessarily reflective either of the standard of living enjoyed during the marriage or the standard of living that she should expect going forward. AUTONUMOUT The wife sets out her expenses as follows: Part 4

Current Monthly Expenses

4.1 General Item Amount Rent 14,913 Mortgage instalments Utilities (electricity, gas, rates, telephone & water) Management fees Food 3,500 Household expenses Car expenses 3,600 Insurance premia Domestic helper(s) Other (specify): MINI-STORAGE Total monthly household expenses Attach copies of the latest rental receipt. HK\$23,963

4.2 Personal Item Amount Meals out of home Transport Clothing / shoes Personal grooming (including haircut and cosmetics) 1,500 Entertainment / presents Holidays Medical / dental Tax Insurance premia 2,488 Interim maintenance Contribution to parents 1,000 Dependent family members Other (specify): MAINTENANCE ON PROPERTY 7,580 Total monthly personal expenses HK\$16,538

4.3 Children Item Amount School fees Extra tuition fees (S) School books and stationery Transport to school (including school bus) Medical / dental Extra Curricular Activities Entertainment / presents Holidays Clothing / shoes Insurance premia Lunches and pocket money Other Transport Child-minding fees Uniform Others (specify): MEALS OUT Total monthly personal expenses for children HK\$1,806 Total Monthly Expenses (4.1 + 4.2 + 4.3) HK\$42,307

51. In broad terms I accept that general expenses and G's expenses are reasonable. In so far as the wife's personal expenses are concerned I note that she has included a contribution to her parents of HK\$1,000 per month. I will not allow this. The wife's mother appears to have sufficient funds to maintain herself and her father has sadly passed away. Further the wife has chosen not to rent out the property in Canada. Given that it is accepted that the wife should retain this property, it does not seem to me to be reasonable to expect the husband to contribute towards the maintenance figure of HK\$7,580 per month. She will need to do this from her own resources. I also note that the wife has chosen to take out a critical illness insurance plan which is quite expensive. Again I do not think the husband should be expected to contribute towards this. This is something that the wife will need to pay for herself. If one deducts these items one is left with approximately HK\$31,240 per month in expenses. Maintenance in the short term
52. Going forward I will expect the wife to return to the workforce probably in a part time capacity at first and then eventually on a full time basis. I have also taken into account that she has approximately HK\$6 million in assets including her inheritance. In such circumstances I will order the husband to continue to pay HK\$22,000 per month for the next 24 months divided between the wife and G, which should give the wife sufficient time in order to find a job and to reorganize her financial affairs. In the interim I will expect her to make up the difference from her own resources. I accept that the husband cannot be expected to pay more than HK\$22,000 per month or that he can pay this figure on a long term basis. I accept that HK\$22,000 per month is a stretch for him. Maintenance in the longer term
53. Thereafter I will expect the wife to fund her own personal expenses and for the wife and husband to contribute equally towards G's expenses. After the 24 month period the husband shall continue to pay nominal maintenance to the wife of HK\$1 per annum.

Conclusion

54. The court is charged with dividing the assets in a fair and equitable manner. Consequently, as set out above, I will make an order that upon pronouncement of the decree absolute that the husband do pay to the wife HK\$40,000 in full and final settlement of her claims for capital ancillary relief. The husband's claims for all forms of ancillary relief shall likewise be dismissed. The husband shall also pay the wife HK\$15,000 per month for the next 2 years and nominal maintenance for herself thereafter and maintenance for the daughter in the sum of HK\$7,000 per month, until she attains the age of 18 years or cease full time education, whichever is the later. The husband has also said that he will pay for the any additional educational expenses, medical expenses and for any extracurricular activities for the daughter. This should be expressed as an undertaking in the order. Costs
55. Given that neither party can be said to have entirely won or lost I will make an order nisi to be made absolute in 14 days time that there be no order as to costs. The order

56. Upon the husband undertaking to continue to pay for the child of the family s additional educational expenses, medical expenses and the cost of any extracurricular activities (limited to three at any one time) IT IS ORDERED THAT
1. Each party shall retain those assets held in their sole names. Further the division of capital as set out in paragraph 2 below shall be in full and final settlement of the Petitioner s claims for capital ancillary relief and in full and final settlement of the Respondent s claims for all forms of ancillary relief.
 2. Upon pronouncement of the decree absolute the Respondent do pay to the Petitioner a lump sum of HK\$40,000.
 3. The order dated the 26 September 2013 shall be varied to the extent that the Respondent do pay to the Petitioner maintenance pending suit for herself in the sum of HK\$15,000 per month until the grant of the decree absolute and thereafter to be paid as periodical payments at the same rate and in the same manner until the 31 December 2016 such payments to be made on or before the end of each month, the first payment to be made on or before the 31 January 2015. Thereafter nominal periodical payments to be paid to the Petitioner by the Respondent at the rate of HK\$1 per annum for her maintenance during the joint lives of the parties or until the Petitioner s remarriage whichever is the shorter first payment to be made on the 31 December 2016.
 4. The Respondent do pay to the Petitioner periodical payments for the child of the family G, in the sum of HK\$7,000 per month, first payment to be made on or before the 31 January 2015 and thereafter to be paid on or before the end of each month until the child s 18th birthday or cessation of full time education, whichever is the later or until further order.
 5. There shall be an order nisi to be made absolute in 28 days time that there be no order as to costs.
 6. A section 18 declaration to issue. (Sharon D MELLODY) District Judge The Petitioner and the Respondent both appeared in person PAGE - PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk }mb[bV ho\$F ho\$F h`XB gdo\$F h|oX hL%S h|oX hL%S ho\$F ho\$F ho\$F h`XB h`XB h`XB hL%S h|oX gdLN gdo\$F qfZN sid`d[W ho\$F ho\$F ho\$F ho\$F ho\$F ho\$F hK'_gdLN gdo\$F {vq{j h}>[h]>[gdZH gdZH gdZH {s{s h}>[h^z, h]>[gdZH gdZH pe^eYTP h]>[h^z, hl0" h]>[h]>[gd*j gdZH tmthb[bTb h]>[h]>[h]>[gd4 xlxaxaxa h4 h]>[h4 h5_e h]>[h5_e gd4 yt4 gd4 gd4 gd4 gd4 yt4 gd4 gd4 gd4 yt4 gd4 gd4 gd4 yt4 gd4 gd4 gd4 yt4 gd4 gd4 gd4 yt4 bZRZ h5_e h]>[h5_e h5_e h5_e h5_e h5_e h5_e h5_e h4 h]>[gd4 gd4 gd4 yt4 gd4 gd4 gd4 yt4 h5_e d[PIPD?;? gd%E gd%E gd%E gd%E gd%E h5_e h5_e h5_e h5_e hc\$< gd%E gd%E hc\$< hc\$< hn\y h@hl h@hl h@hl gdAlg gdAlg gdH_ gd@hl gd@hl pepZeZe h]>[h4 gdAlg gdAlg ytH_ gdAlg gdAlg gdAlg ytH_ gdAlg gdAlg gdAlg ytH_ gdAlg gdAlg gdAlg ytH_ gdAlg gdAlg gdAlg ytH_ kdj ytH_ }rkrfa]a]aXa yryk hn\y gd&/ h(jb h(jb h(jb h_]F hx\$! hn\y m\m\J7J7J7 |pcU@/@/ wfQ@ h_]F h_]F gdfr gd&/ gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr gdfr kdz gdfr gdfr

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