

HONG KONG / JUDGMENT

CJB v. RCS

[2022] HKFC 167

COURT

Family Court

DECIDED

19 August 2022

CASE / FILE NUMBER

FCMC14020/2017

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bjbj FCMC 14020 / 2017

[2022] HKFC 167 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION MATRIMONIAL CAUSES NUMBER 14020 OF 2017

BETWEEN CJB Petitioner and RCS Respondent

Coram : Before HHJ K. K. PANG in chambers (Disposal on papers) Date of Petitioner (Applicant) s
Submission: 14 July 2022 Date of Respondent s Submission: 4 August 2022 Date of Handing Down:
19 August 2022

RULING ON COSTS

AUTONUMOUT This is the ruling of the petitioner father (the Father s application for costs of the
respondent mother (the Mother s summons for emergency temporary relocation filed on 12
January 2022. AUTONUMOUT The Father accepts that the general practice in children s cases is
to make no orders as to costs, but he argues that this is a case that the Mother s conduct has been
so reprehensible or her stance is beyond the band of what is reasonable that the court has a
discretion to make costs order against her. AUTONUMOUT The Father refers the court to LWYY v
UKWK [2020] HKFC 118 at 4-7 Legal principles

4. Although costs are always in the discretion of the court, it is accepted that a costs order
made against one parent in a child related matter is generally considered unusual unless
that parent has, for example, been unreasonable in the conduct of the litigation or has
behaved in a way that is somehow reprehensible, or beyond the limit of what might be
regarded as reasonable. See [HYPERLINK "https://launch.westlawasia.com/document/](https://launch.westlawasia.com/document/)

IC6C90AE0E42811DA8FC2A0F0355337E9" Sutton London Borough Council v Davis (Costs) (No 2) [1994] 2 FLR 569 , Gojkovic v Gojkovic (No 2) [1992] 1 AER 271 , S v S HCMP 5547/1999 and L v C CACV 169 of 2006).

5. Thus, in the normal course of events, regardless of the outcome, the court would normally make no order as to costs following a trial on a children's matter. To that end, Ms Irving for the mother has also referenced the following English cases in her written submission:

5. The principle that reprehensible behaviour, or behaviour beyond the band of what is reasonable, may result in an order for costs against that party was set out in Keller v Keller and Legal Aid Board [HYPERLINK "https://launch.westlawasia.com/document/I6C323E90E43611DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I6C323E90E43611DA8FC2A0F0355337E9)

[1995] 1 FLR 259 at 265 per Wilson J.; "No one suggests that the court's discretion in respect of costs under s 51 (1) of the Supreme Court Act 1981 has become emasculated in children cases. The position is only that in most such cases, indeed in ordinary cases, the proper weighing of the factors in the exercise of the discretion is likely to lead to the choice of no order . Where, for example, the conduct of a party has been reprehensible or his stance in the litigation has been beyond the band of what is reasonable, an order for costs might well be made against him." [emphasis added]

6. When assessing whether a party's conduct has been unreasonable, what should be considered is unreasonableness in the attitude to the litigation. In R v R (Costs: Child Case) [HYPERLINK "https://launch.westlawasia.com/document/I82475210E43611DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I82475210E43611DA8FC2A0F0355337E9)

[1997] 2 FLR 95 at 98B, per Hale J.

7. In Re G (Costs: Child Case) [HYPERLINK "https://launch.westlawasia.com/document/I614FFD50E43611DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I614FFD50E43611DA8FC2A0F0355337E9)

[1999] 2 FLR 250 , per Butler-Sloss LJ at 252G: "If this judge in this case had found that this Father had behaved unreasonably in the litigation and had gone beyond what many Fathers do, seeking orders which are hopeless, the point will come at which pursuing a hopeless application becomes unreasonable. But hopelessness and unreasonableness are not necessarily the same thing. Indeed, particularly where there is a litigant in person, a degree of generosity towards a litigant may be more appropriate than to a litigant which is on legal aid generally advised by counsel and solicitors as to the extent to which they should continue to litigate." [emphasis added] Her Ladyship then added at 253D: "It seems to me that the case of R v R does not change the normal situation that it is unusual to order costs, although it will be appropriate to order costs when a parent, even a litigant in person, goes beyond the limit of what is reasonable to pursue the application before the court. " [emphasis added]

6. This general approach was also reiterated in the later case of HYPERLINK "<https://launch.westlawasia.com/document/IC76A05D0E42811DA8FC2A0F0355337E9>" Re T (A Child) [2005] EWCA Civ 311, where the Court of Appeal in England and Wales repeated the general principles on costs in child related matters as follows:
36. The principles, which fall to be applied, are not, we think, in dispute. The judge summarised them succinctly in the following way:- 2.1 "The CPR apply. Under normal circumstances, according to rule 44.3(2)(a), the general rule is that costs should follow the event, although the court can make a different order. (Rule 44.3(2) (b)) 2.2 However, this general rule does not apply to family proceedings. (Family Proceedings (Miscellaneous Amendments) Rules 1999) 2.3 It is suggested that even in family proceedings, the general rule is probably the starting point but can more easily be displaced. (Gojkovic v Gojkovic (No 2) HYPERLINK "<https://launch.westlawasia.com/document/IB229EB00E42711DA8FC2A0F0355337E9>" [1992] Fam 40) 2.4 In cases involving children in particular, costs awarded against one parent or another are exceptional since the court is anxious to avoid the situation where a parent may feel "punished" by the other parent which will reduce co-operation between them. This will only impinge ultimately on the welfare of the child or the children concerned. (London Borough of Sutton v Davis (Costs) (No 2) HYPERLINK "<https://launch.westlawasia.com/document/IC6C90AE0E42811DA8FC2A0F0355337E9>" [1994] 2 FLR 569 ; Re: M (Local Authority's Costs) HYPERLINK "<https://launch.westlawasia.com/document/I714CDAC0E43611DA8FC2A0F0355337E9>" [1995] 1 FLR 533) 2.5 The conduct of the parties is in reality the major consideration when deciding whether or not an exceptional order for costs should be made. It should only be made if the penalised party has been unreasonable in his or her conduct. Moreover the "unreasonableness" must relate to the conduct of the litigation rather than the welfare of the child. (R v R (Costs: child case) HYPERLINK "<https://launch.westlawasia.com/document/I82475210E43611DA8FC2A0F0355337E9>" [1997] 2 FLR 95) 2.6 One has to be very careful in this distinction when, as in the case of (the mother), the apparent unreasonableness is as a result of the personality of the relevant party. In such circumstances, there is often an overlap of that party's conduct of the litigation and the conduct relating to the welfare of the child.
7. Reference may also be made to our own Court of Appeal decision in TPL v WYY CACV 47 & 61 of 2014, which also reiterates these general principles. AUTONUMOUT The Mother opposes the costs application and furthermore, she seeks an order that the Father do pay her costs of the present costs application. AUTONUMOUT About the law, the Mother refers the court to TPL v WYY (CACV 47 and 61/2014, unreported, 15 December 2014), in which the Court of Appeal summarised the general practice for costs in children's cases and set out the exceptional circumstances in which a costs order would be appropriate as follows: -
- "General practice

- no order as to costs 14.1. One starts with the "proposition" or "general practice" (though not a "principle": see [HYPERLINK "https://launch.westlawasia.com/document/IC6C90AE0E42811DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/IC6C90AE0E42811DA8FC2A0F0355337E9) London Borough of Sutton v Davis (Costs) No.2 [1994] 2 FLR 569 at p570H) that in applications to do with children, the usual order should be no order as to costs. 14.2. This approach stems from the aspiration that in these applications the court is seeking to find an arrangement which is best for the children, so that the only "winner" is the children, and neither parent should be regarded as the "winner"/"loser", although they had mutually exclusive proposals regarding custody and care and control. 14.3. The rationale is that when a court considers custody and care and control of children, the proceedings are inquisitorial rather than adversarial. In the court's search for the best option available, it does not wish "the spectre of an order for costs to discourage those with a proper interest in the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them" (LB of Sutton v Davis (No.2) at pp570H -571C). 14.4. As the English court of appeal observed in [HYPERLINK "https://launch.westlawasia.com/document/I82475210E43611DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I82475210E43611DA8FC2A0F0355337E9) R v R (Costs: Child Case) [1997] 2 FLR 95 at p97, there is a "possibility that in effect a costs order will add insult to the injury of having lost in the debate as to what is to happen to the child in the future; it is likely to exacerbate rather than to calm down the existing tensions; and this will not be in the best interests of the child". 14.5. Having said that, this general practice is not a rigid rule. In particular, the court must be careful that this approach to costs should not be abused eg in cases where one parent has more means at his disposal than the other who does not qualify for, or prefers not to use, legal aid. The practice should not provide the opportunity for one parent to wear the other down financially by means of multiple interlocutory skirmishes. Exceptional circumstances 15.1. Accordingly the courts have said that this approach to costs does not apply in exceptional circumstances, such as where the conduct of one party has been reprehensible, or the party's stance has been beyond the band of what is reasonable (LB of Sutton v Davis (No.2) at p571B-C, following [HYPERLINK "https://launch.westlawasia.com/document/I64FEFB90E43611DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I64FEFB90E43611DA8FC2A0F0355337E9) Havering LBC v S [1986] 1 FLR 489 and [HYPERLINK "https://launch.westlawasia.com/document/IB229EB00E42711DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/IB229EB00E42711DA8FC2A0F0355337E9) Gojkovic v Gojkovic (No. 2) [1992] Fam 40). 15.2. However, in considering whether the exception applies in a particular case, the court should not be too quick to label a parent's conduct as "unreasonable". As Hale J (now Baroness Hale SCJ) observed in R v R at p98B, "The fair point is made that in children cases one must not confuse unreasonableness in relation to the child - because one might say that we are expected to be unreasonable in our attitudes to our children - and unreasonableness in the attitude to the litigation". 15.3. Merely because a judge, dealing with a case dispassionately and objectively, considers one parent's proposals hopeless does not justify a costs order against him/her. As Butler-Sloss LJ said in [HYPERLINK "https://launch.westlawasia.com/document/I614FFD50E43611DA8FC2A0F0355337E9"](https://launch.westlawasia.com/document/I614FFD50E43611DA8FC2A0F0355337E9) Re G (Costs: Child Case) [1999] 2 FLR 250 at p252G: "If this judge in this case had found that this father had behaved unreasonably in

the litigation and had gone beyond what many fathers do, seeking orders which are hopeless, the point will come at which pursuing a hopeless application becomes unreasonable. But hopelessness and unreasonableness are not necessarily the same thing. Indeed, particularly where there is a litigant in person, a degree of generosity towards a litigant may be more appropriate than to a litigant who is on legal aid generally advised by counsel and solicitors to the extent to which they should continue to litigate". 15.4. To that I would add this proposition, that even if a court finds a parent's conduct reprehensible, or his/her conduct in the litigation unreasonable, and the court orders that one party should pay the other's costs, the costs so ordered should be no more than is necessary to reflect the exceptional circumstances. This is because of the policy consideration in the rationale discussed above, ie that it is in the best interests of the children that there should be no order as to costs. AUTONUMOUT There is no dispute that the general practice is that, save for in exceptional circumstances, there should be no order as to costs in children s cases. The dispute is whether the conduct complained of by the Father meets the threshold of being reprehensible or unreasonable. AUTONUMOUT The Mother s summons filed on 12 January 2022 was summarily dismissed by the court during the 1st hearing on 31 January 2022. Despite the Mother s contentions to the contrary, I maintain the view that the Mother s said application is unmeritorious, taking into consideration: - (1) The said application covers essentially the same grounds as her summons filed on 30 April 2021 for permanent relocation, the substantive trial of which has already been set down to take place on 22 February 2022 that is just 3 weeks away from the returnable date of the summons filed on 12 January 2022; (2) Inasmuch as the Mother herself anticipates it may be that she is not in a position to bring the children back to Hong Kong as the Father may wish, in the event that the application for temporary removal is granted, the said application has the effect of pre-empting the permanent relocation trial; (3) Upon a careful scrutiny of her financial situation at the material time, I take the view that she should be able to get by on the funds that she had or would have in Hong Kong until the trial. AUTONUMOUT Notwithstanding, I take exception to the Father s argument that being summarily dismissed, the Mother s application may be regarded as hopeless and therefore, unreasonable. According to the principles on costs in children s cases as summarised in TPL v WYY, hopelessness and unreasonableness are not necessarily the same thing. It is also stated that indeed, particularly where there is a litigant in person, as it is in the present case, a degree of generosity towards a litigant may be more appropriate than to a litigant who is on legal aid generally advised by counsel and solicitors to the extent to which they should continue to litigate. I further take notice that in DCB v AB (HCMP 2173/2014, unreported, 28 July 2017 at 13), Madam Justice Bebe Chu endorsed counsel s submission that there is a distinction between a party behaving unreasonably , which would warrant a costs order; and a party running a hopeless case , which would not warrant a costs order. AUTONUMOUT The Father further argues that the Mother s summons for emergency temporary removal is wholly unreasonable, even for a litigant in person. The Father informed the Mother on 1 January 2022 that he had paid her HK\$80,000 in December, that he would pay further sums of HK\$60,000 monthly and that he would be able to pay her the balance of the AR Judgment

dated 3 September 2021 (the AR Judgment) of HK\$1.7 million by March 2022. Additionally, the Mother receives HK\$16,000 per month in child maintenance. It being the Family Court's Judgment that the Mother's reasonable expenses are HK\$66,000 per month (AR Judgment at 57), taking into consideration all of the above, the Mother was receiving more than her reasonable needs and as such, she clearly had sufficient funds to remain in Hong Kong until the substantive trial. AUTONUMOUT According to the AR Judgment, the Father is to pay the Mother HK\$16,000 per month for the maintenance of the children from October 2021. Up until that time, the Father was paying interim maintenance for the children in HK\$60,000 per month. The AR Judgment also provides for the sale of 3 US Properties to be completed within 2 months of the date of the AR Judgment, or upon the making of the Decree Absolute, whichever is the later. The net proceeds of sale of the US Properties are to be divided equally between the parties. The sale of the US Properties was not forthcoming and the Father did not keep the Mother apprised of any efforts in relation to this aspect of the AR Order. Over and above, the Father did not apply for the Decree Absolute and by not doing so he extended the time that he had to sell the US Properties or pay the Mother. The Mother contends that after the children's maintenance was reduced from HK\$60,000 to HK\$16,000 per month, by the end of 2021 she was in dire need of financial assistance, and failing the Father applying for the Decree Absolute, she had no choice but to apply for the Decree Absolute herself, which she did with a return date on 30 December 2021. The Father vehemently opposed the application for the Decree Absolute. It was only after the granting of the Decree Absolute on 30 December 2021, and with the court's encouragement, that the Father agreed to pay the Mother a partial advancement on the lump sum with the payment of HK\$80,000. The Mother contends that she was given no assurance when, and how much, she would receive the monies in respect of the terms of the AR Judgment and she was given no security that further payments would be made to her. Conversely, the Mother contends that the application for temporary removal was borne out of the Father's failure to pay the Mother the monies he was ordered to pay her. AUTONUMOUT I accept that the chain of events leading to the Mother's application filed on 12 January 2022 must be considered when looking to her motives to pursue the application for emergency temporary relocation and the reasonableness of such application at the time it was made. There was deep distrust between the parties that apparently was caused by the failure in the Father's application for the Decree Absolute and the reality that the sale of the US Properties was not forthcoming and the Father did not keep the Mother apprised of the progress of the sale. It is obvious that the Father's unmeritorious opposition to the Mother's application for the Decree Absolute only exacerbated the Mother's distrust of the Father and prompted her to take out the application for emergency temporary relocation. I take notice that with the sale of the US Properties yet in the flux at that time, the Mother was facing with an uncertain financial situation and worse still, she was troubled with the deep distrust between the parties. All things considered, I am prepared to accept that the Mother's worries about finances and her position was bona fide in the hope that the emergency temporary relocation would reduce her monthly expenses significantly. AUTONUMOUT In summary, I do not regard that the Mother's application for emergency temporary relocation is reprehensible or unreasonable.

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