HONG KONG / JUDGMENT

CS v. WCT

[2022] HKCA 654

COURT
Court of Appeal

DECIDED
6 May 2022

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CAMP142/2021

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bjbj CAMP 93/2021 and CAMP 142/2021

[2022] HKCA 654 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL MISCELLANEOUS PROCEEDINGS NOS. 93 AND 142 OF 2021 (ON AN INTENDED APPEAL FROM FCMC NO. 5660 OF 2020) BETWEEN Petitioner Respondent Before: Hon Poon CJHC and Kwan VP in Court Date of Written Submission in CAMP 93/2021: 25 March and 9 April 2021 Date of Written Submission in CAMP 142/2021: 3 and 17 May 2021 Date of Judgment: 6 May 2022

JUDGMENT

The Court:

Introduction

After a 7 day trial, by a judgment dated 29 December 2020 (Main Judgment Deputy District Judge Egerton ordered, among others, that (the Order): joint custody be granted to the Mother and the Father; shared care and control of the Children on equal basis be granted to the Mother and the Father in a seven to seven days routine on a bi-weekly basis; and school holidays be split equally or alternatively to be agreed by the Mother and the Father. The Mother sought leave to appeal, seeking an order that sole custody and sole care and control be granted to her with reasonable access be granted to the Father, and generous access to be granted to the Father during school holidays; and costs. In his judgment dated 12 March 2021, the Judge dismissed the leave application and ordered costs against the Mother, summarily assessed at $180,053 (the Costs Order). The Mother now renews the application for leave to appeal against the Order. Separately, she also seeks leave to appeal against the Costs Order made by the Judge. They respectively form the subject matters of CAMP 93/2021 and CAMP 142/2021. Both applications are opposed by the Father. Having considered the matters, we are of the view that both applications can be appropriately dealt with on paper without an oral hearing. We now hand down our judgment. Proceedings below The Mother and the Father were married in 2013. They have a son and a daughter (the Children), born in 2014 and 2016 respectively. Both of them are qualified

solicitors. The Mother runs her own company providing offshore services while the Father works as an in-house lawyer. The Mother petitioned for divorce on 22 February 2019. After the parties agreed that there would be a consensual divorce, the Mother on 2 July 2020 filed another petition in the current proceedings below. On 6 May 2019, the court granted interim shared care and control of the Children to the parties on a bi-weekly basis. The Mother initially proposed joint custody and shared care and control on an equal basis on a bi-weekly basis, from which she resiled as the proceedings progressed. Her latest proposal on 24 August 2020 was sole custody to her with an undertaking to inform and consult the Father upon any changes of the son s schooling and residence as well as significant health care matters; and additional access . The Father s initial proposal was that care and control be granted to him with defined access to the Mother. His latest proposal on 18 August 2020 was joint custody and shared care and control on an equal basis. Three reports prepared by the social welfare officer ( ) of the Social Welfare Department dated 18 April and 6 September 2019 and 6 April 2020 (the SWO Reports), all recommended joint custody with shared care and control on equal basis on a bi-weekly basis. A psychological report prepared by a clinical psychologist ( ) of the Social Welfare Department dated 22 October 2019 (the CP Report) also supported such recommendation. After having carefully considered the evidence and the parties lengthy submissions, the Judge concluded that it is in the best interests of the Children for there to be an order for joint custody and shared care and control on an equal basis. Hence the Order. In applying for leave to appeal against the Order before the Judge, the Mother raised 7 grounds of appeal (see below). After finding each of them to be unarguable, the Judge dismissed the application. The Father asked for costs. The Judge considered the issue of costs as a discrete issue and saw no reason why costs should not follow the event. Hence the Costs Order. Leave to appeal against the Order Under section 63A of the District Court Ordinance, leave to appeal will only be granted if the applicant satisfies the court that the intended appeal has a reasonable prospect of success, or there is some other reason in the interest of justice that the appeal should be heard. In respect of the first limb, reasonable prospects of success involve the notion that the prospects of succeeding must be reasonable and therefore more than fanciful without having to be probable: SMSE v KL [2009] 4 HKLRD 125, at [17]. The Mother raised 7 grounds of appeal before us, which are substantially the same as advanced below. They may be summarized as follows: The Judge erred in making an order of joint custody as he failed to recognize that the lack of co-operation between the parents is antithetical to the concept of joint custody, wrongly held that the parties could communicate sufficiently in support of a joint custody order and ignored to consider the real likelihood of the parties not being able to or having great difficulty agreeing on the appointment of a parental coordinator (Ground 1); The Judge erred in failing to give sufficient weight to: the parties shared view that the Children shall be taken care of by a stay-home parent; the unavailability of the Father as he works full time and relies heavily on his helpers and mother to provide care to the Children; the involvement of the Father s helper Orlina which will make communication between the parties more improbable and her inappropriate influence on the Children; the non-communication and lack of co-operation between the parties; the parties unsynchronised care arrangements and the potential harm to the young Children (Ground 2); The Judge erred in placing weight on the oral evidence of the Father and Orlina (Ground 3); The Judge erred in

agreeing with the Father s assertion that the Mother is too busy with her consultancy business to be a full-time carer with sole custody, care and control of the Children and failed to articulate any reasons for his findings in [79] of the Main Judgment (Ground 4); The Judge erred in giving weight and adopting the recommendations of the SWO Reports for an order of joint custody and shared care and control on a week on week off basis and failed to give sufficient regard or weight to the defects of such recommendation (Ground 5); The Judge erred in giving weight and adopting the recommendations of the CP Report for an order of joint custody and shared care and control on a week on week off basis and failed to give sufficient regard or weight to the defects of such recommendation (Ground 6); The Judge erred in taking into account the following wrongful and/or irrelevant considerations:

a. The Judge erred in using the Order to maintain the balance in the dynamics of the parties as parents;

b. The Judge erred in holding that the parties will complement each other as parents despite their present difficulties in co-working;

c. The Judge erred in relying on the SWO Reports observation that the Children are performing satisfactorily at school socially and academically as reflective of the Children s general welfare and contentment at home and concluding the Children are doing well;

d. The Judge erred in holding that the Mother s agreement to parallel parenting in principle is an agreement to the care and control arrangement ordered by the Judge;

e. The Judge erred in holding that the Mother s previous agreement to joint custody and shared care and control in May 2019 as a ground to support the Order and failed to acknowledge the Mother s subsequent disagreement. (Ground 7) It can be readily seen that these grounds of appeal mostly concern the evaluation of evidence by the Judge including the weight that he attached to SWO Reports and the CP Report, various findings of fact, and the exercise of discretion in making the Order as he did. As to evaluation of evidence and findings of fact, the Mother must pinpoint palpable errors that the Judge had committed which had rendered his findings plainly wrong: China Gold Finance Ltd v CIL Holdings Ltd & Others, CACV 11/2015, unreported, 27 November 2015, at [11] [30]. As to the exercise of discretion, the Mother must demonstrate that the Judge had exercised it in a manner which is wrong in principle or without regard to relevant matters or based on misunderstanding of evidence or the Judge s decision was so plainly wrong that he must have exercised his discretion wrongly: ZJ v XWN [2018] 3 HKLRD 644, at [31]. However, despite the efforts of Ms Yip SC, for the Mother, to dress them up as such, the complaints are in substance mere regurgitation of the points run before and rejected by the Judge twice at trial and at the leave application. As this Court (differently constituted) emphasized in Wong Myra Repizo v Ling Fung Coach and School Service Co Ltd & Another, CACV 64/2015, unreported, 7 December 2015, at [21]: This heavy burden of the appellant is not satisfied by re-running arguments that have been fully canvassed before the judge, or by asking the appeal court to evaluate the evidence afresh from reading selective parts of the transcript, or by trying to pick holes in the judgment by

emphasizing certain parts of the respondent s testimony (or for that matter the appellant s testimony) and complaining that the judge should not have rejected such evidence or should not have given insufficient weight to it. The complaints thus do not constitute any permissible ground of appeal. We only need to deal with the grounds of appeal very briefly. On Ground 1, contrary to Ms Yip s contentions, the Judge was well aware of the communication difficulties encountered by the parties as well as the high level of conflict between them but at the same time observed evidence of exchanges of information, search for consensus as well as co-operation between the parties. The Judge found that the parties have sufficient communication skills to communicate sufficiently for a parallel parenting arrangement. Moreover, both parties indicated that they are willing to receive co-parenting course to further improve their collaboration on handling the Children s issues. In fact, as acknowledged in the CP Report, at [42], and accepted by the Judge, the parties have been able to follow the court order and carry out the existing week-on week-off parenting arrangement without major problems. Evidence also shows that the handover arrangement has been punctual and smooth in general. There is accordingly no merit in Ground 1.

16. On Ground 2, again contrary to counsel s submission, the Judge did take into account the views of the parties and noted that the Father no longer shared the view that the Children shall be taken care of by a stay-home parent; the working hours of the Father and the Mother s criticism of the Father s parenting arrangements. The Judge found that the Father is doing his very best to parent the Children in a loving, responsible and supportive manner and has organised his working life to spend as much time as he can with the Children. The Judge s positive findings on the Father s parenting skills and application of time is also supported by the SWO and CP. Further, as observed by the Judge, there was evidence of exchanges of information, search for consensus and co-operation between the parties despite the communication difficulties and conflict between them. The evidence also showed that the Children are adjusting well in the new living arrangement after the divorce and there have been no significant signs of emotional or behavioural problems.

17. When assessed against the overall evidence, the Judge s decision on the weight to be attached to various matters complained of in Ground 2 cannot be faulted.

18. On Ground 3, the Mother failed to identify any mistake in the Judge s evaluation of evidence that is sufficiently material to undermine his conclusions in granting shared care and control which is supported by the observations and recommendations of the SWO Reports and the CP Report.

19. On Ground 4, the judgment must be read as a whole. When it is so read, the Judge at [79] of the Main Judgment only expressed that he agreed with the general tenor of the Father s case but it does not appear that he had attached much weight to the Mother s workload in reaching the decision of joint custody. It is clear from [82] and [83] of the Main Judgment that the key considerations which support the Judge s decision of joint custody are that both parties have at various times in the proceedings proposed joint custody, there has been an order for interim shared care in place since May 2019, the recommendations of joint custody

in the four reports of the SWO and the CP, as well as the Judge s opinion that it would be a benefit to the Children if the parents stand as equals in the context of custody with neither parent being a supplicant to the other so as to avoid creating an imbalance in the dynamics of the parties inter-relationship as parents which would lead to an increase in disagreements and power play .

20. Properly read in context, [79] of the Main Judgment does not, as Ms Yip contented, give rise to a reasonably arguable basis for suggesting that the Judge s decision of joint custody was plainly wrong.

21. On Ground 5, the SWO had met the respective parties before preparing the SWO Reports. The parties had the opportunities to relate and did relate to the SWO the relevant information concerning the custody, care and control of the Children. In particular, the SWO was fully aware of the communication problems between the parties and did mention the same in the SWO Reports. However, the SWO considered that the parties have demonstrated capability to co-work for the interest of the Children and observed that both of them are willing to receive co-parenting course to further improve their collaboration on handling the Children s issues . The SWO s opinion was well founded. For example, the SWO observed that the parties had made the effort to jointly seek assistance from a registered child psychologist for a joint script to help the Children better cope with their divorce and the new care arrangement and the handover arrangement was punctual and smooth in general. It was also mentioned in the SWO Report that when the Father s domestic helper did not turn up on time to pick up the Children from the Mother, the helper came after the Mother texted the Father. The SWO s recommendation was also supported by the fact that the Children have been placed under shared care and control since May 2019 and were observed to have adjusted well to the arrangement.

22. In the circumstances, the criticisms in Ground 5 are wholly untenable.

23. On Ground 6, unlike joint care and control, shared care and control can be granted even where there is a very high level of conflict between the parents which makes cooperative co-parenting virtually impossible but where it is in the children s best interests to spend significant periods of time with both parents: see S,V v M,S [2020] HKFC 197, at [17].

24. The CP had duly considered all relevant factors including the difficulties in co-operation between the parties, their entrenched resentment against each other, the adequacy of the parties parenting capacity, the support they have for taking care of the Children, the Children s attachment to the respective parents, the fact that the parties have been able to follow the court order and carry out the week-on week-off parenting arrangement without major problems and that the Children have adjusted to the routines and living arrangement of two homes. The CP also considered the benefit of keeping the present routines and opined that significant changes in a short time would upset the Children s routines and they might see the changes as their fault or the abandonment of either parent. The CP s recommendation was plainly based on a holistic consideration.

25. Ground 6 is entirely without merit.

26. Lastly on Ground 7, the Mother does not have a reasonably arguable basis to suggest that the Judge was plainly wrong in taking the view that granting sole custody would create an imbalance in the dynamics of the parents inter-relationship as parents and would lead to power play which is not in the best interest of the Children. The Judge s opinion is a logical inference as the ultimate decision making power vests in only one parent if an order of sole custody is granted.

27. Contrary to Ms Yip s contentions, the evidence showed that the Mother has acknowledged that the Father had tried his best to perform his father role and the Father has acknowledged that the petitioner can be nice and gentle in his affirmation.

28. In considering the well-being of the Children, apart from the Children s performance at school, the Judge also considered other things including the CP Report which stated that the results of the Child Behaviour Checklist completed by the parties show that there is no significant sign of emotional or behavioural problems, the reports of the parents are largely consistent and there is no report of particular emotional issues or problem behaviours found on the Children.

29. Ms Yip s contention that the Judge erred in holding that the Mother s agreement to parallel parenting in principle is an agreement to the care and control arrangement ordered by the Judge, is misconceived. It is crystal clear, as can be seen in [46] to [55] of the Main Judgment, that the Judge was fully aware of the Mother s stance concerning the care and control arrangement. It is also clear from the Main Judgment, in particular [55], that the Judge was well aware of the Mother s subsequent disagreement to joint custody and shared care and control.

30. The complaints in Ground 7 are unmeritorious.

31. All in all, the Mother has failed to demonstrate a reasonable prospect of success in arguing that the Judge exercised his discretion in making the Order in a manner that is plainly wrong.

32. In conclusion, we hold that the Mother has failed to meet the threshold under the first limb of section 63A of the District Court Ordinance by showing a reasonable prospect of success in her intended appeal. Nor can we see any reason why in the interest of justice the appeal should be heard. Leave to appeal against the Costs Order

33. While it is well established that in a contested custody case, the court would usually make no order as to costs (that is in fact what the Judge ordered at trial), the same practice may also apply to appeal. However, we must emphasize that it is only a matter of practice. The court still retains an unfettered discretion to order costs when the circumstances of the case so warrant.

34. Here, although the Judge did not expressly say so, he must have taken into account the obvious fact that the Mother had embarked on a wholly unarguable application for leave to appeal, which he was entitled to do in exercising his discretion on costs. We can see no basis to interfere with the Costs Order. Dispositions

35. For the above reasons, we dismiss both applications for leave to appeal.

36. On costs, as both applications are wholly unmeritorious, we order the Mother to pay the Father costs, to be summarily assessed. The Father has already filed a statement of costs. We direct the Mother to file a statement of objection, limited to 3 pages, within the next 14 days. We will then deal with the amount of costs on paper. (Jeremy Poon) (Susan Kwan) Chief Judge of the High Court Vice-President Ms Anita Yip SC and Mr Ken S. H. Chan, instructed by ONC Lawyers, for the petitioner (the Mother) in both CAMP 93/2021 and CAMP 142/2021 Mr Robert Pang SC, Mr Eric Leung and Ms Gigi Ho, instructed by Alvin Cheng & Rosaline Choy, for the respondent (the Father) in CAMP 93/2021 Mr Robert Pang SC and Mr Eric Leung, instructed by Alvin Cheng & Rosaline Choy, for the respondent (the Father) in CAMP 142/2021

[2020] HKFC 276. See [5] below.

[2021] HKFC 56. Cap 336. Yuen JA, Kwan JA (as she then was) and Chu JA. The reference to the appellant s testimony in the parentheses is added by us for completeness. Main Judgment, at [54], [64-65]. Main Judgment, at [58] & [65]. Main Judgment, at [66]. SWO Report dated 6 September 2019, at [34]. See the SWO Report dated 6 April 2020, at [16]. Main Judgment, at [31]-[33]. Main Judgment, at [3]. Main Judgment, at [69]. Main Judgment, at [70]. Main Judgment, at [58] & [65]. Main Judgment, at [54], [64-65]. Main Judgment, at [43]. See the SWO Report dated 6 September 2019, at [34], and the SWO Report dated April 2020, at [32]. See the SWO Report dated 6 September 2019, at [34]. See the SWO Report dated 6 September 2019, at [34]. See the SWO Report dated 6 April 2020, at [16]. See the SWO Report dated 6 April 2020, at [16]. See the SWO Report dated 6 April 2020, at [33]. CP Report, at [37]. CP Report, at [41]. CP Report, at [43]. CP Report, at [10]. CP Report, at [42]. CP Report, at [44]. CP Report, at [46]. SWO Report dated 6 April 2020, at [17]. Affirmation of WCT dated 11 April 2019, at [17]. Main Judgment, at [43]. No PAGE - PAGE * MERGEFORMAT - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V hW&H h sl h sl h sl gd>q gd>q gd>q ke_Y_ hr}g hW&H hW&H gdK(gd+1A gdT8 xixcW h+1A h+1A h+1A h+1A h+1A h+1A h+1A h+1A h+1A h+1A h+1A h+1A gd J gd[h/ mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH v]W]Q] mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH h[h/ mH <nH sH <tH mH <nH sH <tH h[h/ hiM h[h/ mH <nH sH <tH }t}nhn}t}tY}tSY mH <sH < mH <sH < mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH mH <nH sH <tH hHO{ gd[# heOf heOf gdi8m ~zvrnrn heOf gdiM hy}M hy}M hiM hiM &`#$ gdGO h]W} b[b[b[hOA, hOA, hOA, h]W} h]W} gdOA, gdi8m heOf h]W} :pK($:V $:V $:V & #$ & #$ & #$

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